Ontario Supreme Court
Canada (Attorney General) v. Confederation Life Insurance Co.[1],
Date: 1995-07-04

Re Attorney General of Canada

and

Confederation Life Insurance Company

Ontario Court (General Division), R.A. Blair J. July 4, 1995

R.A. BLAIR J.:—

PART A

OVERVIEW

[1] “Confederation Life” is a venerable Canadian company. Known fondly in the industry for years as “Confed”, it is one of the country’s oldest and, until recently in any event, it was one of its most solid and most respected financial institutions. Fatally afflicted by the “real estate boom” disease of the 1980s, however, it has fallen into financial difficulties. A court order has directed that Confederation Life Insurance Company be wound up and liquidated.

[2] The failure of such a financial institution invariably causes great hardship to certain segments of society. Innocent people suffer. Their financial plans and expectations are shattered. They must compete, in priority contests, for the scarcity of corporate assets which, by the very nature of the circumstances, are insufficient to satisfy all claims.

[3] Such is the case here.

[4] In this matter—at least in the proceedings before me—those affected are the Confederation Life policyholders, on the one hand (the widows, widowers and other investors who depend upon the reliability of the company’s life policies and annuities for their continued financial well-being) and the retired Confederation Life employees and supplementary retirement income beneficiaries, on the other hand (those who depend upon the benefits arising from their long-term employment relationship with the company for *their* continued financial well-being). There is also an issue to be determined regarding deferred income arrangements involving the two most senior officers of the company.

[1] Application for leave to appeal to the Court of Appeal for Ontario granted October 2,1995 (Carthy, Osborne and Weiler JJ.A.).

[5] Confederation Life had a contractual arrangement with its employees, as part of their overall remuneration package, that they would be entitled to long-term medical, dental and life insurance coverage after their retirement. I am told that there are approximately 700 retired employees who fall into this category. Many have been retired for many years, are elderly, and depend upon the continuation of these benefits for their livelihood.

[6] The company also had a supplementary retirement income arrangement with its senior officers. The purpose of this arrangement was to "top up" the benefits provided under Confederation Life's registered pension plan for officers and employees to a level more consistent with the remuneration level of the senior officers. This was necessary because of limits imposed by Revenue Canada upon the level of pension benefits that can be provided through registered plans. There are 31 retired senior officers who claim to be entitled to such benefits; some of them were already receiving the supplementary retirement income benefit at the time of the liquidation order, and some were not. There is no doubt that without the receipt of such payments, the affected former senior officers, too, will experience financial hardship.

[7] Messrs. J.A. Rhind and P.D. Burns are the former chairman and president of Confederation Life, respectively. In the early 1980s, when it was still permissible to do so, they had agreed to defer a portion of the income they had earned pursuant to what were known as "deferred compensation plans". Under such a plan, in exchange for deferring payment of a portion of their compensation to be earned in a given year, the employee was able to defer the tax on such amounts to a later taxation year (when, presumably, they would be taxed at a lower rate of taxation). Messrs. Rhind and Burns did so. The amounts accruing to their credit, as at December 31, 1993, totalled $1,185,780—$707,143 to the credit of Mr. Rhind, and $478,637 to the credit of Mr. Burns. They now claim to be entitled to recover those moneys from Confederation Life.

[8] In these reasons, I will refer to the retired employees, as a group, as "the retirees"; to the senior officers claiming a supplementary retirement income benefit, whether in pay or not in pay, as the "supplementary pensioners"; and to Messrs. Rhind and Burns, together, as "the deferred compensation claimants". They are defined with more detail, and as classes of persons with potential claims in the liquidation and winding-up, in an order of Mr. Justice

Houlden dated January 13, 1995, and attached as Schedule “B” to these reasons [see p. 800 *post*].

[9] I will refer to the three groups *en masse,* from time to time, as “the claimants”. Similarly, the three groups of benefits mentioned in the preceding paragraphs will be referred to as “the employee benefits”.

[10] Since there is an issue to be determined as to whether the arrangements, which provide the senior officers with supplementary retirement income, constitutes a “pension plan” or something else, such as a “retiring allowance”, I intend to refer to these arrangements in these reasons as the “supplementary retirement income arrangements”. I recognize that there is a creature of the *Income Tax Act,* R.S.C. 1985, c. 1 (5th Supp.), with a similar designation, known as an “SRIA” (a “Supplementary Retirement Income Arrangement”). By using the phrase “supplementary retirement income arrangements” I do not mean to ascribe to the arrangements here in question the meaning of the capitalized technical term of art in income tax parlance. I simply use it as the most convenient generic way in which to describe the supplementary retirement income benefits in a neutral fashion, for purposes of these proceedings.

[11] There is little doubt that the claimants have a contractual right to the recovery of the group benefits, the supplementary retirement income benefit, and the deferred compensation payments in question. I so hold at the outset. Such contractual entitlement, however, is not what is at issue here, in reality. As is the case in most financial collapses, Confederation Life has insufficient general assets to meet its obligations in full. It cannot provide the benefits and payments to which the claimants are entitled and, at the same time, honour its other obligations, particularly those of the company to its policyholders.

[12] “Policyholders” are entitled to priority under the distribution provisions of the *Winding-up Act,* R.S.C. 1985, c. W-11. Consequently, notwithstanding their contractual entitlement to receive the benefits and payments claimed, the claimants can only receive effective protection in the winding-up proceedings if their claims are in the nature of trust claims (express, statutory or constructive)—as they assert they are—or if they can place themselves amongst the category of Confederation Life “policyholders” who have priority—as they assert they can.

PART B

DIRECTIONS SOUGHT AND ISSUES

A. *Directions Sought*

[13] Hence these proceedings.

[14] The original court order came on August 15, 1994, and was made by the Honourable Mr. Justice Houlden pursuant to the provisions of the *Winding-up Act,* as amended. The winding-up is effective as of August 12, 1995. The Superintendent of Financial Institutions was appointed the provisional liquidator of the company. It, in turn, appointed Peat Marwick Thorne Inc. as its agent to assist in the administration of the liquidation of the estate of Confederation Life.

[15] In these proceedings, the provisional liquidator, through its agent, moves for directions in view of the dilemma arising from the foregoing circumstances. It seeks advice and direction regarding the following questions:

> (a) Whether all or any of the retirees, the supplementary pensioners in pay, the supplementary pensioners not in pay, and the deferred compensation claimants, as classes of persons, have claims against the estate of Confederation Life; and,
>
> (b) if all or any of those classes of persons have a claim or claims against the estate of Confederation Life, does such claim or claims constitute:
>
> (i) a trust claim?; or
>
> (ii) a claim under a policy in respect of which priority is accorded to a policyholder by the provisions of s. 161(1)(*c*) of the *Winding-up Act*?

[16] By orders of Mr. Justice Houlden dated January 13 and February 8, 1995, representative counsel were appointed to represent each of the above classes.

B. *The Issues*

[17] While question (b) above sets out the ultimate issues to be determined—are there "trust" claims and/or claims as "policyholders"?—there are a number of individual issues which must be addressed in making those determinations. They are varied and complex. For

ease of reference, I set out the issues to be considered by the class of claimant. They are as follows:

With Respect to the Retirees:

(a) Are the assets of Confederation Life subject to an express trust in respect of the amount required to satisfy all benefit liabilities under the Group Benefit Plans?

(b) Alternatively, are the assets of Confederation Life subject to a constructive trust in respect of the amount required to satisfy all benefit liabilities under the group benefit plans arising as a result of either,

(i) a breach of fiduciary duty; or,

(ii) an unjust enrichment?

(c) Are the retirees “policyholders”, as that term is utilized in s. 161(1)(*c*) of the *Winding-up Act,* and thus entitled to share *pari passu* in the priority accorded to policyholders by that section?

(d) Should the court exercise its discretion under s. 33 of the *Winding-up Act,* to require the provisional liquidator to keep the group benefits in place or to compel the provisional liquidator to take legal action on behalf of the retirees against certain alleged, but not particularly well-specified wrongdoers?

[18] *With Respect to the Supplementary Pensioners:*

(a) Is there a distinction to be drawn in the treatment of the supplementary pensioners “in pay” and the supplementary pensioners “not in pay”?

(b) Are the assets of Confederation Life subject to an express trust in respect of the amount required to satisfy all benefit liabilities under the supplementary retirement income arrangements?

(c) Alternatively, are the assets of Confederation Life subject to a constructive trust in respect of the amount required to satisfy all benefit liabilities under the supplementary retirement income arrangements, arising as a result of either,

(i) a breach of fiduciary duty; or,

(ii) an unjust enrichment?

(d) Are the supplementary pensioners in pay and not in pay entitled to the priority accorded to “policyholders’’ within the meaning of s. 161(1)(*c*) of the *Winding-up Act*?

(e) Are the supplementary retirement income arrangements a “pension plan” to which the *Pension Benefits Act,* R.S.O. 1990, c. P.8 applies?

(f) If the supplementary retirement income arrangements are a “pension plan”, does R.R.O. 1990, Reg. 909, s. 47(3), para. 6, as amended to October 28, 1994 (by O. Reg. 665/94, s. 3(1)) apply?

(g) If the *Pension Benefits Act* applies to the supplementary retirement income arrangements, is Confederation Life deemed, pursuant to s. 57(3) of the Act, to hold in trust an amount equal to the due but unpaid contributions required under the legislation and regulations?

(h) 57(5) of the Act, in an amount equal to the due but unpaid contributions required by the legislation and regulations?

(i) Does the lien and charge created by s. 57(5) of the *Pension Benefits Act* constitute a secured claim against the estate of Confederation Life?

(j) If the supplementary retirement income arrangements are a “pension plan” subject to the *Pension Benefits Act* does the operation of the Act conflict with the *Winding-up Act* thereby rendering the operation of the *Pension Benefits Act* unconstitutional as a result of the application of the doctrine of paramountcy?

(k) What is the test to be applied for determining whether federal legislation is paramount?

[19] *With Respect to the Deferred Compensation Claimants:*

(a) Are the assets of Confederation Life subject to an express trust in respect of the contributions from salary made by the Deferred Compensation Claimants, together with interest, for the full amount of the balances standing to the credit of their accounts?

(b) Are the assets of Confederation Life subject to a constructive trust in respect of the contributions from salary made by the deferred compensation claimants, together with interest, for the full amount of the balances standing to the credit of their accounts, arising as a result of either,

(i) a breach of fiduciary duty; or,

(ii) an unjust enrichment?

(c) Are the deferred compensation claimants entitled to the priority accorded to "policyholders" within the meaning of s. 161(1)(*c*) of the *Winding-up Act?*

[20] Thus, each of the groups of claimants is asserting a claim based upon an express trust, upon the imposition of a constructive trust, and upon an entitlement as a "policyholder". The retirees raise an additional argument based upon the court's discretion to impose duties upon a liquidator under s. 33 of the *Winding-up Act.* Finally, there are an additional series of "pension" or *Pension Benefits Act* issues and a constitutional issue which relates to the supplementary pensioners' claims.

[21] Before beginning the trek through this myriad of issues, I turn to a fuller outline of the factual circumstances surrounding the winding-up and the claims.

PART C

FACTS

A. *Confederation Life's "Benefit" Programs*

[22] Confederation Life has provided employee benefits as part of its employment package since 1924. The extent and subject matter of the benefits has evolved over the years. As at the date of the winding-up, however, the benefits consisted primarily of the following:

(a) Group life insurance;

(b) Group accidental death and dismemberment insurance;

(c) Major medical benefits;

(d) Dental benefits;

(e) Registered Pension Plan benefits;

(f) Supplementary retirement income benefits; and

(g) Deferred compensation plan benefits.

[23] All except the registered pension plan benefits are at issue in these proceedings. I shall refer to that plan in these reasons as the "registered pension plan". Similarly, the Group Life and Accidental Death and Dismemberment Insurance and the major medical and dental benefits will be referred to in these reasons, collectively, as "the group benefits".

B. *The Retirees*

[24] The group benefits were provided by Confederation Life to its employees, both while they were actively employed and upon their retirement, as part of each employee's overall compensation package. As stated in the Confederation Life Employee Handbook (at p. 2):

> Compensation, in total, consists of salary, group life, health, dental and pension benefits, vacations and many other fringe benefits provided for staff members. These items require a direct significant contribution from the Company on behalf of each employee. *Thus total compensation is a composite, of which salary is the most visible and significant item.*
>
> …
>
> Our approach to overall compensation is to be in line with general community levels in the areas where we operate, and to provide a fair return for the contribution each staff member makes to the Company's operating success.

(Emphasis added)

[25] While at one point in their history the group benefit plans required employee contribution, at the date of the winding-up order they were paid in full by Confederation Life.

[26] The source of authority for the current group benefit plans is to be found in a by-law enacted by the board of directors of Confederation Life on April 20, 1955. The by-law provided:

> (a) that a board of trustees be appointed to administer the group insurance plans on behalf of Confederation Life, as employer (the "trustees");
>
> (b) that the benefits to be provided under the group contracts, and the rules and regulations pertaining thereto, would be determined by Confederation Life from time to time; and,
>
> (c) that the board of directors of Confederation Life could at any time direct the payment of premiums respecting any or all group insurance plans be discontinued and employees no longer be entitled to any related benefits.

[27] That foundation for the group benefit plans has not changed.

[28] No formal trust agreement was ever entered into between Confederation Life, as employer, and the trustees of the plans. In April, 1983, however, the board of directors approved a document entitled “Guidelines for Canadian Group Benefit Plan Trustees”. These guidelines distinguished between the duties of the trustees in relation to the pension plans and their duties in relation to the group benefit plans. They provided that the trustees should:

> (1) *with respect to the pension plans* they are responsible for:
>
> > (a) ensure that the plans are funded in a manner that will enable them to meet all their obligations;…
> >
> > (c) administer the plans in accordance with the plan documents established by Confederation Life in a manner that provides equity and consistency of treatment for all participants; and
>
> (2) *with respect to the other group benefit plans* they are responsible for:
>
> > (a) administer the plans in accordance with the contracts established by Confederation Life in a manner that provides equity and consistency of treatment for all participants;…

[29] (Emphasis added) The guidelines, I observe, place no obligation upon the trustees to ensure that the group benefit plans were funded, whereas such an obligation is expressly stated with respect to pension plans. These guidelines were not distributed to the employees of Confederation Life.

[30] What *was* distributed to the employees of Confederation Life were a series of booklets describing the employment benefits that the company offered (the “booklets”). The booklets were later replaced with a handbook entitled “Your Confed Handbook” (the “handbook”). Prior to 1983, the benefits for retired employees were described in the booklets. Thereafter, upon retirement, retired employees were provided with a pamphlet entitled “Benefits for Retired Employees of Confederation Life in Canada” summarizing the benefits provided to retired employees (the “retirement pamphlets”). In each of the three documents, a statement appeared advising employees that the document merely outlined or summarized the benefits and provisions of the group plan but, “does not create or confer any contractual or other rights. All rights with respect to the benefits of a member will be governed by the Group Policy.”

[31] Although this statement varied slightly in each of the booklets, handbooks and retirement pamphlets, the substance of the statement in each is consistent.

[32] The benefits, and the documents reflecting them, were amended from time to time. When this occurred—at least in later years—employees and retired employees were notified and replacement pages were circulated. In October 1991 the handbook was amended by providing that employee benefit coverage could cease on the "Termination of the Contract or coverage under the Division or Class to which [the employee] belong[ed]". This same warning did not appear in the retirement pamphlets, however, until the publication of the last pamphlet in May 1993. That pamphlet begins with a section bearing the word "Important" which states:

> This booklet contains information concerning your group coverage and should be kept in a safe place. *It supersedes and replaces all previous communication material.*
>
> Confederation Life's services with respect to Major Medical and Dental Benefits are provided on an administrative basis only. Such benefits are not insured by Confederation Life. All other benefits are underwritten and insured by Confederation Life.
>
> This booklet summarizes the benefits and provisions of your Group Plan. *It does not constitute the Group Contracts and is not a contract of coverage. nor does it create or confer any contractual or other rights.* Every effort has been made to insure that the information is accurate. However, if there is any question as to interpretation, all rights with respect to a covered person will be governed solely by the Group Contracts issued by Confederation Life Insurance Company.

(Emphasis added)

[33] As the foregoing notice indicates, there is a difference in the manner in which the group life benefits (including accidental death and dismemberment benefits) and the other benefits are provided. The major medical and dental benefits are not insured. The group life benefits are. These are the arrangements that were in effect at the time of the winding-up. They superseded and replaced all earlier communications.

[34] The Group Life benefits are provided through group insurance policies issued by Confederation Life, as insurer, to the trustees, as policyholders ("the life policies"). The life policies are experience-rated policies with the premiums determined annually based upon the

claims experience of the employees of Confederation Life covered thereby. Each of the life policies is renewable annually, on March 31, upon payment of the premium due, and expires annually.

[35] Major medical and dental benefits have been provided to employees and retirees on a self-insured basis since the 1980s, pursuant to a series of plan documents (the “group plans”) and administrative services only (“ASO”) contracts. An ASO contract is a contract by which an employer provides benefits for its employees. The employer is responsible for the cost of the benefit payments but an insurance company is retained to provide administrative services such as processing claims and sending out cheques and receives a fee for providing those services. In these arrangements, the insurance company does not agree to indemnify the employer for claims made.

[36] Under the ASO contracts at issue in this action, Confederation Life, as insurer, contracted with the trustees to provide administrative services only. Confederation Life, as employer, is responsible for the cost of the benefit payments. The ASO contracts were not distributed to the retirees.

[37] Like the life policies, each of the group plans and ASO contracts in question was for a term of one year, renewable annually, on March 31, for a further term of one year upon payment of the first premium due for the new policy year. All of the existing coverages for the group benefits have, therefore, technically speaking, ceased. However, the provisional liquidator, through its agent, has continued to make premium payments since the date of the winding-up order with respect to the life policies and group plans which were in place on August 12, 1994, pending the decision of the court.

[38] It is clear from the materials filed, and from the evidence, that none of the group benefit plans were protected by any form of pre-funding mechanism or secured by any form of segregated trust fund or other assets. The cost of the group benefits was expensed annually as the related insurance premiums and medical/dental liabilities were incurred.

[39] It is, of course, the lack of any such protection or security, which would enable the group benefits to be continued, notwithstanding the winding-up of Confederation Life, that lies at the heart of the retirees’ position on this motion.

C. *Supplementary Pensioners “In Pay” and Supplementary Pensioners “Not In Pay”*

[40] Since 1975 Confederation Life has provided supplementary retirement income arrangements for senior officers to supplement the pension benefits received under the company's registered pension plan. The necessity for such arrangements arose because of limits contained in the *Income Tax Act* (Canada) on the amount of pension income which could be paid from a registered pension plan (the "Revenue Canada limits"). The purpose of the supplementary retirement income arrangements was to ensure that senior officers received the full retirement benefit to which their income level and years of service would otherwise have entitled them but for the Revenue Canada limits.

[41] While initially confined to a small group of officers, by the time of the winding-up order of August 15, 1995, the supplementary pension arrangements extended to 31 senior officers of the company. Of these, 11 were receiving payments at the time of the order and 20 were not.

[42] Confederation Life's supplementary retirement income arrangements were established in accordance with two resolutions of the company's board of directors. In the first resolution, dated June 21,1972, the board approved in principle the concept of providing "a supplementary pension" to those officers whose pensions would otherwise be limited by the Revenue Canada limits; management was asked to investigate the method of handling the matter, possibly by way of employment agreement. In the second resolution, dated July 16, 1975, the board authorized:

> that on retirement there be provided a retiring allowance consistent with the service and contribution by such members to the Company as authorized by the Board of Directors.

[43] The supplementary retirement income arrangements were not implemented through the creation of a formal plan document. Instead, Confederation Life advised the senior officers of their entitlement to this benefit by sending them a form letter. All of these letters cannot be found, but I am told that letters in the materials which are dated in April 1983 (the "April 1983 letters") are reasonable samples of what was sent and received—at least until June 1993. While the form of the various April 1983 letters varies slightly, their substance remains the same. The following statement appears in some fashion in each:

> In accordance with a resolution of the Board of Directors, the Company agrees to provide you in recognition of your valuable, loyal and long devoted service, a retiring

> allowance payable monthly commencing on the 28th day of the month following your actual retirement. The retiring allowance will be payable during your lifetime provided you are willing, consistent with your age and health, to make yourself available to the Company in a consulting capacity at reasonable times, and provided you agree to not engage in competing business without prior approval from the Company, nor to divulge or communicate confidential information of the Company.

[44] The April 1983 letters go on to describe the formula upon which the “retiring allowance” is based. They then conclude with this comment:

> In the unlikely event that your employment with the Company is terminated for cause, the retiring allowance is not vested to you and therefore not payable.

[45] To indicate their concurrence with the supplementary retirement income arrangements, the senior officers were asked to return a signed copy of the letter.

[46] The terms of the supplementary retirement income arrangements were later restated by way of a form letter dated June 9, 1993 (the “June 1993 letter”) sent by Mr. J.R. Cunningham to all eligible members. Mr. Cunningham was at all material times a senior officer of Confederation Life—the Vice-President, Corporate and Human Resources. He was head of the company’s human resources department and secretary to the human resources and compensation committee of the board of directors, although he was not a member of the board. He provided evidence, by affidavit, on behalf of the claimants.

[47] Mr. Cunningham distributed copies of both the April 1983 letters and the June 1993 letter.

[48] The June 1993 letter states in part as follows:

> The purpose of this letter is to clarify and confirm your entitlement to the Senior Officers’ Supplementary Pension Arrangement.
>
> In accordance with a resolution of the Board of Directors and in order to ensure that your post retirement income compares equitably to other employee members of the registered Pension Plan for Salaried Employees, when measured as a percentage of pre-retirement income, the Company agrees to provide you with a Supplementary Pension on your retirement.

This supplement will be in addition to the pension benefit you will receive from the registered pension plan and recognizes that the amount of pension benefit which can be provided under the provisions of the registered Plan is limited by Revenue Canada regulations.

…

1. [Sets out how the Supplementary Pension is to be paid]

Any Supplementary Pension payable under this arrangement will be paid in the same form and in the same manner as you elect for the pension income from the registered pension plan.

3. From time to time the Company may, on an ad hoc basis, increase the amount of pension being paid to retired members (or their beneficiaries) of the registered pension plan. In this event, the amount of the Supplementary Pension will be increased in a similar and consistent manner.

4. In the event of your death after retirement, the form of the Supplementary Pension amount continuing to your spouse or other beneficiary will be of the same form as that under the registered pension plan, with the same actuarial adjustment being applied if such is required under the registered plan.

7. If you should leave the Company prior to retirement, you shall be entitled to a deferred Supplementary Pension payment determined in the same manner as outlined in point 1 above… You should be aware, that in the event you leave the Company prior to retirement, the Supplementary Pension will only be provided as a deferred payment and it is not permissible to receive or transfer the lump sum actuarial equivalent of your pension benefits. Further, in the unlikely event that your employment with the Company is terminated for cause, the Supplementary Pension is not vested to you, and therefore not payable.

[49] Administration of the supplementary retirement income arrangement was the responsibility of the Corporate Human Resources Department of Confederation Life, under the supervision of Mr. Cunningham. The trustees had no responsibility for the supplementary retirement income arrangements, notwithstanding the “guidelines” referred to earlier in these reasons which envisage responsibility for both the company’s “pension plans” and the group benefit plans being with the trustees. Moreover, the liability for the supplementary retirement

income benefit does not form part of the pension plan obligations under the company's registered pension plan. None of the annual reports of the trustees for the years 1986, 1987, 1992, 1993, and 1994 refers to a supplementary retirement income arrangement.

[50] The supplementary retirement income arrangements were not funded. At no time did Confederation Life set aside any specific funds or assets to support the liability to pay those benefits. Neither the April 1983 letters nor the June 1993 letter make reference to the creation of a trust or the segregation of assets to secure the supplementary retirement income arrangements.

[51] There was an account—Account No. 2332G (later No. 20332)—created in the records of Confederation Life pertaining to the supplementary retirement income arrangements and reflecting activity in it. These were accounting entries only, however, and the account did not represent any assets of Confederation Life; nor was it an account in which assets were deposited or held. It was an account created to record the accruing actuarial liabilities attributable to the supplementary retirement income arrangements. When payments were made to the supplementary pensioners, they were made from the general funds of Confederation Life, not from any funds or assets in account No. 2332G.

[52] From 1990 forward, Confederation Life obtained annual actuarial valuations with respect to both the registered pension plan and the supplementary retirement income arrangements from Towers Perrin, a firm of actuarial and compensation consultants. These reports revealed that the market value of the assets of what the authors called the supplementary pension were *nil* and that the liability for it was increasing. The Towers Perrin report dated June 27, 1991, stated "that there are no assets segregated in a fund for the purposes of securing the benefit obligations of the Program".

[53] In late 1993, Mr. Cunningham requested Towers Perrin to prepare a report which focused upon providing security and funding for the payment of benefits promised under the supplementary retirement income arrangements. According to the Towers Perrin report dated November 8, 1993, several options were available to Confederation Life in order to secure its obligation to provide these benefits in the event it were unable or unwilling to make payments. These options included: obtaining a third-party guarantee, obtaining a surety bond, obtaining a bank letter of credit, or establishing a fully funded trust. The report concluded:

> There is no magic to any of these methods of providing security. Each of them will probably cost the company more than an unsecured promise.

[54] The report went on to discuss what it referred to as supplementary pension benefits:

> These benefits are paid monthly to retirees through “payroll”. Unlike the registered plan benefits that are well funded and secure against any calamity happening to Confederation Life, receipt of these benefits is dependent on the future financial health of the company. This is consistent with common practice in Canada. Less than 10% of companies have funded or otherwise secured these kinds of obligations.

[55] Confederation Life did not implement any of the options recommended in the Towers Perrin report, and the supplementary retirement income arrangements remained—as they had been at all times—unfunded.

[56] The liquidator has ceased making payments to the supplementary pensioners in pay and has indicated that it will not make payments to those not in pay.

D. *Deferred Compensation Claimants*

[57] In December 1981, Confederation Life established a senior management deferred compensation plan to provide retirement benefits to certain designated senior executives. Mr. Rhind and Mr. Burns, the chairman and president of the company, respectively, were the only two persons ever designated as members of the plan.

[58] Deferred compensation plans are income tax mechanisms, designed to allow senior executives to defer entitlement to all or part of their employment income until after retirement, at which time its receipt would provide a source of post-retirement income that would be taxable at (presumably) lower marginal rates applicable in the years of retirement.

[59] A deferred compensation plan, being the tax-driven instrument that it is, is a complicated and carefully chiselled instrument. It is carefully chiselled because, if not, it may unwittingly be caught in the tentacles of one or another of the myriad of different tax instruments which exist, and thus attract undesired tax consequences. In the case of Confederation Life’s deferred compensation plan, the tax deferral aspects of it were approved in an advance ruling by Revenue Canada, dated June 18, 1982.

[60] The advance ruling obtained from Revenue Canada was based upon a specific series of representations which were made by Confederation Life and Messrs. Rhind and Burns. Those representations included the terms of the deferred compensation plan referred to above. Both Confederation Life and Revenue Canada treated the plan as a "retirement allowance" and expressly agreed that it was not an "employee benefit plan" or an "employee trust" within the meaning of s. 248 of the *Income Tax Act* (Canada).

[61] The operation of the plan is described in a plan document entitled "Senior Management Deferred Compensation Plan". It is in the form of an agreement between Confederation Life and Messrs. Rhind and Burns. In essence, the members are required to elect, on an annual basis, the amount of income earned in the year in question that they will not defer. This amount of their annual income they receive. The balance is deferred, but it is not put anywhere awaiting the member's retirement. It is, in fact, not paid, although the company accrues a liability for its payment, with interest. A ledger account is set up on the company books, in which the deferred amounts are recorded and interest is credited on the balance.

[62] Upon retirement, all deferred amounts become payable as directed by the member or the member's beneficiary in an election.

[63] The deferred compensation plan is quite specific about these matters. It includes, for instance, the following terms:

> *Crediting of Portions of Deferred Amounts to Member's Accounts*
>
> The Deferred Amount for a Period shall not be paid into the Plan by the Employer nor shall it be construed to be so paid.
>
> In respect of each Period, the Employer shall pay to a Member… all amounts included in such Member's Aggregate Cash Remuneration for such Period until the aggregate of such payments is equal to the Member's Non-Deferred Amount for such Period. The Employer shall not pay to the Member any other amounts included in such Member's Aggregate Cash Remuneration for the Period but will credit each of such other amounts, as at the date that but for the provisions of the Plan it would otherwise have become due, to such Member's Account.

> For greater certainty, such crediting is entirely a matter of internal book-keeping of the Employer and the Employer shall be under no obligation to make any actual payments to the Plan.

[64] As in the case of the group benefits and the supplementary retirement income arrangements, Confederation Life's deferred compensation plan was not pre-funded or secured by any form of segregated assets. Indeed, the terms of the plan do not refer to the establishment of a trust, or to the segregation of funds or assets. Similarly, as noted, they do not oblige Confederation Life to make actual payments to the plan.

[65] Mr. Rhind retired from employment with Confederation Life in April 1985. He continued to act as a director of Confederation Life until November 14, 1994, however, and because of that he had not yet begun to receive payments under the deferred compensation plan prior to the liquidator's decision to withhold further payments. At the date of the winding-up order, Mr. Burns had retired and was receiving equal monthly instalments as per his election. At the time of his retirement, he elected not to purchase an annuity.

[66] As of December 31, 1993 the account for Mr. Rhind showed a balance of $707,142.76 and the account for Mr. Burns showed a balance of $478,637.

[67] The provisional liquidator has stopped making payments to Mr. Burns under the plan and has refused to make such payments to Mr. Rhind.

PART D

THE POSITIONS OF THE PARTIES

A. *The Retirees*

[68] The retirees submit that they are entitled, either by virtue of an express trust or by virtue of the imposition of a constructive trust, to have a sufficient portion of the assets of Confederation Life segregated from the company's general assets and set aside to fund the continued provision of the group benefits. They approach the constructive trust objective from two different directions: first, they submit that a fiduciary relationship exists between Confederation Life and its employees and retired employees in relation to the group benefits and that the imposition of a constructive trust is the appropriate remedy for the company's breach of that fiduciary duty by failing to pre-fund and secure the benefits; and secondly, they

submit that the imposition of a constructive trust is the appropriate remedy to redress an unjust enrichment which Confederation Life has enjoyed at the expense of its employees in this regard.

[69] The retirees argue further, and in any event, that they are "policyholders" within the meaning of s. 161(1)(*c*) of the *Winding-up Act* and, accordingly, that they are entitled to share *pari passu* with other policyholders in the distribution of the assets of the company upon the winding-up.

B. *The Supplementary Pensioners*

[70] The supplementary pensioners also argue that the assets of Confederation Life are subject to an express trust in the amount required to fund all benefit liabilities under the supplementary retirement income arrangements. Alternatively, they assert the constructive trust argument, based upon the breach of a fiduciary duty and upon the notion of unjust enrichment. They submit, as well, that they are "policyholders" within the meaning of s. 161(1)(*c*) of the *Winding-up Act.*

[71] These claimants then raise a series of "pension plan" issues arising under the *Pension Benefits Act.* They submit that Confederation Life's supplementary retirement income arrangements constitute a "pension plan" as defined in the Act, and that therefore there is a deemed statutory trust in the amount necessary to fund the arrangements and, in addition, a statutory lien and charge against the company's assets for that amount: *Pension Benefits Act,* s. 57(3) and (5).

[72] If the latter issues regarding a statutory trust, lien and charge are determined in favour of the supplementary pensioners, an issue arises as to whether the operation of the *Pension Benefits Act* is unconstitutional in these circumstances because of the doctrine of paramountcy.

[73] C. *The Deferred Compensation Claimants*

[74] The deferred compensation claimants submit that the full amount of the balances outstanding in their accounts are protected by reason of an express trust, or, alternatively, by reason of a constructive trust based upon a breach of fiduciary obligation and upon the

doctrine of unjust enrichment. They also argue that they are “policyholders”, as contemplated by s. 161(1)(*c*) of the *Winding-up Act.*

[75] I will deal with each of these submissions separately.

PART E

LAW AND ANALYSIS

I. *The Claimants as “Policyholders” of Confederation Life*

[76] The claimant groups each argue that they are “policyholders” within the meaning of s. 161(1)(*c*) of the *Winding-up Act,* and therefore that they are entitled to share *pari passu* with other policyholders in the liquidation proceeds in accordance with the priority scheme of distribution set out in that provision. For the retirees, this claim is premised upon the existence of an *indemnity-like* contract; for the supplementary pensioners and the deferred compensation claimants, it is premised upon the existence of an *annuity-like* contract.

[77] As these submissions raise issues that go to the heart of the purpose of winding-up proceedings, in general, and the scheme of priority distribution of assets, in particular—all in the context of a life insurance company insolvency—I will address them first even though they are not articulated first either in the questions as put forward by the provisional liquidator for directions or in the issues as I have earlier summarized them.

[78] Under s. 161(1)(*c*) of the *Winding-up Act*, claims of “policyholders” of the company rank in priority after the costs of liquidation and a preferred claim given to employees for three months’ wages but ahead of the priority provided for in s. 161(2) for the ordinary or general creditors. The priority scheme, as set out in s. 161, is as follows:

> 161(1) Subject to this Act, claims shall be paid in the following order of priority:
>
> (a) costs of liquidation and the mortgage insurance and special insurance portions of the expenses described in paragraph 686(1)(a) of the *Insurance Companies Act* that were incurred by the Superintendent in respect of the company after March 31, 1986;
>
> (b) claims of preferred creditors, specified in section 72;
>
> (c) *claims of policy holders of the company ranking as follows:*

(i) if reinsurance is not effected as provided in section 162,

(A) *firstly,* any of the following claims:

(I) *in the case of policies of life insurance and policies of accident and sickness insurance, claims that have arisen under those policies of the company,* in accordance with the terms thereof, prior to the date of the filing of the statement of the liquidator in the Office of the Superintendent of Financial Institutions as provided in subsection 168(1), less any amount previously advanced by the company on the security of those policies, and claims of holders of policies of life insurance and policies of accident and sickness insurance to the value of those policies computed as provided in section 163, and

(II) in the case of policies of insurance other than policies of life insurance and policies of accident and sickness insurance, claims that have arisen under those policies of the company by reason of the occurrence of the event insured against, in accordance with the terms thereof, prior to the date of the filing of the statement of the liquidator in the Office of the Superintendent of Financial Institutions as provided in subsection 168(1), less any amount previously advanced by the company on the security of those policies, and

(B) secondly, in the case of policies of insurance other than policies of life insurance and policies of accident and sickness insurance, the claims of such policy holders to the value of those policies computed as provided in section 163 or, as the case may be, claims that have arisen under those policies of the company by reason of the cancellation of such policies, in accordance with the terms thereof, prior to the date of the filing of the statement of the liquidator in the Office of the Superintendent of Financial Institutions as provided in subsection 168(1), less any amount previously advanced by the company on the security of the policies, or

(ii) if reinsurance is effected… [this part is not relevant to these proceedings]

(2) *Other creditors and policyholders of the company,* including policyholders claiming any minimum amount that a life company has agreed to pay under a policy… are entitled to receive a dividend on their claims only if the assets are more than sufficient to pay the claims specified in subsection (1).

(Emphasis added)

(i) *The retirees*

[79] In the case of the retirees, the "policyholder" argument is based on the premise that the group benefits are provided by way of contracts of indemnity—and, thus, are policies of insurance—under which they are entitled to benefit and, accordingly, that they are entitled to rank as "policyholders" under s. 161(1) of the *Winding-up Act.*

[80] I accept, after some initial hesitation, that the retirees' rights to group benefits flow from "policies of insurance" to that effect. Although it may appear implausible, at first appearance, that an employer who promises to provide such benefits becomes an "insurer" in this respect, an examination of the relevant legislative defining provisions seems to lead inexorably to that conclusion.

[81] "Policy" of insurance is given a very broad meaning in insurance legislation, and "policy" is defined in s. 159 of the *Winding-up Act* as including "policy" as defined in the *Insurance Companies Act,* S.C. 1991, c. 47, as amended, s. 2. There, the term "policy" is stipulated to mean:

…any written contract of insurance whether contained in one or more documents… and includes any annuity contract.

[82] There is no definition of "contract of insurance" in the federal *Insurance Companies Act* but in Ontario, "insurance" is defined in s. 1 of the *Insurance Act,* R.S.O. 1990, c. I.8, as amended, as follows:

"insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event, and includes life insurance.

[83] Since a “contract” under the *Insurance Act* simply means “a contract of insurance” and includes “a writing evidencing the contract”, Confederation Life’s promise to provide the group benefits, as evidenced by the booklets, handbook and retirement pamphlets, and by the group benefit plan documents, would seem to amount to a “policy of insurance”. It is evidenced in writing, albeit in one or more documents; and it constitutes “the undertaking by one person [Confederation Life] to indemnify another person [the retiree] against loss or liability from loss in respect of a certain risk or peril to which the object of the insurance may be exposed [i.e., to the risk or peril of illness and the costs of dealing with it]”. Why, then, is it not a “written contract of insurance”, as contemplated by the *Insurance Companies Act* and therefore a “policy”, as contemplated by the *Winding-up Act?* In my opinion, it is.

[84] What is missing from the foregoing analysis, and from the specific definition of “insurance” in the *Insurance Act* is the concept of “premium”, an essential characteristic of a contract of insurance—the consideration in exchange for which the benefit is provided. While consideration is necessary, it is well established, however, that it need not take the form of a cash payment: see *Prudential Insurance Co. v. Commissioners of Inland Revenue,* [1904] 2 KB. 658 at p. 663; *California Physicians’ Service v. Garrison, Insurance Commissioner,* 172 P.2d 4 (1946) at pp. 17-18, adopted by Pennell J. in *Bendix Automotive of Canada Ltd. v. United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) Local 195,* [1971] 3 O.R. 263 at pp. 270-71, 20 D.L.R. (3d) 151 (H.C.J.). In the latter case, the court held that an employer’s obligation under a collective agreement to reimburse employees for what today would be called “extra billing” payments constituted “a contract of insurance” and that the consideration was to be found in the employees’ own covenants in the collective agreement. Here, the consideration is found in the retirees’ former contributions of labour, skill and knowledge in exchange for which Confederation Life’s compensation package as a whole had been offered.

[85] Consequently, I am satisfied that the retirees are the holders of “policies of insurance”, for these purposes.

[86] It is argued that there can be no insurance with respect to the major medical and dental benefits because they are provided through the mechanism of “administrative services only” contracts. In this sort of arrangement the company, as employer, “self-insures” and accepts the risk associated with providing the benefits; it is directly responsible for payment of

all claims. The company's role as insurer *in this respect* is purely administrative; it processes and deals with claims in exchange for an administrative fee. Such arrangements do not constitute insurance: see Norwood and Weir, *Norwood on Life Insurance in Canada,* 2nd ed. (Toronto: Carswell, 1993) at p. 142.

[87] The retirees handbook itself seems to recognize the same distinction. On the first page, under a heading entitled "Important", the following is to be found:

> Confederation Life's services with respect to Major Medical and Dental Benefits are provided on an administrative basis only. *Such benefits are not insured by Confederation Life.* All other benefits are underwritten and insured by Confederation Life.

(Emphasis added)

[88] To my mind, however, the distinction which needs to be made on these facts is the following. There is a difference between the nature of the relationship between Confederation Life, *as employer,* and its employees, and the nature of the relationship between Confederation Life, *as insurer,* and itself (i.e., the trustees) as the holder of the ASO contracts. With regard to the latter, there is no contract of insurance. In relation to the former, however, in these circumstances, a contract of insurance exists.

[89] Unfortunately for the retirees, however, this result—while it takes them along the road they seek to travel—does not get them to the destination they seek to reach.

[90] Even given a policy of insurance as I have described it, the policy is terminable at any time by the company, and in the circumstances of a winding-up proceeding, the provisional liquidator is obliged in my view to terminate such policies—or, at least, not to renew them. In my opinion, the retirees are entitled to no more than the benefits of the coverage in effect and paid for at the time of the winding-up order.

[91] Each of the life policies and the group medical/dental plans provide that coverage will terminate when the earliest of the following events occurs:

> (a) the employer terminates the employee's coverage; or
>
> (b) the policy or the ASO contract terminates or coverage on the group, division or class to which the employee belongs terminates.

[92] A winding-up is effective as of the date of the notice of presentation of the petition for winding-up, and it is the duty of the liquidator to effect “a speedy, inexpensive and effectual distribution of the assets among the shareholders and creditors”: see Jay A. Carfagnini, *Proceedings Under the Winding-Up Act (Canada)* (1988), 66 C.B.R. (N.S.) 77 at pp. 79-80; *Partington v. Cushing* (1906), 3 N.B. Eq. 322 (S.C.). The general principles governing a winding-up proceeding are described in *Ince Hall Rolling Mills Co. v. Douglas Forge Co.* (1882), 8 Q.B.D. 179 at p. 184, as follows:

> In determining this question it is necessary to consider the effect upon the company and its operations of a petition for liquidation followed by a subsequent order to wind-up. In the first place, *the purpose of the* winding-up is to make an equable and rateable *distribution of all the assets of the company, from the moment of the commencement of the winding-up,* that is the presentation of the petition, amongst all the creditors of the company without favour or preference to any one according to the legal rights of the creditors and the company at the moment of the commencement of the winding-up.
>
> All the assets of the company are to be got in and collected in the most beneficial way and distributed. *In fact, from the moment of the winding-up, the company is stopped as an independent going concern.*
>
> *Every transaction entered into by the company from that moment is void unless sanctioned by the Court; no contracts can be executed nor can the business of the company be carried on in a single particular except for the purposes of winding-up and for the benefit of the creditors,* and, although the company continues in existence and under the same name, and may, if allowed by the Court, continue to carry on its business and enter into or complete transactions, it does so in a new interest and a new capacity, and solely for the purpose of winding-up its affairs in the interest of its creditors and shareholders except in one class of cases which have no application to the present, viz., where transactions bonâ fide executed and carried out between the petition and the winding-up order may in the discretion of the Court be ratified and confirmed.

(Emphasis added)

[93] Canadian courts have adopted a similar approach: see Carfagnini, *supra,* at p. 80.

[94] Here, the ASO contracts in question were one-year contracts. They expired on March 31, 1994. The provisional liquidator has indicated its intention to cease payments under the ASO contracts unless the court orders otherwise, but has agreed to continue funding the group benefits until the issue has been determined. Leaving aside arguments having to do with the existence of trusts or other remedies, there is nothing in the "policyholder" submission itself, or in the relationship between the company and the retirees *qua* participants in the group benefits contracts which compels the provisional liquidator to continue to renew the contracts and to fund the Group Benefits. In my view, unless the court orders otherwise, the provisional liquidator is obliged to discontinue the ASO contracts, in order to advance the liquidation of Confederation Life's assets as of the date of the winding-up and the distribution of those assets amongst the creditors according to law. In the circumstances of this case, there is no basis for the court to order otherwise.

[95] Although the group life benefits attract the same "policy of insurance" analysis as do the major medical and dental benefits, and in addition have the advantage of being provided through contracts of insurance, they give rise to a similar problem for the retirees. Confederation Life, as employer, implemented its contractual obligation to provide group life benefits through a series of contracts of insurance between the trustees, as policyholder, and Confederation Life, as insurer. Although there is an insurance policy in existence with respect to these benefits, it, too, is an annual term policy. Confederation Life pays the yearly premium out of the company's general assets. The life policies also expired on March 31. Confederation Life is insolvent and can no longer pay the premiums. For the same reasons as it is not entitled to do so with respect to the major medical and dental benefits, the provisional liquidator is obliged not to continue to pay the premiums for the group life benefits, in my view.

(ii) *The Supplementary Pensioners and the Deferred Compensation Claimants*

[96] The "policyholder" arguments respecting the supplementary pensioners and the deferred compensation claimants are founded on similar grounds. They proceed on a different basis than those of the retirees, which were premised upon a contract of indemnity. Rather, the supplementary pensioners and the deferred compensation claimants assert that *their* benefits constitute them policyholders because they are the owners or holders of an annuity which by definition, they assert, is a contract of life insurance.

[97] Both the supplementary retirement income arrangements and the deferred compensation plan call for payments to be made on retirement in a stream of periodic payments. In addition—in the case of the supplementary retirement income arrangements—the claimant may elect to take a life annuity as provided under the company's registered pension plan.

[98] Such arrangements, it is argued, constitute an undertaking to provide an annuity, i.e., a series of periodic payments, and annuities are life insurance policies for purposes of insurance legislation. Consequently, the submission concludes, the supplementary pensioners and the deferred compensation claimants are the holders of policies of life insurance and entitled to rank as "policyholders" under s. 161(1)(*c*) of the *Winding-up Act.*

[99] This argument has a certain plausibility about it, at first glance. However, it cannot withstand analysis in this context of employee benefits granted by a company which happens to be a life insurance company and which is being wound up. There are two reasons for this:

> (1) The supplementary retirement income benefits and the deferred compensation payments do not constitute true annuities, in my opinion, but are more in the nature of a pure debt, and,
>
> (2) Even if they do constitute an "annuity", as contemplated in the definition of "life insurance" in the *Insurance Act,* they are not annuities provided by way of "an undertaking entered into by an insurer", as contemplated in that legislation.

Not a true annuity

[100] I accept that the benefits in question, if not placed in context, may be characterized as an "annuity" in the very broad sense in which that term is often employed. An annuity has been defined as broadly as simply "a contract… for the payment of periodic amounts during the lifetime of a particular person, or for a fixed or guaranteed period": see D. Norwood, *The Uniform Life Insurance Law of Canada* (Toronto: Life Insurance Institute of Canada, 1974) at p. 18. See to the same effect, *Black's Law Dictionary,* 6th ed.

[101] An annuity, then, can be quite a sweeping concept. Indeed, it is one of those concepts which can be made to appear more sweeping than it is, in a given context, if one too slavishly adheres to broad dictionary definitions. As Thorson J. said, in *O'Connor v. Minister of National*

Revenue, [1943] Ex. C.R. 168 at p. 176, [1943] 4 D.L.R. 160 at p. 167, the term “annuity” “is a word that is often loosely and, therefore, ambiguously used”.

[102] Central to the concept of an annuity is the alienation of capital—the payment of a sum of money or other asset *of a capital nature*—which is then turned into a flow of income, so that the capital is used up and replaced by the flow of income. In *O’Connor v. Minister of National Revenue, supra,* Thorson J. said, at p. 176 Ex. C.R., p. 167 D.L.R.:

> Ordinarily an annuity is thought of as a series of annual payments which a person has *purchased or arranged for with a sum of money or other asset of a capital nature.* As Best J. said in *Winter v. Mouseley* (1819), 2 B. & Ald. 802 at 806 [106 E.R. 558]:
>
> “I have, however, always understood the meaning of an annuity to be where the principal is gone forever, and it is satisfied by periodical payments.”
>
> In *Halsbury’s Laws of England,* Second Edition, Vol. 17, at page 181, this definition of an annuity is given:
>
> “An annuity is an income purchased with a sum of money or an asset, which then ceases to exist, the principal having been converted into an annuity.”
>
> This accords with the ordinary acceptance of the term. The capital that went into the purchase of the annuity has been turned into a flow of income, so that the capital has disappeared altogether and only the flow of income continues.

[103] (Emphasis added)

[104] See also *Coopérants Mutual Life Insurance Society (Re Provisional Liquidator of),* [1993] Q.J. No. 1203 (Que. C.A.), unofficial translation, paras. 92-96 (referred to hereafter as “*Coopérants*”).

[105] It is the purchase of the future income stream with money or “other asset *of a capital nature*” which is the feature distinguishing an annuity from a mere debt. That feature, in my view, is lacking in the supplementary retirement income and deferred compensation arrangements. No sum of money or assets in the nature of capital were put forward either by the claimants or by Confederation Life, in connection with the “purchase” of the future periodic income payments on retirement. While there is “consideration” for the payment of the income stream, in the form of the provision of labour and services to the company, I am not prepared

to hold in the circumstances of this case, that it is consideration of a capital nature in the sense that that concept is used in support of the purchase of an annuity.

[106] No one would argue that the provision of labour in exchange for the payment of periodic salary amounts—*i.e.,* an ordinary employment arrangement—constitutes that contract an "annuity" contract. The provision of future retirement income payments as partial consideration for employment services can be no different.

[107] The same is true even with respect to the entitlement to elect a life annuity for the supplementary retirement income arrangements. Once again, the loose use of the word "annuity" can lead to misconceptions. While the life annuity granted under the registered pension plan may very well be a true annuity—because it is backed by the making of capital contributions to the plan by the employer, and by the general pre-funding which exists for such plans—the supplementary pensioners are not entitled to such benefits *qua* supplementary retirement income claimants. There is no pre-funding for *those* benefits, nor any segregated amounts providing for their security. All the supplementary pensioners are entitled to do—those who are so entitled, at least—is to elect to take payments "in the same form and in the same manner as [they] elect for the pension income from the registered pension plan" (see the June 1993 letter). It is a promise with respect to the manner of payment, not the establishment of an annuity in the true sense, as I understand it. It is simply the creation of a debt.

Not an undertaking to provide an annuity by an insurer

[108] Even if the arrangements respecting the supplementary retirement income benefits and the deferred compensation claims do constitute "annuities", however, there is another reason why the claimants in those categories are not entitled to succeed as "policyholders" of Confederation Life. The annuities are not issued by Confederation Life *as insurer.* They are promised by Confederation Life *as employer.* They are therefore not caught by the definition of "life insurance" in the *Insurance Act* in my opinion, and the claimants are, likewise, not the holders of policies of life insurance as contemplated in s. 161(1)(*c*) of the *Winding-up Act.*

[109] I accept that recent case law and amendments to insurance legislation have clarified the question of whether an annuity is "life insurance". In *Gray v. Kerslake,* [1958] S.C.R. 3, 11 D.L.R. (2d) 225, the Supreme Court of Canada had ruled that such was not necessarily the

case. Since that decision, however, many jurisdictions, including Ontario, have amended their legislation. Section 1 of the *Insurance Act* now defines annuities as a form of life insurance. It states:

> "life insurance" means an undertaking by an insurer to pay insurance money,
>
> (*a*) on death,
>
> (*b*) on the happening of an event or contingency dependent on human life,
>
> (*c*) at a fixed or determinable future time, or
>
> (*d*) for a term dependent on human life,
>
> and, without restricting the generality of the foregoing, includes,
>
> …
>
> (*g*) *an undertaking entered into by an insurer to provide an annuity* or what would be an annuity except that the periodic payments may be unequal in amount and such an undertaking shall be deemed always to have been life insurance.

(Emphasis added)

[110] It appears to be accepted in the literature that "by definition, *all* annuity contracts now constitute life insurance": see Norwood and Weir, *supra,* at p. 19. I do not agree, however. In the insurance law context it is an annuity or an undertaking to provide an annuity *entered into by an insurer, in its capacity as insurer,* which in my opinion meets that test. Neither the undertaking by Confederation Life to provide a supplementary retirement income stream of periodic payments—or the right to elect to take an annuity—nor the undertaking to make periodic payments to the deferred compensation claimants, *in the circumstances of this case,* constitute such an undertaking given or entered into *by an insurer.* They are undertakings given or entered into by Confederation Life *qua employer,* not *qua insurer.* The fact that the company happened to be an insurance company is a pure coincidence.

[111] The decision of the Quebec Court of Appeal in *Coopérants* is instructive in this regard, I believe. In that case, *Coopérants*—an insolvent insurer—had issued deferred annuity contracts to individuals and to groups in the normal course of its business. Many were for the purpose of funding retirement savings plans. As in the case at bar, the issue before the Quebec Court of Appeal was whether the owners or holders of the annuity contracts were

entitled to the priority protection of “policyholders” under s. 161(1)(*c*) of the *Winding-up Act.* The court held that they were. Leave to appeal to the Supreme Court of Canada was refused.

[112] The court in *Coopérants* came to this conclusion largely on the basis that the legislatures of most of the provinces had responded to the decision in *Gray v. Kerslake, supra,* by modifying their respective statutes so that the definition of the term “life insurance” would include annuity contracts: [1993] Q.J., para 39. In the French language version of the legislation, annuities “are assimilated to life insurance”. In the English language version “policy” includes “any annuity contract”.

[113] It is important to note, however, that all of the annuity contracts at issue in *Coopérants* were arm’s-length transactions entered into by the company in the ordinary course of business. They were not “in-house” contracts designed to enable Coopérants to fulfil its obligations, *qua employer,* to its employees. At para. 43, the court stated:

> All the contracts in question in this appeal were transacted within the framework of the business of a life insurance company with respect to the domain of retirement funds. Each and every one is linked to the various means generally offered by insurance companies to insure the capitalization and distribution of various pension plans.

[114] The court reviewed the history and evolution in the life insurance industry of the use of annuities as a primary financial services vehicle for the promotion of retirement savings plans. It pointed out that “for all of Canada in 1990, the annuities business by life insurance companies represented $11.853 billion, or 64% of the total premium revenues collected by life insurance companies” (para. 45). In this context, and against this background, the court concluded that by incorporating annuities into life insurance contracts the legislators had recognized the importance of annuities as a financial services product to the life insurance business and had dictated “an evolutive and dynamic interpretation of this practice that the courts must respect” (para. 41).

[115] I note, however, that the “large and evolutive interpretation of the notion of annuity contract” adopted by the court (para. 77) is applied in the context of arm’s-length financial services products being marketed by life insurance companies to their customers.

[116] Such a broad definition of “annuity” is appropriate in the context of the sale of financial products by a life insurance company to its customers. It is not justified in the context of a life

insurer, as employer, providing benefits to its employees as part of their compensation package, particularly where those benefits are in conflict with the statutorily protected rights of another group. In such circumstances, in my opinion, the court ought not to strain to find an interpretation which would include classes of persons who would not, on a plain and ordinary meaning approach, be included in the protected group.

[117] I believe this approach to the interpretation of the word “annuity” and the term “life insurance” is supported by the purpose behind the highly regulated and structured nature of the life insurance industry.

[118] Brown and Menzies, *Insurance Law in Canada,* 2nd ed. (Toronto: Carswell, 1991), describe the supervision of the structure of the industry in this fashion (at p. 26):

> As indicated, the federal statutes and legislation in force in most of the provinces address the question of insurer’s solvency. Following two spectacular failures of insurance companies in England in 1867, *there developed considerable interest in Canada, as elsewhere, in protecting policy holders. The modern manifestation of that development is a comprehensive body of legislation providing for security deposits by insurers and for a system of supervision by government agencies.*

(Emphasis added)

[119] In *Coopérants* the Quebec Court of Appeal picked up this same theme in a passage that I have referred to, partially, elsewhere in these reasons. I cite it in full here (paras. 81-83):

> It would appear that the preservation of the financial security attached to an insurance policy was [the] underlying principle for the federal legislator when it stipulated that the claims of policyholders would be paid in priority in the event of the liquidation of a life insurance company.
>
> In assimilating an annuity contract transacted by an insurer to an insurance policy, the legislator even intended to preserve, due to the financial stability of insurance companies, the financial security attached to the annuity contract. An annuity and life insurance are, in effect, two means by which a person can protect himself against financial risks. Insurance permits an accumulation of a capital upon the death of the insured in order to protect the beneficiaries against the negative financial effects of death. The goal of an annuity is a liquidation of a patrimony (i.e., loosely translated, a

body of invested capital) in order to ensure the annuitant a stable revenue during the protection phase.

Insolvency and the winding-up of an insurance company are two events which threaten the protection and the financial security sought by the people who execute annuity contracts with an insurer, if they cannot benefit from the privileged status provided by the legislature in the Winding-Up Act.

[120] The purpose of the regulatory scheme governing the insurance industry, and of the priority scheme enacted through s. 161(1) of the *Winding-up Act,* in my view, is to protect policyholders who invest funds with an insurance company. In such circumstances the regulatory scheme established under the *Insurance Companies Act* requires that an adequate reserve be established to cover the actuarial liability associated with the investment. What the "policyholder" priority of s. 161(1)(*c*) does is to preserve access to that reserve by arm's-length purchasers of financial services products from life insurance companies, when such companies become insolvent.

[121] It is not the senior officers of the company—many of whom, including the chairman and president, would have been at the helm in the period leading up to the collapse—whom the priority scheme is designed to protect. Vaulting the claims of such senior officers—and even the retired employees as well—into the same position as policyholders of the company's products would mean ignoring the carefully constructed regulatory scheme which Parliament and the legislatures have erected.

[122] The only reason the claimants are able to argue that their claims are claims of "policyholders" under the *Winding-up Act,* is because the liquidation of their employer, Confederation Life, is the liquidation of an insurance company. Parliament, in my opinion, could not have intended to treat employees differently, in terms of priority on the liquidation of their employer, simply because of the nature of their employer's business. That, however, would be the result if the claimants' position on the "policyholder" argument were to prevail. In my view, it cannot prevail.

[123] I therefore hold that neither the retirees nor the supplementary pensioners nor the deferred compensation claimants are "policyholders" of Confederation Life, as that term is contemplated in s. 161(1)(*c*) of the *Winding-up Act.*

[124] Finally, even if it could be said that the claimants are “policyholders”, as contemplated by s. 161 of the *Winding-up Act,* they would only rank, in the circumstances of this case, with “other creditors *and policyholders*” under s. 161(2), in my opinion. Ensuring the integrity of the legislative scheme of priority, intended as it is to protect arm’s-length purchasers of insurance policies and annuities from insurers, commands nothing less.

[125] I turn now to the issues of whether Confederation Life is bound by trust or fiduciary obligations in relation to its arrangements with the three groups of claimants.

II *True or Express Trusts*

[126] All categories of claimants are asserting the existence of an express trust in relation to their benefits.

[127] For a court to hold that a true or express trust exists, the party asserting the existence of such a trust must establish what are commonly referred to as “the three certainties”. They are:

(i) certainty of intention on the part of the settlor to create a trust;

(ii) certainty of the subject matter of the trust, *i.e.,* the property to be settled upon the trustee in favour of the beneficiaries of the trust; and,

(iii) certainty of the object or persons intended to be the beneficiaries of the trust.

[128] See *Knight v. Knight* (1840), 49 E.R. 58 at p. 68 (Ch.); D.W.M. Waters, *Law of Trusts in Canada,* 2nd ed. (Toronto: Carswell, 1984) at p. 105.

[129] In terms of pensions, it has been held that whether the pension arrangement is governed by contract or by trust principles depends upon the terms of the plan itself: see *Schmidt v. Air Products of Canada Ltd.,* [1994] 2 S.C.R. 611 at p. 639,115 D.L.R. (4th) 631, particularly per Cory J.

[130] While, in determining whether or not there was an intention to create a trust, the use of the words “in trust”, or “as trustee”, or words to that effect is not essential, the evidence must be clear that the settlor did, indeed, *intend to create a trust*; a general intention to benefit someone will not suffice to create a trust: *Re Allan Realty of Guelph Ltd.* (1979), 24 O.R. (2d) 21 at pp. 31-32, 29 C.B.R. (N.S.) 229 at pp. 241-42 (S.C.); *Jones v. Lock* (1865), L.R. 1 Ch. App. 25 at pp. 28-29; J.E. Martin, *Hanbury & Maudsely: Modern Equity,* 13th ed. (London:

Stevens & Sons, 1989) at p. 80. A court will give weight to the absence of any reference to a trust in a pension plan, in determining whether there was an intention to create a trust: *Crownx Inc. v. Edwards* (1994), 20 O.R. (3d) 710, 120 D.L.R. (4th) 270, 5 E.T.R. (2d) 197 (C.A.); affirming (1991), 7 O.R. (3d) 27, 45 E.T.R. 57 (Gen. Div.).

[131] In cases such as the present one, where what is argued is that the alleged settlor (Confederation Life) and the proposed trustee (the Confederation Life trustees, or the human resources committee acting under the direction of the board of directors) are in effect one and the same, particular difficulties arise. Waters, *supra,* at pp. 150-51 deals with such difficulties in the following passage:

> The principles applicable to this mode of making a gift are perfectly clear. The owner of the legal or equitable interest in the property in question must make it evident that he intends to constitute himself a trustee, *he must leave no doubt* as to what property interest of his is to be the subject of the trust, and he must similarly leave no doubt as to who is to be the trust beneficiary. In other words, the three certainties must be established as in the case of the creation of all trusts. As Jessel M.R. pointed out in *Richards v. Delbridge* (1874), L.R. Eq. 11, however, an authority quoted in many Canadian judgements, it is not necessary that the donor use the words, "I declare myself a trustee": *words of any kind, and even conduct, are sufficient, provided it is satisfactorily shown that the donor did in fact intend to constitute himself a trustee*….
>
> The burden of proof that the donor intended to make himself a trustee is on those who allege such a trust, however, and many factors may reveal the true intent.

[132] (Emphasis added) See also on this point *Re Garden Estate,* [1931] 4 D.L.R. 791, 25 Alta. L.R. 580 (C.A.).

[133] On behalf of the supplementary pensioners in pay and the deferred compensation claimants, Mr. Matheson submits that the Supreme Court of Canada has recognized the special nature of promises made with respect to retirement benefits and that such promises should be viewed as trust promises, in recognition of the special vested rights acquired by retirees in connection with their benefits. Mr. Zigler and Mr. Robertson make a similar submission on behalf of the retirees and supplementary pensioners not in pay, respectively. In support of this proposition they all rely upon the decision in *Dayco (Canada) Ltd. v.*

National Automobile, Aerospace & Agricultural Implement Workers Union of Canada, [1993] 2 S.C.R. 230, 102 D.L.R. (4th) 609.

[134] In *Dayco, supra,* the Supreme Court of Canada held that retirement benefits, depending upon the wording of the promise, could survive the expiration of a collective agreement. This is so because when a worker withdraws from the employer-employee relationship upon retirement, his or her accrued employment benefits crystallize into some form of "vested" retirement right and cannot subsequently be terminated or "divested": see *Dayco, supra,* at pp. 249, 273, 297 and 305 S.C.R., pp. 619, 637, 654 and 659 D.L.R., *per* La Forest J.

[135] The key to the *Dayco* decision for the purposes of this case, however, is to be found in the statement of La Forest J. at p. 273 S.C.R., p. 637 D.L.R., that, "…the old collective agreement is not rendered a nullity. *Rights that have accrued* under that agreement *remain enforceable*" (emphasis added).

[136] In short, the rights that have accrued to the retired employees cannot be terminated and may continue to be enforced. This is the essence of the "vesting" concept in this context. The right remains *enforceable.* Being *enforceable* is not necessarily the equivalent to being *secured* in the sense of pre-funded or the equivalent of being subject to *a trust.* There is nothing in *Dayco,* in my opinion, which leads to the conclusion that because the retirement benefits had become vested upon retirement, and therefore remained enforceable, they had become tantamount to trust benefits.

[137] In my view, the claims of all categories of claimants on the express trust ground cannot be sustained on the evidence and materials filed. They fail on at least two of the three "certainties", namely, certainty of intention and certainty of subject matter. It may be that there is sufficient certainty in the description of the class of persons entitled to benefit in each case to meet the certainty of subject matter test—see Waters, *supra,* at pp. 122-23—but in view of the clear failure on the first two of the certainties, it is not necessary to determine that point with finality.

[138] It is readily apparent that no segregated moneys or assets were ever set aside or designated to fund either the group benefits, the supplementary retirement income arrangements or the deferred compensation plan. Indeed, the evidence and the materials

filed are consistent only with the conclusion—and I so find—that the purported settlor, Confederation Life, had no intention of doing so and no intention of settling a trust.

[139] With respect to the group benefits, the company by-law stipulates that they may be altered or discontinued at any time, and the guidelines absolve the trustees of any responsibility for ensuring that the group benefit plans are “funded”. Whether or not the employees and retirees were ever advised of these factors is not relevant to a consideration of the employer’s intention. The group benefits were funded by yearly pay-as-you-go policies, and in the case of the major medical and dental benefits, these were “administrative services only” contracts.

[140] In the case of the supplementary retirement income arrangements, what the company authorized was a “retiring allowance”, and what the retirees were told in the letters they received was that they were being provided with a retiring allowance. The retiring allowance was subject to three conditions, namely, a non-compete, a confidential information agreement and an agreement to be available for consulting purposes, subject to health considerations. The imposition of conditions to the availability of the supplementary retirement income, it seems to me, is at least some indication that no express trust was intended. Moreover, the communications made it plain that the retiring allowance was not “vested” in the event that employment was terminated for cause, and Mr. Matheson candidly acknowledged that a benefit could not be vested for one purpose but be vested for another. While vesting is not equivalent to the creation of a trust claim, it would be some evidence of an intention on the part of the employer to establish an inalienable right to the benefit.

[141] I note as well that the supplementary retirement income arrangements did not fall within the purview of the Confederation Life trustees. Its administration was the responsibility of the Corporate Human Resources Department of the company. This leads me to the conclusion—at least from the employer’s perspective—that the guidelines which applied to the trustees with respect to the funding of the registered pension plan did not apply to the supplementary retirement income benefits. Finally, it is patently obvious from the various Towers Perrin reports and the failure of Confederation Life to make changes as a result of the advice contained in them, not only that the supplementary retirement income arrangements were unfunded and unsecured but that the company had determined—undoubtedly because

of the costs involved in doing so—not to alter that situation. Moreover, its practice in this respect was in keeping with that of most comparable Canadian corporations.

[142] The November 1993 Towers Perrin report states (at p. 1):

> These benefits are paid monthly to retirees through “payroll”. Unlike the registered plan benefits that are well funded and secure against any calamity happening to Confederation Life, receipt of these benefits is dependent on the future financial health of the company. This is consistent with common practice in Canada. Less than 10% of companies have funded or otherwise secured these kinds of obligations.

[143] The April 15, 1994 Towers Perrin report, addressed to Mr. Cunningham, repeated the same theme:

> Securing retirement promises made to executives outside a registered pension plan has two major elements:
>
> • documenting the promise so that executives can prove their claim to benefits, and
>
> • setting up financial arrangements to fund the promises or to be available to provide the benefits if the company cannot.
>
> Confederation Life has dealt with the documentation issue and the current focus is on creating financial security. Our surveys show that over 90% of companies that have these promises have decided that they will not create any financial security other than by accumulating a book reserve on the balance sheet. They expect to provide the benefits on a pay-as-you-go basis from current revenue and they are not putting any backup in place to secure their promises. Only the rare company has decided to fund or otherwise secure their promises. The reason is cost. Creating security costs more than most companies want to pay.

[144] In the case of the supplementary retirement income arrangements, there is the existence of the account—account No. 2332G (later No. 20332)—in the company’s records to be considered. This Account did not represent segregated assets, however, but was merely an accounting record created to record the accruing actuarial liabilities attributable to the supplementary retirement income arrangements, for book-keeping purposes. It represents the accumulated book reserve on the balance sheet that Towers Perrin refer to. In a memorandum dated October 20, 1983, to Mr. Burns, and copied to Mr. Cunningham, the

Vice-President, Corporate Actuarial & Finance (with whom Mr. Cunningham deposes he worked "to determine the level of contribution required to be put into account No. 2332G in order to meet pension benefit liabilities") reported that:

> "Pension" payments above the then ruling Revenue Canada maximum are not part of the pension plan obligations, *and must therefore be covered by the company's general funds.* The purpose of this memo is to discuss the size of this additional liability, and how to account for it.

[145] The liability was accounted for by accruing it in account No. 2332G.

[146] Payments to the supplementary pensioners were made out of the general funds of Confederation Life, not from any funds or assets in account No. 2332G or its successor; and the records that were prepared to show the market value of the assets of what was called, for these purposes, the "supplementary pension", showed "zero". I am not prepared to hold that the establishment of such an account and the record-keeping associated with it evidence conduct sufficient to demonstrate either the requisite declaration of trust or the requisite intention to create a trust on the part of Confederation Life.

[147] Mr. Cunningham, himself, was well aware of the unfunded and unsecured nature of the supplementary pension arrangement. In a January 21, 1983 memorandum to Mr. Burns, the president, he wrote:

> Retiring Allowance Programs are not usually pre-funded since such amounts are not tax deductible to the Company, and any investment income thereon would be taxable. As noted above, only the actual payments made can be deducted from income. The existence of a Retiring Allowance Program however does not necessarily create a contingent liability for the Company.
>
> …
>
> …*If the Company did pre-fund* the additional liability, then a recommended rate would be 0.05% of payroll which translates into approximately $20,000 per year. The liability and cost for the Retiring Allowance Program would be reviewed annually at the same time as the Group Pension Plan valuation.

(Additional emphasis added)

[148] Each year the company's pension consultants prepared an actuarial valuation for pension accounting in which the "Sr. Officers' Supplemental Pension Program (Non-Registered)" was included as one of five "Plans". The market-related value of the assets for that program is consistently shown as "zero", however. This is of some significance because counsel for the claimants rely heavily upon Note 13 to the company's financial statements for the 1992 and 1993 fiscal years. That note deals with company pension costs, and states, in part:

> The Company maintains several pension plans which include substantially all employees. The latest actuarial valuations were completed for transaction to [fiscal year end] and projected to [calendar year end].

[149] Note 13 showed that the "several pension plans" referred to had assets at market related values as of January 31, 1993, of $441,535,000 and an *excess* of assets over pension benefit obligations of $88,638,000. Counsel submit that the "several pension plans" include the foregoing reference to the senior officers' supplemental program, and thus, that the financial statement—issued and approved by Confederation Life's board of directors—constitutes an express declaration of trust of the assets in question to the supplementary retirement income arrangements as well as the registered pension plans.

[150] I cannot agree. The note is founded upon the pension consultant's annual report, which clearly distinguishes between the supplementary retirement income arrangements and the other plans and attributes zero assets to the former. This is consistent with all of the other evidence.

[151] Thus, neither the existence of account No. 2332G nor the references in the notes to Confederation Life's financial statements can serve to found the existence of an express trust. Contributions were made each year to meet pension benefit liabilities, and they were accounted for in account No. 2332G; but they were made from the company's general funds. There were no assets built up in the account to defray those payments. In this respect, Mr. Cunningham's "understanding", to which he deposed in his affidavit sworn February 13, 1995, "that the balance in account 2332G represented assets of the Company from which payments for pension benefits would be drawn" cannot be correct. It is inconsistent with all of the evidence.

[152] The various factors which I have outlined regarding both the group benefits and the supplementary retirement income arrangements illustrate a lack of certainty both with respect to the intention to create a trust and with respect to the subject matter of the purported trust.

[153] The same thing may be said for the deferred compensation claims. No moneys or assets were set aside to fund the deferred payments. In fact, the relevant document expressly states that such will not be the case and that credits to the accounting records in question were "entirely a matter of internal bookkeeping of the Employer".

[154] Mr. Prophet argued, delicately, that the deferral of income in the given years by Messrs. Rhind and Burns had the effect of transferring or conveying that salary entitlement back to Confederation Life to be held in the member's deferred compensation account, thus "settling" the amounts on the company as trustee. By its conduct in accepting these contributions to the plan and maintaining detailed ledgers for the deferred compensation accounts, he submitted, the company manifested an intention that it would act as trustee with respect to the amounts credited from time to time to those accounts. This argument cannot succeed. It contradicts the very structure which gave the deferred compensation plan its taxation validity, namely, that there would be *no* funds set aside in the account by either employer or employee to which the employee had any entitlement or power to control pending retirement. Moreover, Revenue Canada's advance ruling respecting the plan is premised on the plan being treated as a "retirement allowance"—a defined term under the *Income Tax Act* (Canada) and regulations—and on the agreement that it was not an "employee benefit plan" *or an* "*employee trust*" within the meaning of s. 248 of that Act.

[155] It remains to consider, on this aspect of the case, a reference in the notes to Confederation Life's 1993 audited financial statements—the last such statement, and the only such reference—to "segregated trusteed funds". Each of the claimant groups relies upon this reference. They submit it constitutes an express declaration of trust.

[156] Note 1(g) to the 1993 financial statements states:

> (g) Company pension costs and other employee benefits
>
> The Company maintains a variety of defined benefit pension plans for its employees and agents. The Company also provides other post-retirement life, health and dental

> insurance benefits for its employees and agents. *The assets supporting these benefits are held in segregated trusteed funds.*
>
> …
>
> The Company also provides certain health care and life insurance benefits for its employees upon retirement. Eligible employees are those who retire from the Company at normal retirement age. The cost of these benefits is expensed as the related insurance premiums are incurred.

(Emphasis added)

[157] The reference to "segregated trusteed funds" in relation to anything other than the company's registered pension plan appears to be a factual error, however. This is confirmed in a letter from Goodman & Goodman, solicitors for the agent of the provisional liquidator, to counsel, dated February 10, 1995, which said:

> Our client has advised us that there were no "segregated trusteed funds" held in respect of the post retirement life, health and dental insurance benefits.
>
> We have been advised that discussions took place concerning amendment of the note… It was intended to make it clear in future notes that the reference to "segregated trusteed funds" applied only to the defined benefit pension plan and not the other post retirement insurance benefits. We understand that Mr. Roger Cunningham was involved in these discussions and was aware of the foregoing.

[158] It may be that the reference to segregated trusteed funds does not apply to the retirees, in any event, because it is located in the passage from the notes which relates to "employee" benefits, as opposed to the section of the note dealing with health care and life insurance benefits "upon retirement", in which case it is plainly stated that the benefits are expensed. I do not need to base my conclusions with respect to the non-existence of an express trust on this latter consideration, however, as I am satisfied that an errant comment in a financial statement cannot operate to create a trust which did not otherwise exist.

[159] For all of the foregoing reasons, I hold that the arguments of all claimants based upon the alleged existence of an express trust must fail.

[160] In dealing with this portion of the claimants' arguments I have referred throughout to "express" trusts. It may be that the more appropriate expression would be "true" trusts, because the concept incorporates not only trusts created by express declaration, but also true trusts—meeting the three certainties—which necessarily arise by implication from the circumstances of the case. No such trusts exist here, expressly or by implication, in that sense. Counsel made their submissions utilizing the parlance of "express trust"—no doubt to distinguish those submissions from others relating to "constructive" trusts, which also arise by implication from the circumstances of the case—and I have followed that approach as well.

III. *Constructive Trust*

(1) *Fiduciary Obligations*

[161] The claimants argue that Confederation Life stands in a fiduciary relationship to them regarding their rights under the group benefit plans, the supplementary retirement income arrangements, and the deferred compensation plan. That fiduciary obligation, they submit, required the company to put their interests ahead of its own and those of its policyholders in ensuring that these employee benefits were provided in a secured fashion. Confederation Life did not do so, thus breaching its fiduciary duties and, therefore, the claimants conclude, the court should impress the company's general assets with a constructive trust sufficient to fund the retirees' group benefits, the supplementary retirement income arrangements and the deferred compensation plan.

[162] The fiduciary notion is an equitable concept of considerable sweep. It has enjoyed a significant evolution during the latter part of the 20th century. Its inherently flexible nature and broad scope is well summed up in the oft-cited remark of Arnup J.A. in *Laskin v. Bache & Co.,* [1972] 1 O.R. 465 at p. 472, 23 D.L.R. (3d) 385 at p. 392 (C.A.), that the categories of fiduciary, like the categories of negligence, are not closed. The existence of a fiduciary obligation, by its very nature, is founded upon the presence of some position of trust, confidence or loyalty, and it is the function of the fiduciary principle to monitor abuses of those factors which have been reposed by one person in another: see *Hodgkinson v. Simms,* [1994] 3 S.C.R. 377,117 D.L.R. (4th) 161, [1994] 9 W.W.R. 609, at pp. 404-05, *per* La Forest J., and at p. 461 *per* Sopinka and McLachlin JJ. (S.C.R.); *Keech v. Sandford* (1726), 25 E.R. 223.

[163] In recent years the Supreme Court of Canada has had occasion to deal with the concept of fiduciaries on a number of occasions, and the following statement by Wilson J. (then in dissent) in *Frame v. Smith,* [1987] 2 S.C.R. 99 at p. 136, 23 O.A.C. 84, 42 D.L.R. (4th) 81, is frequently cited—to use her words—as "a rough and ready guide" in determining whether a fiduciary relationship exists. She began the Supreme Court's search for "an underlying fiduciary principle" in this fashion [pp. 135-36]:

> A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts emerging from the case law, it is understandable that they have differed in their analyses… [references omitted]… Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[164] This conceptual approach was followed in *R. v. Guerin,* [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, and in *International Corona Resources Ltd. v. LAC Minerals Ltd.,* [1989] 2 S.C.R. 574, 36 O.A.C. 57. In *Hodgkinson v. Simms, supra,* it has been developed further. There, La Forest J., speaking for the majority (in the result), said at pp. 409-10 (S.C.R.):

> In *LAC Minerals* I elaborated further on the approach proposed by Wilson J. in *Frame v. Smith.* I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party

> Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships *are per se* fiduciary, Wilson J.'s three-step analysis is a useful guide.
>
> As I noted in *LAC Minerals,* however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship; see at p. 648. *In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue.* Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

[165] (Additional emphasis added) At p. 412 (S.C.R.) La Forest J. continued:

> As is evident from the different approaches taken in [*Norberg v. Wynrib,* [1992] 2 S.C.R. 226], the law's response to the plight of vulnerable people in power-dependency relationships gives rise to a variety of often overlapping duties. Concepts such as the fiduciary duty, undue influence, unconscionability, unjust enrichment, and even the duty of care are all responsive to abuses of vulnerable people in transactions with others. *The existence of a fiduciary duty in a given case will depend upon the reasonable expectations of the parties, and these in turn depend on factors such as trust, confidence, complexity of subject matter, and community or industry standards.*

(Emphasis added)

[166] This analysis is helpful, I believe, in the context of the case at bar. Employer-employee relationships are not *per se* fiduciary; they are based on contract, and grounded in the employer-employee relationship. There are many familiar instances, however, where employees have been found to owe fiduciary duties to their employers—situations involving the disclosure of confidential information, trade secrets, customer lists, competing businesses, for example. Nothing in principle precludes the relationship existing in reverse,

i.e., the imposition of a fiduciary obligation *vis-à-vis* its employees by the employer. It is a question of context, and the factual circumstances which exist.

[167] Indeed, in *Stanton v. Reliable Printing Ltd.* (1994), 25 C.B.R. (3d) 48, 17 Alta. L.R. (3d) 215 (Q.B.), such a relationship was found to exist, and in the context of a winding-up proceeding. A printing company was wound up and all of its employees were dismissed without cause and without notice. The receiver sold the company's equipment. In a dispute with unsecured trade creditors the company's unionized former employees argued that they were entitled to priority for their pay out of the proceeds in lieu of notice. The employees succeeded. They succeeded because the existence of a provincial statutory scheme regarding the protection of wages and the provisions of a collective agreement both created an environment in which the employer was obliged to safeguard the severance entitlements created for its employees. Acknowledging that the employer-employee relationship did not, in itself, create a fiduciary situation, Veit J. stated [at p. 56]:

> I conclude that the nature of the relationship—which for centuries we thought was well described by the term "master-servant"—harbours a vulnerability and one that is not present in the relationship between the trade creditor and the employer. Time is a factor in that vulnerability, and so is the subservience to management. The nature of severance entitlements is similar to that of pensions: both are entitlements earned through employment. Both are vulnerable because the employee cannot have the employer's discretion in managing the business. Only one of these entitlements, has, however, been protected by statute [in the sense of establishing a statutory trust]. *However, if there were nothing more, the mere existence of the employer-employee relationship, as important and unique as that relationship is, might not entitle severance payments to the protection of a fiduciary designation. There may be a vulnerability without a requirement on the employer to act in the interests of the employee.* In this case, there are additional factors that must be taken into account in relation to that last obligation.

(Emphasis added)

[168] I agree with this analysis of the employer-employee relationship. Such a relationship does have aspects to it that differ from the straightforward arm's-length relationship of mere contracting parties. A person's place of employment is their working home. From an

employer's perspective, an employee is not merely a supplier of goods or services, but a supplier of knowledge, skill and labour which, as the Confederation Life Employee Handbook notes, is the simple reason for the company's success. Compensation—again, according to the handbook—is designed "to provide a fair return for the contribution each staff member makes to the Company's operating success". In any employment situation, there are "power dependency" characteristics, although one cannot be categorical about the nature of these because it is a matter of degree in individual situations and, indeed, there may be circumstances in which the employees, rather than the employer, are in the "power" as opposed to the "dependency" position. The analysis which focuses upon the ability to exercise a discretion and to influence other's interests, and upon vulnerability, fits in certain circumstances—at least with respect to such things as employee programs that lie within the purview of the employer to create and to implement.

[169] Nonetheless, the employer-employee relationship—which is the basis for the benefits flowing to all classes of claimants here—is not per *se* fiduciary. It is not the sort of relationship which by itself has as its "essence" the kind of discretion, influence over interests, and *inherent* vulnerability "arising out of the inherent purpose of the relationship" which creates a rebuttable presumption that one party has a duty to act in the best interests of the other party": *Hodgkinson v. Simms, supra,* at p. 409 (S.C.R.). As Veit J. noted in *Stanton v. Reliable Printing Ltd., supra*: "There may be a vulnerability without a requirement on the employer to act in the interests of the employee."

[170] The search for a fiduciary element in the employer-employee relationship, then, must move to the fact-driven analysis articulated by La Forest J. in *Hodgkinson.* Does a fiduciary obligation, although "not innate" to the relationship "arise as a matter of fact out of the specific circumstances of [the] particular relationship"? To assess this question, one must ask: Was it within the reasonable expectation of the parties that the employer would forsake its own interests and oblige itself to act solely in the interests of the employee in relation to the matter in question?

[171]The exercise of assessing and weighing the applicability of the various fiduciary *indicia* to the facts of a particular case is a difficult one, requiring a careful consideration of the circumstances. Professor P.D. Finn, whose writings in this field are cited regularly in the highest courts, sums up the nature of the exercise very well, in my view, in the following

passage from an article entitled “The Fiduciary Principle”, in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 1. He states:

> If, from whatever combination of factual conditions, the parties in their relationship are so circumstanced that one is reasonably entitled to expect that the other is acting or will act in his interests, then that person should be entitled, on bare grounds of public policy to have that expectation protected.
>
> This said, the critical question is when will parties be found to be so circumstanced? *It is obviously not enough that one is in an ascendant position over another: such is the invariable prerequisite for the unconscionability principle. It is obviously not enough that one has the practical capacity to influence the other: representations are made, information is supplied (or not supplied) as of course with the object of, and in fact, influencing a host of contractual dealings. It is obviously not enough that the other party is in a position of vulnerability: such is the almost inevitable state in greater or lesser degree of all parties in contractual relationships. It is obviously not enough that some degree of trust and confidence are there: these are commonly placed in the skill, integrity, fairness and honesty of the other party in contractual dealings. It is obviously not enough that there is a dependence by one party upon the other: as the good faith cases illustrate, a party’s information needs can occasion this. Indeed elements of all of the above may be present in a dealing—and consumer transactions can illustrate this—without a relationship being in any way fiduciary.*
>
> *What must be shown, in the writer’s view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship.*

(Emphasis added)

[172] Balancing these factors in the context of this case, then, requires an examination of the retirees’ group benefit plans, the supplementary retirement income arrangements, and the deferred compensation plan. I have dealt at some length with these employee benefits in the section of these reasons dealing with the facts and in the context of the express trust arguments. Much of what was said in those contexts is also applicable to the constructive trust analysis, including the fiduciary analysis, and I will not repeat more than is necessary here.

[173]As outlined above, the Confederation Life group benefit plans had their origins in the mid-1920s and have continued to develop and to provide expanded and improved benefits since that time. The supplementary retirement income arrangements were a response, in the 1970s, to Revenue Canada limits on the amounts that could be paid from a registered pension plan, and an attempt to provide senior officers with the same proportionate retirement income that could be enjoyed by less highly remunerated employees. The deferred compensation plan was a tax-planning device of the early 1980s.

[174] None of these employee benefits were the result of negotiations or collective bargaining; nor did they find their way into some form of contractual document like a collective agreement. As far as I can determine from the evidence, changes in group benefits or supplementary retirement income arrangements were all implemented at the initiative of the company, which then made available the improved benefits to its active and retired employees, advising them of the changes through revised versions of the booklets, handbooks and retirement pamphlets issued from time to time.

[175] The company by-law, which set up the current group benefit plans in 1955, while establishing a board of trustees to administer the plans, makes it clear that: (1) the benefits will be determined by Confederation Life from time to time, and (2) the company's board of directors can at any time cause the benefits to cease. The practice with respect to changes in the benefits has been quite consistent with the first of these provisions, and, while they have not always done so, the employee handbooks and retirement pamphlets as they existed at the time of the winding-up order reflect the latter.

[176] The group benefit plans are not pre-funded, supported by any segregated trust funds, or secured in any other way. They are "pay-as-you-go" plans. The life policies are funded on a yearly renewable term basis through experience-rated policies issued by Confederation Life itself. The major medical and dental benefits are provided through administrative services only contracts which, as the handbooks note "are not insured". Nothing is to be found, anywhere in the evidence, to the effect that the employer was obliged to, or, indeed intended to pre-fund or secure the payment of the group benefits in any fashion; nor is there anything to indicate that the employees expected such to be done.

[177]The same is true with respect to the supplementary retirement income arrangements. They are not pre-funded or secured, and all of the company documentation emanating from

the officers involved in dealing with the subject indicates a recognition and understanding of that fact. The July 16, 1975 resolution of the board which authorizes this benefit, simply authorizes that senior officers be provided upon retirement with a retirement allowance "as authorized by the Board of Directors", suggesting, as Mr. Burns points out in a later memorandum, that each case is to be individually considered at the time of retirement. There is nothing in either the April 1983 letters sent to eligible officers or in Mr. Cunningham's subsequent "clarifying" June 1993 letter which suggests that the supplementary entitlement is pre-funded or otherwise secured.

[178] In the context of the deferred compensation plan, the circumstances are even clearer in this respect. The strictures of the *Income Tax Act* (Canada) and the advance ruling obtained from Revenue Canada make it clear that no moneys were being set aside or deposited anywhere by Confederation Life to fund or protect the deferred payments. Any records kept of Mr. Rhind's and Mr. Burns' entitlement, including interest accumulations, were merely for bookkeeping purposes.

[179] I note as well—again—the comments of Towers Perrin. Over 90% of companies which have outstanding retirement promises to executives provide for the benefits in question on a pay-as-you-go basis without creating any financial security, because of the high cost of doing otherwise. From the shareholders' perspective, such costs can rarely be justified.

[180] In short, in my view, the evidence does not support a finding that there was a mutual understanding the employee benefits would be pre-funded or secured, and there is nothing upon which to base a finding that the employees had any reasonable expectation that Confederation Life had undertaken to subordinate its own interests, and those of its policyholders, to those of the employees and retirees with respect to the establishment of such benefits. On that basis, the very important ingredient for the creation of a fiduciary relationship, namely, the relinquishing of one's own self-interest and agreeing to act solely in the interests of, and on behalf of, the other party, is missing: *Hodgkinson v. Simms, supra,* at pp. 409-10 and 412 (S.C.R.).

[181] I conclude, in the circumstances of this case, that Confederation Life did not stand in a fiduciary relationship towards the retirees, the supplementary pensioners or the deferred compensation claimants in relation to the provision of the employee benefits or, at least, in relation to an obligation to pre-fund or secure such plans.

[182]Counsel argued on behalf of the claimants that Confederation Life is precluded from terminating their benefits because those benefits had “vested” and because the company had not given adequate or any warning to the claimants that the benefits could be terminated. Where rights have vested at the time of retirement, they submitted, the employer may not divest such rights or thereafter decrease (although it may increase) the benefits: see *Dayco, supra.* Moreover, if the employee booklets, handbooks and retiree pamphlets do not warn the beneficiaries of the possibility that benefits could be terminated, the company should not be allowed to rely on the plan documents to terminate the benefits; nor should it be allowed to rely upon a term of the plans that it kept secret from the retirees: *Re James and Richmond Hill (Town)* (1986), 54 O.R. (2d) 555 at p. 561, 32 M.P.L.R. 313 (H.C.J.), *per* Griffiths J.; *Madott v. Chrysler Canada Ltd.,* unreported decision of the Ontario High Court, March 17, 1989, *per* Labrosse J.; *Daniels v. Canadian Tire Corp.* (1991), 5 O.R. (3d) 773 at p. 777, 39 C.C.E.L. 107 (Gen. Div.), *per* McMurtry A.C.J.O.C.

[183] In my view these arguments do not advance the claimants’ position. As I have indicated earlier in these reasons, they fail to distinguish between the concept of “vesting”, which relates to the locking-in of an entitlement, and the obligation to fund a benefit flowing from that entitlement. In the absence of an obligation to pre-fund or otherwise secure the employee benefits, the fact that they may be vested in the claimants upon their retirement is small comfort to them. Similarly, if indeed the company is in breach of an obligation not to terminate the plans—which I do not find—that breach is of little consequence, in the context of the winding-up, unless it can be remedied by way of some access to a segregated part of Confederation Life’s general assets or to some assets impressed with a trust.

[184] As there is no fiduciary relationship between the company and the claimants in relation to the employee benefits, there can be no constructive trust imposed as a remedy for breach of the obligations arising out of such a relationship. This leaves the question of whether a constructive trust should be imposed on the basis of unjust enrichment.

(2) *Unjust Enrichment*

[185] I conclude that it should not.

(a) Unjust enrichment: the three-fold parameters

[186] The principles which give rise to the imposition of a constructive trust, based upon unjust enrichment, require the finding of a benefit to or enrichment of one party, a corresponding detriment to or deprivation suffered by the other party, and an absence of any juristic reason for the benefit or enrichment: see *Rathwell v. Rathwell,* [1978] 2 S.C.R. 436, 83 D.L.R. (3d) 289; *Pettkus v. Becker,* [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257; *Sorochan v. Sorochan,* [1986] 2 S.C.R. 38, 29 D.L.R. (4th) 1; *LAC Minerals, supra*; *Peter v. Beblow,* [1993] 1 S.C.R. 980, 101 D.L.R. (4th) 621.

[187] In *Rathwell, supra,* Dickson J. (as he then was) formulated the principle in this fashion (at p. 455):

> The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; *but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason—such as a contract or disposition of law—for the enrichment.*

(Emphasis added)

[188] While most of these leading authorities emanating from the Supreme Court have been cases dealing with those concepts in family law matters, it is clear that the principles have equal application in commercial contexts. *LAC Minerals, supra,* for instance, involved a commercial transaction.

[189] As I shall explain, I am doubtful that the benefit-detriment dichotomy which exists in the circumstances of this case amounts to the type of corresponding enrichment and deprivation contemplated by the unjust enrichment principle. I do not think it matters for these purposes, though, because in my view the claims of the retirees, the supplementary pensioners, and Messrs. Rhind and Burns all fail to meet the “absence of juristic reason” test, and thus an unjust enrichment claim is not made out. Moreover, I would not in any event impose the constructive trust remedy sought, as I do not believe it would be appropriate in this instance to do so. There is not a sufficient connection between the contributions of the claimants and the assets which it is sought to impress with the trust; and, in addition, the winding-up/insolvency

context of the proceedings brings a dimension to the analysis which works against the application of constructive trust principles which would place the claimants in an advantageous position over other Confederation Life claimants.

[190] *The "Enrichment-Detriment" Analysis*

[191] In carrying out the enrichment-detriment analysis the courts have generally taken an economic approach, recognizing these elements as the "morally neutral" components of the mix, and looking to the third element, that of the absence of juristic reason for the enrichment, as the source of "unjustness". As stated by McLachlin J. in *Peter v. Beblow, supra,* at p. 990 S.C.R., p. 645 D.L.R.:

> This Court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment: *Pettkus v. Becker, supra; Sorochan v. Sorochan,* [1986] 2 S.C.R. 38; *Peel (Regional Municipality) v. Canada,* [1992] 3 S.C.R. 762 (hereinafter "*Peel*"). It is in connection with the third element—absence of juristic reason for the enrichment—that such considerations (those outlined earlier in her Reasons) may more properly find their place. It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".

[192] In addition, in terms of the enrichment-detriment consideration, the courts have indicated that once enrichment has been found, the conclusion that the plaintiff has suffered a corresponding deprivation is virtually automatic—two sides of the same coin, as it were: see *Peter v. Beblow, supra,* at p. 1012 S.C.R., pp. 631-32 *per* Cory J.

[193] Accordingly, on this analysis, if Confederation Life has received a benefit in economic terms and the claimants have suffered a detriment in economic terms, the first two elements of the unjust enrichment test will have been met. I accept that each of the complainants will suffer a detriment if the provisions of the benefits under the group benefit plans, the supplementary retirement income arrangements and the deferred compensation plan are not continued during their retirement, as promised. I also accept that Confederation Life has benefited either by the provision of their labour and employment services—in the context of the retirees and supplementary pensioners—or from the control over and use of the funds

that Messrs. Rhind and Burns elected to defer from their incomes in the years in question under the terms of the deferred compensation plan.

[194] As I have indicated and shall explain momentarily, however, I am not satisfied that the enrichment/detriment circumstances of this case falls within that concept as contemplated in the unjust enrichment authorities.

Absence of "*Juristic Reason*"

[195] While a number of authorities discuss the question of what factors should be taken into account in determining whether there is an absence of juristic reason for the enrichment, none that I have reviewed deal with the question of what the phrase "juristic reason" actually means. In *Rathwell, supra,* where the phrase appears to have originated, Dickson J. used the expression "such as a contract or disposition of law" in giving examples of what could amount to "an absence of any juristic reasons… for the enrichment" (p. 455). He considered the notion further in *Sorochan, supra,* saying (at p. 46):

> The third condition that must be satisfied before a finding of unjust enrichment can be made is also easily met on the facts of this case. There was no juristic reason for the enrichment. Mary Sorochan *was under no obligation, contractual or otherwise,* to perform the work and services in the home or on the land.

(Emphasis added)

[196] Cory J. was of a similar view in *Peter v. Beblow, supra,* stating at p. 1018 S.C.R., p. 636 D.L.R.:

> When a claimant is under *no obligation contractual, statutory or otherwise to provide the work and services* to the recipient, there will be an absence of juristic reasons for the enrichment.

(Emphasis added)

[197] That the concept of "juristic reasons" is a broad one, involving many factors, and that it is the element in the unjust enrichment exercise which involves an examination of the "unjustness" of the situation, is apparent from the following statement of Madam Justice McLachlin in *Peter v. Beblow, supra,* at p. 990 S.C.R., p. 645 D.L.R.:

> It is in connection with the third element—absence of juristic reason for the enrichment—that such considerations may more properly find their place. It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".
>
> What matters should be considered in determining whether there is an absence of juristic reason for the enrichment? The test is flexible, and the factors to be considered may vary with the situation before the court.
>
> …
>
> In every case, the fundamental concern is the legitimate expectation of the parties.

[198] The need to consider the parties' expectations and whether retention of the benefit would be "unjust" is emphasized by Dickson J. in *Pettkus v. Becker, supra,* at pp. 848-49 and again in *Sorochan, supra,* at p. 46. "The test put forward" in this respect, according to Cory J., "is an objective one": *Peter v. Beblow, supra,* at p. 1017 S.C.R., p. 635 D.L.R.

[199] The case-law indicates that a contractual debtor-creditor relationship will be sufficient to establish the existence of a juristic reason for an enrichment that can be accounted for on the basis of that contractual relationship. I note, for example, the decision of the Saskatchewan Queen's Bench in *Royal Bank v. Pioneer Trust Co. (Liquidator of)* (1988), 68 C.B.R. (N.S.) 124, 67 Sask. R. 146, and the decision of the Ontario Court of Justice (General Division) in *Pikalo v. Morewood Industries Ltd.* (1991), 7 C.B.R. (3d) 209. Both of these decisions arose in an insolvency context.

[200]In *Pioneer Trust, supra,* the trust company had obtained $30,000 in cash from the Royal Bank on February 7, 1985, in exchange for a cheque in the same amount in favour of the Royal Bank. Later that day the Minister of Finance directed the Superintendent of Insurance to take control of Pioneer Trusts' assets. Proceedings under the *Winding-up Act* were commenced, and a liquidator was appointed. The cheque was returned to the Royal Bank. The Royal Bank submitted a claim to the liquidator. It then brought an action, claiming, among other things, that the liquidator held the sum of $30,000 in trust for it as a constructive trustee.

[201] In dealing with this claim Gerein J. readily accepted that there was an enrichment and corresponding deprivation. However, because the parties were in a debtor-creditor relationship there was a juristic reason for the enrichment. According to Gerein J. at p. 133:

> It is not unjust in law to hold the plaintiff to that status with the attendant consequences. To do otherwise would have no basis in law and would cause wrongful harm to the other creditors.

[202] In *Pikalo, supra,* Chadwick J. dealt with a claim for a constructive trust by a lessor in the context of a bankruptcy of the lessee. The court viewed the lessor as an unsecured creditor and described the relationship between the parties as being "purely contractual". In holding that this fact took the claim outside the realm of constructive trust, Chadwick J. said at p. 214:

> As in most bankruptcy cases, the unsecured creditor may suffer financial hardship in the appearance of an unjust enrichment or benefit to either the bankrupt estate or a secured creditor, such as the bank in this case.

[203] Finally, it appears that the absence or presence of a juristic reason in connection with the enrichment need not necessarily arise out of any relationship between the party asserting the claim for unjust enrichment and the party enriched: see *Royal Bank of Canada v. Harowitz* (1994), 17 O.R. (3d) 671 (Gen. Div.); *Re Allison* (1995), 22 O.R. (3d) 102, 30 C.B.R. (3d) 144 (Gen. Div.). This is of some significance here because it is Confederation Life's other creditors, rather than Confederation Life itself, who will "benefit" if the company's assets are not impressed with a constructive trust to secure the group benefits, the supplementary retirement income arrangements and the deferred compensation plan.

[204] Several propositions can be distilled from the foregoing authorities respecting the concept of "juristic reason", it seems to me. They may be summarized as follows:

> (i) An obligation to make the contribution which leads to the enrichment—whether that obligation arises in a debtor-creditor or other contractual context, or whether by reason of the principles of common law or of equity, or whether it arises by way of a statutory provision—may constitute a juristic reason.
>
> (ii) The reasonable expectations of the parties must be considered, in particular, whether the party providing the contribution leading to the enrichment did so with a reasonable expectation of receiving an interest in property, and the other party knew or ought to have known of this reasonable expectation. The test in this respect is an objective one.

(iii) It must be evident that the retention of the benefit would be “unjust” in the circumstances of the case.

(iv) Finally, the juristic reason for the enrichment need not always be tied irrevocably to the person who asserts the unjust enrichment but may arise out of a relationship between the person enriched and some other person.

[205] In short, a “juristic reason” simply means some underlying justification, grounded in a legal or equitable base, for the circumstances that have arisen, notwithstanding that the benefit/ detriment equilibrium has since become unbalanced.

[206] There are, as I shall outline, a number of such reasons underlying the imbalance in this case.

(b) *Unjust enrichment: gateway to constructive trust*

[207] A finding of unjust enrichment provides a gateway to the imposition of a constructive trust. It does not automatically open the gate, however. The process is two-staged. If an unjust enrichment has occurred the next step is to determine whether the imposition of a constructive trust *is an appropriate remedy in the circumstances.*

[208] At the outset it is wise, I think, to heed the caution expressed in the judgment of La Forest J. in *Lac Minerals, supra.* At pp. 677-78 (S.C.R.) he states:

I do not countenance the view that a proprietary remedy can be imposed whenever it is “just” to do so, unless further guidance can be given as to what those situations may be.

…

Much of the difficulty disappears if it is recognized that in this context the issue of the appropriate remedy only arises once a valid restitutionary claim has been made out. The constructive trust awards a right in property, but the right can only arise once a right to relief has been established. *In the vast majority of cases a constructive trust will not be the appropriate remedy… a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property*

(Emphasis added)

[209] The focus of the inquiry, then, should be on whether there is a justifiable reason for recognizing a right of property in the claimant, or what is tantamount to a right in property—which would be the effect in the Confederation Life context of impressing the company's general assets with a trust to secure the claimants' claims.

[210] A number of guideposts have been established by the courts to help in navigating the path between the unjust enrichment gateway and the imposition of a constructive trust. They include:

> (a) whether a monetary award would be sufficient in the circumstances;
>
> (b) whether there is a sufficient factual connection or link between the contribution leading to the unjust enrichment and the property or asset in question;
>
> (c) whether the claimant reasonably expected to obtain a proprietary interest in the property or asset; and,
>
> (d) whether the competing equities point toward the imposition of a constructive trust.

Monetary Award Insufficient—The Inadequacy Consideration

[211] It is obvious that a monetary award would be of little assistance to the claimants in this case, in view of the winding-up and insolvency of Confederation Life. As Bell J. noted, in *Barnabe v. Touhey* (1994), 18 O.R. (3d) 370 at p. 379, 4 E.T.R. (2d) 22 (Gen. Div.):

> In my view, none of the remedies suggested, other than the declaration of a constructive trust, would be appropriate in this case. A simple money judgment would not be a satisfactory remedy here *given the bankruptcies of Touhey and Sigouin.* In *Jesionowski v. The* "*Wa-Yas*", [1993] 1 F.C. 36 at p. 58, 55 F.T.R. 1 at p. 27, Reed J. stated that, before a constructive trust is awarded, there must be some special reason to grant the plaintiff the additional rights which would flow from a right to property. She listed examples of special reasons including "a need to give priority to the plaintiff in a bankruptcy situation". I agree.

(Emphasis added)

[212] I think it warrants noting, however, that the mere fact of insolvency and the mere "need to give priority" to a claimant in such a situation is not, by itself, sufficient to trigger the automatic application of the constructive trust mechanism. Priority is almost always a "need"

for someone in an insolvency. Tempered against the inadequacy consideration is the need to be aware of the effect of a declaration of constructive trust in such a context—the beneficiary of the trust essentially becomes a secured creditor, thus taking priority over all other unpaid general creditors. Hence the imposition of a constructive trust cannot be an automatic consideration simply because a monetary award is obviously not an adequate remedy. While priority will almost always be required by the claimant in an insolvency, it must also be just and appropriate in the circumstances to make an order that will have the effect of granting it.

A Connecting Link

[213] The Supreme Court of Canada has held that in order to impose a constructive trust—and thereby, in effect, to recognize the claimant as a beneficial owner of the property in question—there must be a factual connection between the unjust enrichment and the property or asset in question.

[214] Dickson J. described the requirement in *Pettkus v. Becker, supra,* at p. 852, in these words:

> For the unjust enrichment principle to apply it is obvious that some connection must be shown between the acquisition of property and corresponding deprivation. On the facts of this case, that test was met. *The indirect contribution of money and the direct contribution of labour is clearly linked to the acquisition of property,* the beneficial ownership of which is in dispute… *The question is really an issue of fact: was her contribution sufficiently substantial and direct* as to entitle her to a portion of the profits realized upon the sale of the Franklin Centre property and to an interest in the Hawkesbury properties, and the beekeeping business?

(Emphasis added)

[215] In *Sorochan, supra,* the Chief Justice elaborated upon this view. At p. 50, he said:

> These cases reveal the need to retain flexibility in applying the constructive trust. In my view, the constructive trust remedy should not be confined to cases involving property acquisition. *While it is important to require that some nexus exist between the claimant's deprivation and the property in question, the link need not always take the form of a contribution to the actual acquisition of the property. A contribution relating to the*

preservation, maintenance or improvement of property may also suffice. What remains primary is whether or not the services rendered have a "clear proprietary relationship", to use Professor McLeod's phrase. When such a connection is present, proprietary relief may be appropriate… As stated in *Pettkus* at pp. 850-51: The equitable principle on which the remedy of constructive trust rests is broad and general; its purpose it to prevent unjust enrichment in whatever circumstances it occurs."

(Emphasis added)

[216] There need not be an already recognized right of property before the constructive trust may be imposed. As a remedy, it may be used *to create* a right of property in appropriate circumstances, thus obviating the need to find a pre-existing property right by means of equitable tracing rules: see *LAC Minerals, supra,* at p. 676, *per* La Forest J.; and *Peter v. Beblow, supra,* at p. 639, per Cory J.

[217] Once it is established that the claimant's contribution is "sufficiently substantial and direct" to entitle him or her to a property interest, the extent of the property interest must be determined. In general, the amount of the contribution governs the extent of the constructive trust; it must be proportionate to, or reflect the extent of, the contribution of the claimant to the property: *Pettkus v. Becker, supra,* at pp. 852-53 S.C.R., p. 277 D.L.R.; *Peter v. Beblow, supra,* at p. 651.

Reasonable Expectations

[218] Another consideration in the analysis of whether a constructive trust is the appropriate remedy is whether the claimant reasonably expected to obtain an actual proprietary interest as opposed to monetary relief: see *Sorochan, supra,* at p. 52, and *Peter v. Beblow, supra,* at p. 1019 S.C.R., p. 637 D.L.R. As stated by Dickson C.J.C. in *Sorochan* at pp. 52-53:

> A reasonable expectation of benefit is part and parcel of the third pre-condition of unjust enrichment (the absence of a juristic reason for the enrichment). At this point, however, in assessing whether a constructive trust remedy is appropriate, *we must direct our minds to the specific question of whether the claimant reasonably expected to receive an actual interest in property and whether the respondent was or reasonably ought to have been cognizant of that expectation.*

(Emphasis added)

Competing Equities

[219] Equitable remedies entail the necessity of balancing interests. In the context of a constructive trust claim against the assets of an insolvent constructive trustee, it is important to be aware of the interests of the insolvent's other creditors as well as those of the constructive trust claimant. In particular, in the context of this case, it is important to be aware of the interests of the general policyholders of Confederation Life. Widows and widowers, and those who will depend upon the viability of their life insurance policies and annuities when they become widows or widowers, are no less a group in need of protection and deserving of concern than are retired employees, supplementary pensioners and deferred compensation claimants. In fact, the statutory scheme which governs an insurance company winding-up accords them a stipulated priority. This factor cannot be ignored.

[220] In *Coopérants* the Quebec Court of Appeal ascribed the following rationale to the *Winding-up Act* scheme, in a passage cited earlier (para. 81):

> It would appear that the preservation of the financial security attached to an insurance policy was [the] underlying principle for the federal legislator when it stipulated that the claims of policyholders would be paid in priority in the event of the liquidation of a life insurance company. *The Winding-up Act demonstrates the desire of the legislator to protect people who put their confidence in an insurance company because they are generally institutions whose financial stability is not in doubt*

(Emphasis added)

[221] In this context, then, who is it who can more readily be said to have accepted the risk of the company's insolvency in their dealings with it? Is it the policyholders who have purchased its financial services at arm's length, putting their confidence in it in that sense as an institution "whose financial stability is not in doubt"? Or is it the retirees, supplementary pensioners and deferred compensation claimants, who also placed their confidence in the company but did so more in its capacity as an employer and provider of the employee benefits than as a provider of institutional financial services? Some authors have suggested that one way to approach the matter of whether someone should be granted a preference over other creditors in an insolvency situation through the application of the constructive trust doctrine, is to ask whether that person, or group of persons, accepted the risk of the

constructive trustee becoming insolvent: see David M. Paciocco, “The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors” (1989), 68 *Can. Bar Rev.* 315; J.D. McCamus, “The Restitutionary Remedy of Constructive Trust” (1981), *Law Society of Upper Canada, Special Lectures, New Developments in the Law of Remedies* 89.

(c) *Unjust Enrichment in Relation to the Facts Here*

(i) *The Retirees*

[222] The retirees’ claim to succeed on the basis of unjust enrichment founders, in my view, on the shoals of both the “benefit-detriment” analysis and the “juristic reason” analysis. In addition, even if an “unjust enrichment” could be said to have occurred in these circumstances, the remedy of impressing the general assets of Confederation Life with a constructive trust sufficient to fund the group benefit plans *ad infinitum*—or at least until all eligible claimants had retired and ceased to make claims—would be inappropriate. It would be inappropriate in the circumstances because there is not a sufficient connection between the benefits/ detriment and the assets in question, in my opinion; and it would be inappropriate because in the balancing exercise of weighing the interests of the retirees against those of the policyholders, in this insolvency and winding-up situation, Parliament has said that the policyholders are to be given priority: the *Winding-up Act,* s. 161(1).

Enrichment / Detriment

[223] Is there a benefit or enrichment, on the part of Confederation Life, and a corresponding detriment or deprivation, on the part of the retirees, as contemplated by the doctrine of unjust enrichment, in the circumstances of this case? I conclude that there is not.

[224] To be sure, it can be said that Confederation Life has benefited from the services of its former employees, and that they, in turn, will suffer a detriment as a result of the cessation of the group benefits. A deeper analysis is necessary in my view, however, than is reflected in that simple overview in order to resolve the dilemma before the court.

[225] The circumstances here are different than those usually characterizing an unjust enrichment case. One generally asks the question whether it is right that the beneficiary of the enrichment be allowed to keep the benefit or be permitted to continue to enjoy the enrichment. Here, however, Confederation Life does not enjoy a benefit or an enrichment in

that sense. Its “enrichment” lies in having received in the past the benefit of the retired employees’ labour, skills and knowledge. The “deprivation” of the retirees lies in the future partial failure of the consideration for those contributions, i.e., in the future loss of the group benefits which formed part of their compensation package. That deprivation, though, is not related to the enrichment; rather it relates to the company’s financial collapse. In short, the circumstances give rise to a rare exception to the proposition that “once enrichment has been found, the conclusion that the plaintiff has suffered a corresponding deprivation is virtually automatic”: see *Peter v. Beblow, supra,* at p. 1012 S.C.R., p. 631 D.L.R., *per* Cory J.

[226] The imbalance in the benefit/detriment equilibrium here arises as a result of the winding-up and liquidation of the company. It does not result from some unfair “taking advantage” by the person benefiting from the enrichment. What happened, in Mr. Grout’s colourful but succinct description, is simply that “Confederation Life went bust”. Until the company’s unexpected financial collapse in August 1994, the retiree/former employer relationship worked quite well, in terms of the group benefits. Confederation Life honoured its obligations. The retirees received the group benefits which formed part of the compensation package governing the terms of their former employment.

[227] It may be argued that the “enrichment” in these circumstances arises because Confederation Life has had the advantage of the retired employees’ services without having to bear the cost of providing the group benefits on a pre-funded, fully-secured basis and that its policyholders and creditors will be enriched in the winding-up proceedings if the company’s assets are not called to account for that necessary pre-funding or security. While I think it is not untoward to consider the interests of the retirees incontrast to those of the policyholders and creditors in the “benefit/ detriment’’ exercise, the issue to be determined is *whether* there was an obligation to pre-fund or secure the group benefits. It is not permissible to define the benefits/detriment equation, which is a stepping-stone toward the determination of that issue, by predetermining the issue.

[228] Thus, in my view, there has not been an enrichment and a corresponding deprivation in the circumstances of this case which could give rise to a finding of unjust enrichment.

Juristic Reason

[229] Even if I am in error in arriving at the foregoing benefit/detriment conclusion, however, I also find there are several juristic reasons for any benefit or enrichment that the company may have received.

[230] The first is to be found in the contractual/employment relationship between the parties. Where services are rendered pursuant to a contract and in accordance with the terms of the contract, the contract constitutes a juristic reason for a deprivation. Here, the retirees had provided their labour, skills and knowledge to Confederation Life in accordance with their contractual employment arrangements; conversely, the company had benefited from those contributions and agreed to remunerate the former employees through a compensation package which featured, as one important aspect of it, provision of the group benefits. Thus, unlike in the matrimonial cases in the context of which the principles I have been reviewing were developed and in which the spouse who suffered the detriment was under no legal, contractual or statutory obligation to provide the services in question, the retirees had been required by contract to provide their services. The basis for Confederation Life's "enrichment'' in the receipt of those services is the contractual employment relationship. As the subject of a winding-up proceeding—the source of the retirees' "deprivation"—Confederation Life does not derive any benefit or enrichment from the cessation of the group benefits. The fact that a contract cannot be fulfilled does not render the "juristic reason" which it created for the benefit/detriment nugatory.

[231] A second juristic reason for the "enrichment"—if such is the case—is the existence of the winding-up proceedings themselves. Policyholders of insurance companies which are undergoing liquidation pursuant to the *Winding-up Act* are entitled to priority over other creditors under s. 161(1)(*c*) of that Act. Absent the argument that the retirees are, themselves, "policyholders"—addressed earlier in these reasons—the retirees are not entitled to "jump the queue" in the statutory scheme of things. Such a legislative scheme, in my view, is a "disposition of law", as contemplated by Dickson J. in *Rathwell, supra,* and in *Pettkus v. Becker, supra,* and thus provides a "juristic reason" for the enrichment.

[232] Finally, leaving aside the specific statutory scheme of distribution in the *Winding-up Act,* the general insolvency nature of the proceedings is a factor to be considered as part of the "juristic reason" mix. There are insolvency cases in which constructive trusts have been imposed, and, indeed, one such case is *Stanton v. Reliable Printing Ltd., supra,* involving an

employee claim to priority over unsecured creditors for severance benefits. See also *Barnabe v. Touhey, supra,* where Madam Justice Bell fixed a new law firm's accounts receivable with a constructive trust in favour of former partners and at the expense of a secured creditor bank in circumstances where the partners of the new firm were in bankruptcy.

[233] However, the fact that the cessation of group benefits is the direct result of the insolvency and liquidation proceedings puts the present case on a different footing, in my opinion. All payment and benefit obligations were honoured by Confederation Life right up to the date of the winding-up, August 12, 1994. Deprivation of the group benefits did not result from some morally questionable conduct on the part of Confederation Life. The company simply failed, to the considerable surprise of many people.

[234] Where it was not part of the contractual-employment arrangements that the group benefit plans would be pre-funded or otherwise secured—as it was not here—insolvency considerations, which involve the balancing of interests of a number of financially disadvantaged groups, are relevant factors to address. It is not unjust, in such circumstances, for a group such as the retirees to be held to the contractual/employment arrangements that have governed the relationship in the pre-insolvency/winding-up regime.

Constructive Trust—Is it the Appropriate Remedy?

[235] Even if the facts of this case had survived the "unjust enrichment" analysis, I would not have been inclined to grant the remedy of a constructive trust on that basis, in any event.

[236] There is little doubt that a monetary award would be of little assistance to the retirees in this case. The reason why the proceedings are before this court in the first place is that there is not enough money to satisfy all of those who have claims against the assets of Confederation Life.

[237] However, I am not able to conclude that there is a sufficient connection between the retirees' contributions of labour, skill and knowledge, on the one hand, and the company's general assets, on the other hand, to justify the imposition of a constructive trust. Unquestionably, those contributions aided the company in the conduct of its business—indeed, as the handbook says, Confederation Life's "good people" are the secret to its success—and in principle such types of contributions *could* form the basis of a proprietary trust (as they did, for instance, in the family law cases); but there is simply nothing in the

evidence to indicate either that the retirees harboured any sort of expectation that they would be obtaining an interest in the company's assets, or that any such assets would be earmarked to fund and secure their benefits. The reasonable expectation that the group benefits would be provided in partial consideration for their contributions—which the retirees undoubtedly held—does not equate to an expectation that they would acquire what is tantamount to a proprietary interest in company assets necessary to ensure their continuance. Similarly, there is nothing in the evidence to establish that Confederation Life harboured any awareness that the retirees held such expectations. In fact, the evidence is clear that from Confederation Life's standpoint, the group benefits were not pre-funded or secured, and could be altered or terminated virtually at any time.

[238] Finally, as I stated earlier in these reasons, it would be inappropriate, in my view, to impose a constructive trust upon the general assets of the company in order to secure payment of the group benefits because in the balancing exercise of weighing the interests of the retirees against those of the policyholders, in this insolvency and winding-up situation, Parliament has said that the policyholders are to be given priority: the *Winding-up Act,* s. 161(1).

[239] Ms. Rowland argued skilfully on behalf of the retirees that, in balancing the interests and prejudices to the retirees and the policyholders, the court must take into account the reality that the policyholders, as owners of the company, had elsewhere to look and other sources to which they can look for protection; the retirees, on the other hand, are limited to their claim against the company. She pointed out that as owners of the company, the policyholders had received $120,000,000 in dividends during the year before the collapse, notwithstanding Confederation Life has sustained a loss that year; that they rank ahead of commercial creditors by reason of the *Winding-up Act* priority; and that they have another source, in the form of the Canadian Life and Health Insurance Compensation Corporation, to provide them with at least partial protection. Contrast this, she continues, with the fact that the retirees have none of these protections and, for the most part, are not in a position to shop around to replace the benefits which they thought were in place for life upon their retirement, and the use of a constructive trust to preserve what the retirees understood they had all along becomes reasonable.

[240] I agree that these factors need to be weighed in the balance, and I have done so. I am not satisfied, in the final analysis, however, that they are sufficient to tip the scales in favour of the retirees.

[241] In summary, then, the retirees' claim for the imposition of a constructive trust on the basis of unjust enrichment fails, because there is neither the "benefit/detriment" factual basis for such a claim, nor is there an absence of juristic reason for the imbalance between their contributions as employees and the future loss of group benefits. Moreover, there is no sufficient connection between the retirees' contributions as employees and the general assets upon which it is sought to impose a constructive trust, in the sense that the retirees had no reasonable expectation that the group benefits would be pre-funded or secured and, accordingly, that they would be able to look to some portion of Confederation Life's assets in that regard; nor was the company aware of any such expectation.

(ii) *The Supplementary Pensioners*

[242] For similar reasons, I reject the submission that a constructive trust should be imposed for the benefit of the supplementary pensioners.

Enrichment / Detriment

[243] I am satisfied that the circumstances relating to the claims of the supplementary pensioners do not meet the kind of enrichment-detriment criteria envisaged by the authorities on unjust enrichment canvassed earlier in these reasons. At the date of the winding-up order, no imbalance of this nature existed and—as is the case with the retirees' benefits—Confederation Life will not reap any benefit from its financial downfall and inability to continue to fund the supplementary retirement income arrangements on an ongoing basis.

Juristic Reason

[244] In any event, there is not an absence of juristic reason for the situation that has arisen. The supplementary retirement income arrangements were put in place to top up the retirement incomes of retiring officers of the company, as part of their overall benefit/ employment package. Each participant performed their part of the bargain until the winding-up situation prevented the company from doing so. As I have found, in the section of these reasons dealing with the express trust arguments, it was never intended that the

supplementary retirement income arrangements would be secured or pre-funded, but that they would be paid on an ongoing annual basis. While the senior officers who were the beneficiaries of these arrangements certainly had the expectation that their supplementary income payments would be forthcoming, as agreed, I am not able to find on these materials that they had any reasonable expectation that those benefits would be pre-funded or otherwise secured. Indeed, with respect to the most active officers, such as Mr. Burns and Mr. Cunningham, the conclusion is inescapable that they knew very well the exact opposite was the case.

[245] The conclusion to which I am led, therefore, is that the supplementary retirement income arrangements, as they existed at the date of the winding-up order, reflected the pay-as-you-go retiring allowance initially authorized—and the only arrangement duly authorized—by the board of directors. Lack of pre-funding did not constitute a failure by Confederation Life to comply with its undertaking to its employees, although its inability to continue to fund the benefits as they occur, to be sure, does. In short, it is the financial collapse of Confederation Life which has led to the unfortunate situation in which the supplementary retirement income benefits are not being paid, not the absence of any legal or equitable basis—or "juristic reason"—for the situation that has arisen.

Constructive Trust—Is it the Appropriate Remedy?

[246] Moreover, even if the requisite criteria for the establishment of an "unjust enrichment" did exist, I would not impose a constructive trust as a remedy in favour of the supplementary pensioners. My reasons are similar to those relating to the same point regarding the retirees. There is not a sufficient link between the benefit/detriment alleged and the property which it is sought to impress with the trust—the general assets of Confederation Life. Nor would it be an equitable balancing of the interests, particularly given the statutory scheme favouring policyholders in insurance company collapses.

[247] As important as they are to the recipients involved, ample retirement benefits for senior officers and employees remain benefits that accrue to those who are closely connected to the operations of the company, and they are not necessarily always in the interests of those for whom the operations of the company are carried out, namely, the shareholders—or, in this case, the policyholders. As the Towers Perrin report of September 14, 1992—which was

commissioned to suggest ways of providing secured funding for supplementary retirement benefits—noted:

> But, as you know, there are no laws to give [supplementary non-registered retirement income arrangements for executives] (SRIA's) security *and few companies fund them.* Companies plan to make monthly benefit payments directly to the executives from operating revenues.
>
> Generally, executives do not care where their benefits come from—if they get them. But they may worry about what will happen if the company is unable or is unwilling to make the payments. Those concerns usually focus on the possibility of:
>
> • a change of control of the corporation;
>
> • the bankruptcy of the corporation; and/or
>
> • a future decision to renege on the promises that have been made to them.
>
> If such concerns are high, executives seek external "funding" to increase their feeling of security. Unlike the case for registered plans, such funding almost invariably increases the cost of providing the benefits. *From the shareholders* perspective those costs can rarely be justified unless funding is necessary to attract, retain and motivate key executives. To* date, funding has not been that critical.
>
> So most companies decide not to fund the SRIA benefits unless/until there is a specific, imminent security concern (e.g., the company is "in play" or on the brink of bankruptcy)…

(Emphasis added)

[248] Apart from confirming that Confederation Life's supplementary retirement income arrangements were not pre-funded, the foregoing passage illustrates that the company was not only *not* an exception, it was in the mainstream in this respect. To restructure this situation, in circumstances in which to impress the general assets of the company with a trust sufficient to fund the benefits fully—thereby favouring the corporate officers over the statutorily preferred policyholders—would be an inappropriate use of the court's power to impose a constructive trust, in my view.

(iii) *The Deferred Compensation Claimants*

[249] Precisely the same analysis applies with respect to the deferred compensation claimants, as applies with respect to the retirees and the supplementary pensioners. I will not repeat it here, except to say the “equities” apply with even greater force in not favouring the two most senior and responsible officers of the company over the interests of the policyholders.

[250] IV. *The Court’s Power to Impose Duties upon a Liquidator under s. 33 of the Winding-up Act*

[251] Section 33 of the *Winding-up Act* reads as follows:

> 33. A liquidator, on his appointment, shall take into his custody or under his control all the property, effects and choses in action to which the company is or appears to be entitled, *and shall perform such duties with reference to winding-up the business of the company as are imposed by the court* or by this Act.

(Emphasis added)

[252] Counsel for the retirees submitted the court should exercise its powers under the latter part of that section and direct the provisional liquidator to continue to fund the group benefits at least dining the duration of the winding-up and to take action against those responsible for the funding of the group benefits. This argument was based upon the premise, however, that Confederation Life was in breach of fiduciary and/or trust obligations owing to the retirees. As I have concluded that no such obligations existed, the argument loses its force.

V. *Other Issues with Respect to the Supplementary Pensioners*

(1) *Is There a Distinction Between the Supplementary Pensioners “in Pay” and Those “Not in Pay”?*

[253] As indicated earlier in these reasons, there are 11 eligible former employees who were already receiving payments under the supplementary retirement income arrangements at the time of the winding-up order, and 20 who were eligible but who had not yet commenced to receive their payments. Although none of the counsel who opposed the position of the supplementary pensioners advanced the submission that the two groups should be treated separately, they were nonetheless represented by separate counsel. As Mr. Robertson, who was appointed to represent those “Not in Pay” put it, there was some concern that an

argument might be made that a difference existed because of a difference in “vesting” rights between the two groups.

[254] Mr. Robertson submitted that there was no such difference, and I agree. To the extent that “vesting” is an issue in these proceedings, I am satisfied that a supplementary pensioner in these circumstances has the same vested rights with respect to their entitlement whether they were actually in receipt of benefits at the time of the winding-up order or they were not.

[255] I draw no distinction between the two groups for the purposes of my decision and these reasons.

(2) *The “Pension” Issues Respecting the Supplementary Retirement Income Arrangements*

[256] The *Pension Benefits Act* applies to every “pension plan” that is provided for persons in Ontario, and requires that every “pension plan” be registered with the Superintendent of Pensions: ss. 3 and 6.

[257] Counsel for the supplementary pensioners “In Pay” and for those “Not in Pay” submit that Confederation Life’s supplementary retirement income arrangements with its employees constitute a pension plan to which the *Pension Benefits Act* applies. Therefore, they argue, they attract the pre-funding requirements of s. 55 and the deemed statutory trust and statutory lien and charge of s. 57, all as articulated in the questions set out in the section of these reasons entitled “Directions Sought and Issues”.

(a) *Is Confederation Life’s Supplementary Retirement Income Arrangement a “Pension Plan” within the Meaning of the Pension Benefits Act?*

[258] The purpose of Confederation Life’s supplementary retirement income arrangements is to “top up” the retirement income of senior corporate executives to that which it would otherwise have been under the registered pension plan were it not for the Revenue Canada limits on payments out of such plans, based upon the employee’s full salary and service. In general terms, the formula for determining what amount a retiring officer will receive is the difference between,

[259] (a) what would otherwise be payable under the registered plan, were it not for the Revenue Canada limits and,

[260] (b) the pension amount actually payable under the provisions of the registered plan.

[261] The target range for the total package appears to have been four per cent of final average earnings multiplied by a person's years of service.

[262] I am satisfied, in spite of the "supplementary pension" nomenclature attributed to them by those involved—particularly in later years—that these arrangements are not "pension plans" as envisaged by the *Pension Benefits Act.* There are two main reasons for this conclusion. In the first place, the supplementary retirement income arrangements, in my view, are precisely what they were initially—and only—authorized to be, namely "retiring allowances consistent with the service and contribution by [the member] to the Company as authorized by the Board of Directors". As such, they are specifically excluded from the purview of the *Pension Benefits Act* by virtue of the definition of a "pension plan" in s. 1 of the Act. In the second place, the arrangements do not constitute a "pension plan", as that term is contemplated in the *Pension Benefits Act,* because they do not constitute a "plan *organized and administered to provide pensions* to employees" as required by the Act.

[263] *The Arrangements as "Retiring Allowances"*

[264] "Retiring allowances" are specifically excluded from "pension plans" which are defined in s. 1 of the *Pension Benefits Act* as follows:

> "pension plan" means a plan organized and administered to provide pensions for employees, but does not include,
>
> …
>
> (b) a plan to provide a retiring allowance as defined in subsection 248(1) of the *Income Tax Act* (Canada),

[265] The initial consideration of "the matter of the Company providing a supplementary pension to those officers who might be retiring and whose pensions would be limited by existing maximums" is reflected in the minutes of the meeting of the board of directors of June 21, 1972. Under the heading "Pensions—Supplementary" the foregoing was noted, and the minutes continued:

> It was deemed to be in the best interests of the Company to provide a supplemental pension to such participants and the concept of so doing was approved in principle. *It*

> *was agreed, however, that Management should be requested to investigate the method of handling the matter, possibly by way of an employment agreement*

(Emphasis added)

[266] Not until three years later did the board deal with the matter again. On July 16, 1975, it passed the only existing resolution authorizing such a scheme. In spite of the use of the words “supplemental pension” and the heading “Pensions—Supplementary” in the earlier resolution, the July 16, 1975 resolution stated:

> THAT WHEREAS it is the intention of Confederation Life Insurance Company to recognize the valuable, loyal and devoted service of the Senior Officers of the Company, Be It Resolved that *on retirement there be provided a retiring allowance* consistent with the service and contribution by such members to the Company as authorized by the Board of Directors.

(Emphasis added)

[267] It is acknowledged that this is the sole corporate resolution on Confederation Life’s part which authorizes the payment of additional retirement income benefits to employees. There is no formal plan document which sets out a supplementary pension plan for the senior officers. Throughout the 1980s—with infrequent exceptions—the concept of the topping-up payments is referred to consistently in corporate memoranda and records as the “retiring allowance”, the “supplementary retiring allowance” or the “retirement allowance”. Mr. Cunningham was the author or recipient of numerous documents containing such references. When, in his affidavit, he defines the “arrangement to supplement the pension benefits received under the [company’s registered pension plan]” established “in accordance with” the June 21, 1972 and July 16, 1975 board resolutions as “the *Supplementary Plan*”, he could only have been referring, therefore, to the retiring allowance arrangement authorized in the July 16,1975 resolution.

[268] This is confirmed by the April 1983 letters which Mr. Cunningham says were sent to each of the eligible senior officers, on the instructions of Mr. Burns, “briefly describ[ing] the Plan and its operations”. Those letters state that the company agrees to provide the retiring officer with “a *retiring allowance* payable monthly commencing on the 28th day of the month following [the officer’s] retirement”. The company agrees to do so “in recognition of [the

officer's] valuable, loyal and long devoted service" and recites that it is being done "in accordance with a resolution of the Board of Directors". There is only one such resolution, namely, that of July 16, 1975 authorizing the provision of a retiring allowance.

[269] The concept of a "retiring allowance" is defined in the *Income Tax Act* (Canada), s. 248(1), as follows:

> "retiring allowance" means an amount (other than a superannuation or pension benefit…) received
>
> > (*a*) upon or after retirement of a taxpayer from an office or employment in recognition of his service,
> >
> > …
>
> by the taxpayer or, after his death, by a dependant or a relation of the taxpayer or by the legal representative of the taxpayer;

[270] Both the board resolution of July 16, 1975 and the April 1983 letters reflect these concepts—a payment to be received upon retirement in recognition of service to the employer.

[271] I note that "retiring allowance" excludes an amount received as a "pension benefit". The definition of "pension plan" in the PBA, as I have recited earlier, excludes "a plan to provide a retiring allowance" as defined in the *Income Tax Act* (Canada). This suggests to me that a given vehicle for the provision of supplementary retirement income to an officer or employee may have the appearance of both a retiring allowance and a pension benefit, but that if it is designed to be a "retiring allowance" it is not considered to be a "pension benefit", and *vice versa.* What, then, is a "pension benefit"?

[272] The PBA, s. 1, includes the following definitions:

> "pension" means a pension benefit that is in payment;
>
> "pension benefit" means the aggregate monthly, annual or other periodic amounts payable to a member… during the lifetime of the member… to which the member… will become entitled under the pension plan…

[273] In short, a pension benefit is simply the total amount payable to an employee upon retirement under a pension plan. And a "pension plan", as observed earlier, is "a plan

organized and administered to provide pensions for employees". The word "plan" itself is a vague and elastic concept. It can be made to apply to a wide range of circumstances, and how wide that range may be depends upon how broad a definition one might choose to adopt. Do the facts demonstrate "a scheme of action, project, design, the way in which it is proposed to carry out some proceeding", as broadly articulated by the *Shorter Oxford English Dictionary,* or "a formulated and especially detailed method by which a thing is to be done", as more precisely defined in the *Concise Oxford Dictionary*?

[274] Leaving aside for the moment the question of whether the Confederation Life arrangements are something which are "organized and administered" to provide pensions, and assuming that they constitute a "plan" of some sort, it appears to me that they are capable of filling the description of either a plan to provide a pension benefit or a plan to provide a retiring allowance. They call for the payment of periodic amounts during the lifetime of the recipient, to which the recipient will become entitled under the arrangement (a "pension benefit": PBA, s. 1). They envisage the payment of an amount received upon or after retirement from an office or employment in recognition of the recipient's long service (a "retiring allowance": *Income Tax Act* (Canada), s. 248(1)).

[275] In such circumstances, it only makes sense to characterize the arrangement in the manner in which it was authorized and characterized by the company itself, in the constating resolution, and in the initial documentation and correspondence with the retirees. What was created was a plan to provide a "retiring allowance". The retiring allowance is designed to provide supplemental retirement income for senior officers of the company, to which it is offered in order to "top up" the maximum retirement payments permissible under the company's registered pension plan.

[276] As late as March 8, 1988, this was still recognized by Mr. Cunningham. In a memorandum bearing that date he wrote to Mr. Pitts, the vice-president of group pensions:

> Our Board of Directors have previously approved by resolution that *specific individuals as reported by management* to the Board Salary committee will be *entitled to receive an additional retirement allowance benefit.* The Company has defined that those eligible in Canada will be the senior officers of the Company.

> *The retirement allowance benefit* is the amount in excess of the government maximum calculated *on the same formula as the salaried pension plan* for the retirement, death or termination benefit.
>
> We have initiated a full review of the current administration of the retirement allowance benefit, ie. Board Resolution, group policy, individual certificates, and annual employee statements. We expect to be in a position to recommend revisions to Pat Burns in the fall. In the meantime, I wanted to assure you of your eligibility and the basic form of the benefit that you would be entitled [to].

(Emphasis added)

[277] While the review mentioned was initiated in the ensuing years, and some recommended revisions were proposed, no board resolutions were ever passed changing the nature of the supplementary retirement income arrangements as established by the July 16, 1975 board resolution and as described in the April 1983 letters and Mr. Cunningham's memorandum of March 8, 1988.

[278] Beginning in the early 1990s, however, the nomenclature changed. References to "retiring allowances" became less frequent and references to such things as "supplementary pension arrangements", the "Sr. Officers' Supplementary Pension arrangement", "the Company supplementary plan for senior officers" and the "Supplementary Pension Plan" became common in corporate memoranda and documentation relating to such retirement benefits. Indeed, there are at least five offers of employment, on the basis of which individuals apparently joined the company, in which reference is made to "the Supplementary Pension" or the "Supplementary Pension Plan".

[279] I observe that there is some coincidence between the timing of this general change in nomenclature and the creation of the board of directors' sub-committee known as the Human Resources and Compensation Committee—of which Mr. Cunningham was the chair—and the involvement of Towers Perrin in studying the company's supplementary retirement income arrangement. Whether these circumstances account for the change in terminology or not, I do not think that the change in nomenclature itself can alter the nature of what it was that Confederation Life was agreeing to provide to its senior officers, in the absence of a new corporate form of authorization. No such new corporate form of authorization—either in the

form of a different resolution of the board of directors, or in the form of some other redefined "plan" duly approved by the company—exists.

[280] In June 1993, Mr. Cunningham sent the second form letter to senior officers of Confederation Life entitled to the supplementary retirement income benefit. Its contents are outlined in some detail earlier in these reasons. Mr. Cunningham deposes that in or about 1992, upon a review of the supplementary pension arrangements by the Corporate Human Resources Department, he became concerned about the documentation describing the benefits which were to be received. He was also concerned that details of the benefits be communicated to the more recently eligible senior officers. Consequently, "in order *to clarify the terms* of the Supplementary Plan [as his affidavit had defined the plan for a retiring allowance authorized in the July 16, 1975 Board resolution]", he sent a letter "*restating its terms* to each eligible member". I will recapitulate a portion of that letter here for sake of convenience:

> The purpose of this letter is to clarify and confirm your entitlement to the Senior Officers' Supplementary Pension *arrangement.*
>
> *In accordance with a resolution of the Board of Directors* and in order to ensure that your post retirement income compares equitably to other employee members of the registered Pension Plan for Salaried Employees, when measured as a percentage of pre-retirement income, *the Company agrees to provide you with a Supplementary Pension on your retirement.* This supplement will be in addition to the pension benefit you will receive from the registered pension plan and recognizes that the amount of pension benefit which can be provided under the provisions of the registered Plan is limited by Revenue Canada regulations.

[281] (Emphasis added)

[282] The core authority for the proposal, therefore, as stated, is "a resolution of the Board of Directors". Only one such resolution exists—that of July 16, 1975, authorizing a retiring allowance. Moreover, neither the June 1993 letter itself, nor Mr. Cunningham's explanation of it, purports *to change* the arrangement as previously established; they merely purport *to clarify and confirm* it. While the letter goes on to outline a tie-in between the supplementary retirement income arrangement and the registered pension plan, in terms of the formula for payment and the escalation of any benefits, these factors alone cannot operate to incorporate

the terms of the registered pension plan into the supplementary retirement income arrangements and thus turn them into a pension plan, in my view—which is the effect of what counsel submit should be the case. The supplementary retirement income arrangement is a "top-up" arrangement. It is designed to fit with the income flow from the registered pension plan to supply the retired senior officers with an income stream in retirement that "compares equitably to other employee members of the registered [plan]… when measured as a percentage of pre-retirement income". It stands to reason that the payment of the two amounts might be intertwined and that the benefits would advance together, in order to give effect to this objective.

[283] Moreover, it seems to me, the argument that the terms and provisions of the registered pension plan are engrafted upon the supplementary arrangements would defeat the very purpose of the top-up principle. What it would mean is that the registered pension plan and the supplementary arrangements would be so intertwined that they would become, in effect, one—the registered one—and the Revenue Canada limits would then apply to limit payments out to the recipients!

[284] What, though, of the senior officers who received letters describing the supplementary retirement income benefit as a "supplementary pension" arrangement or plan; and, indeed, what of those who accepted employment on the basis that they would be the recipient of such a benefit? Is the company entitled to resile from a position which it appears to have held out to them, through officers with the apparent authority to do so, that they had supplementary pension benefits? It seems to me that the answer to such questions is this: however the benefit is described to the recipients, they could not reasonably have expected to receive anything other than whatever it was that the company provided under the description "supplementary pension arrangement" or "supplementary pension plan" or one of their derivatives.

[285] If, in fact, what was being provided was not a "pension plan" but some other form of retirement income vehicle, referring to it as a pension plan cannot make it such. It may give the recipient some form of claim against the authors of the correspondence and the company, on the basis of misrepresentation or some other related cause of action. It may be that the misrepresentation is a relevant factor for consideration in assessing the appropriateness of other remedies—such as the imposition of a constructive trust, for example, which I have

dealt with elsewhere. But the misdescription cannot operate to transmogrify something that is not a pension plan into a pension plan. A leopard does not change its spots and become a cougar simply by calling it a cougar, despite the fact there may be some similarities between the two species.

Not a Plan "Organized and Administered" to Provide Pensions

[286] There is another reason why, in my opinion, the Confederation Life supplementary retirement income arrangements do not constitute a "pension plan" within the meaning of the *Pension Benefits Act.* On the facts of this case, they simply do not fit what is contemplated as a pension plan in the legislation. If the arrangements constitute a "plan" at all, they are not a plan "*organized and administered to provide pensions*".

[287] In construing legislation a court must look, so far as possible, to the plain wording and meaning of the language used, and do so in the context of the legislation as a whole: *Driedger on the Construction of Statutes,* 3rd ed., Ruth Sullivan, ed. (Markham: Butterworths, 1994) at pp. 3-7. Earlier I referred to the vagueness in meaning of the word "plan". Even if one accepts the broader and more general approach of the *Shorter Oxford English Dictionary,* however—"plan" as a "scheme of action, project, design, *the way in which it is proposed to carry out some proceeding*"—it is plain that the legislature intended to give the word a more restricted meaning. It is not just any "plan" which makes a "pension plan". It is a plan that is *organized.* It is a plan that is *administered.* It is a plan that is organized and administered *to provide pensions.* This leads me to conclude that the legislature intended a pension plan to be something more in line with the *Concise Oxford* definition of "plan", *i.e.,* "plan" as "a *formulated and especially detailed method* by which a thing is to be done".

[288] Some indication of what the legislature had in mind by a plan "organized and administered to provide pensions" is to be found in the provisions of s. 10(1) of the *Pension Benefits Act.* There the statute stipulates what must be set out in the documents that create and support a pension plan. The criteria include:

1. The method of appointment and the details of appointment of the administrator of the pension plan.

2. The conditions for membership in the pension plan.

3. The benefits and rights that are to accrue upon termination of employment, termination of membership, retirement or death.

4. The normal retirement date under the pension plan.

5. The requirements for entitlement under the pension plan to any pension benefit or ancillary benefit.

6. The contributions or the method of calculating the contributions required by the pension plan.

7. The method of determining the benefits payable under the pension plan.

8. The method of calculating interest to be credited to contributions under the pension plan.

9. The mechanism for payment of the cost of administration of the pension plan and pension fund.

10. The mechanism for establishing and maintaining the pension fund.

11. The treatment of surplus during the continuation of the pension plan and on the wind up of the pension plan.

12. The obligation of the administrator to provide members with information and documents required to be disclosed under this Act and the regulations.

13. The method of allocation of the assets of the pension plan on wind-up.

14. Particulars of any predecessor pension plan under which members of the pension plan may be entitled to pension benefits.

15. Any other prescribed information related to the pension plan or pension fund or both.

[289] With the exception of a nod in the direction of items numbered 3 and 7 above, and possibly item No. 4, the Confederation Life arrangements do not feature any of these characteristics. There is no formal plan document setting out the terms and benefits of the arrangement. In fact, there appears to have been a number of different arrangements. This explains why I have been using the plural “arrangements” in describing this benefit throughout these reasons. In spite of the April 1983 letters and the June 1993 letter, an examination of the correspondence gathered together by counsel for the provisional liquidator in vol. 36 of the record reveals that the use of terminology and the expressed terms of the arrangements

vary from senior officer to senior officer. Mr. Zarnett advised that this collection represents the highest documentary claim for each individual.

[290] I am asked not to deal with the supplementary pensioners on an individual basis, and indeed the evidence is not adequate to enable me to do so. However, a review of the documentation gathered together in vol. 36 is instructive, I think, in assessing whether the treatment of this retirement benefit is a plan "organized and administered to provide pensions".

[291] Eight of the 11 supplementary pensioners "In Pay" received the April 1983 form letter stipulating the provision of a retiring allowance, or an identical letter or one *similar to it.* Even the letter to Mr. Pitt, which was dated January 13, 1992—during the period when references to "supplementary pension arrangements" and nomenclature of that sort were more common—is framed in terms of a retiring allowance. Two of these claimants received the June 1993 letter or a similar one (one such claimant had also received a 1983 letter) and two received individualized packages referring to "supplementary pensions" in one form or another.

[292] Of the 20 supplementary pensioners "Not in Pay", eight received the June 1993 letter or something similar to it. Twelve received individual packages, three of which related to termination or pre-emptive parachute situations and five of which were the subject matter of offers of employment with the company. The nomenclature in these packages and in the June 1993 set of letters is in terms of "supplementary pension arrangements" or related language.

[293] Keeping in mind Mr. Cunningham's evidence that all eligible senior officers received either the April 1983 letters or the June 1993 letter—and some, presumably, both—the added layers of "similar" letters and individual arrangements and the lack of many of the *indicia* of a pension plan as laid out in s. 10(1) of the *Pension Benefits Act,* all lend credence to the view that what was presented to the senior officers of Confederation Life was not a "pension plan" but a more general plan to provide retiring allowances in their individual cases.

[294] I conclude, therefore, that the supplementary retirement income arrangements which Confederation Life agreed to provide to its senior officers do not constitute a "pension plan" to which the *Pension Benefits Act* applies.

(b) Regulation 909, as Amended

[295] The regulations under the *Pension Benefits Act* exempt certain pension plans from the application of the Act and regulations. In October 1994—two months after the winding-up order—s. 47(3) of Reg. 909 was amended to add the following exemptions:

- a retirement compensation arrangement as defined in subsection 248(1) of the *Income Tax Act* (Canada)
- a plan that provides only benefits that exceed the maximum benefit limits applicable to a pension plan that is registered under the *Income Tax Act* (Canada).
- A plan that permits only contributions that are in excess of the maximum contribution limit applicable to a pension plan that is registered under the *Income Tax Act* (Canada).

[296] It was submitted that this amendment makes it clear that the type of arrangements in place at Confederation Life for supplementary retirement compensation are not caught by the PBA. The counter-argument was that the amendment does not apply because it post-dates the winding-up order and cannot be given retrospective effect. In view of my conclusion, on the other grounds, that the arrangements do not constitute a pension plan, and therefore are not governed by the provisions of the Act, it is not necessary to decide whether the regulation does or does not apply. I would have been reluctant, however, to interpret the amended regulation in a manner that would give it retrospective effect in view of the general rule against attributing a retroactive or retrospective effect to legislation unless such a construction is expressly or by necessary implication required by the language of the legislation in question: see *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue,* [1977] 1 S.C.R. 271 at p. 279, 66 D.L.R. (3d) 449 at p. 460, per Dickson J.; L.P. Pigeon, *Drafting and Interpreting Legislation* (Toronto: Carswell, 1988) at pp. 75-76.

[297] I am satisfied that the amendment to Reg. 909 as of October 28, 1994 is of neutral impact in the determination of the issues before me.

(c) *The Deemed Statutory Trust and Lien of Section 57 of the Pension Benefits Act*

[298] There are a number of other pension-related issues that were raised and dealt with in argument.

[299] Two such related issues are the twin questions of whether—assuming the *Pension Benefits Act* applies to the arrangements—Confederation Life is deemed to hold in trust an amount equal to the due but unpaid contributions required under the legislation and

regulations and therefore whether the assets of the company are subject to a lien and charge in such an amount? These requirements, which are to be found in s. 57(3) and (5) of the Act, are generally referred to as the deemed statutory trust and hen provisions. Since I have concluded that the supplementary retirement income arrangements in place at Confederation Life are not a "pension plan" within the meaning of the PBA, it is not necessary to address these issues at length.

[300] If the arrangements did constitute a pension plan within the meaning of the PBA, however, Confederation Life's promise to pay the supplementary pension benefits—as the Ontario Court of Appeal had noted in *Re St. Marys Paper Inc.* (1994), 19 O.R. (3d) 163 at p. 168, 116 D.L.R. (4th) 448—would be "a promise which is subject to the carefully calibrated regulatory scheme set out in the PBA and its regulations". It would be subject to the minimum standards set out in the Act, including the minimum funding requirements of s. 55(1). In *Re St. Marys Paper,* Justices Arbour and Osborne stated (at p. 173):

> The PBA and regulations impose an obligation on an "employer"[2] to ensure that a pension plan is adequately funded, both on an ongoing basis and on a wind-up of the plan. *This obligation exists quite apart from the particular funding requirements set out in the pension plan itself This obligation is central to the regulatory scheme established by the PBA.* The Act requires that its minimum funding standards be met.

[301] (Emphasis added)

[302] Consequently, *if* the Confederation Life supplementary retirement income arrangements *were* governed by the "carefully calibrated regulatory scheme set out in the PBA", it would follow, in my view, that the deemed statutory trust and the deemed statutory charge and lien of ss. 57(3) and (5) would be operative. I think arguments to the effect that the company, in the particular circumstances of the Confederation Life arrangements, is not an employer *required to make contributions* to a pension plan, cannot prevail in view of the law as articulated in *Re St. Marys Paper Inc., supra.*

(d) *The Constitutional Issue*

[303] If the provisions of the PBA governed the Confederation Life arrangement and the deemed trust and statutory lien provisions of the Act therefore applied, I would be confronted

[2] The issue in the case was whether the appellant, a trustee in bankruptcy, was an "employer" within the meaning of the PBA.

with the constitutional issue that has been argued. In as much as I have concluded that neither of these eventualities is the case, in the circumstances here, I do not intend to comment upon the interesting and difficult question of whether there would be such an active conflict between the operation of s. 57 of the PBA and the priority scheme of s. 161 of the *Winding-up Act* to cause the doctrine of paramountcy to be invoked: see *Multiple Access Ltd. v. McCutcheon,* [1982] 2 S.C.R. 161 at p. 191, 138 D.L.R. (3d) 1. It is an accepted principle of constitutional adjudication that a court should avoid determining a constitutional question unless it is necessary to do so in order to decide the matterbefore it: see, for example, *Tremblay v. Daigle,* [1989] 2 S.C.R. 530 at pp. 571-72, 62 D.L.R. (4th) 634. In this case it is not necessary to do so.

PART F

CONCLUSION

[304] For all of the foregoing reasons, then, the questions posed by the provisional liquidator for advice and directions will be answered as follows:

> (1) The claimants have claims against the estate of Confederation Life Insurance Company. They are claims, however, as ordinary creditors or, at least, claims which rank behind those of Confederation Life's policyholders under s. 161(1)(*c*) of the *Winding-up Act* (except to the extent that any may be entitled to the preferred status of employee claims under s. 72 of that Act, about which there was no evidence).
>
> (2) None of the claimants is entitled to succeed on the basis either that their claim constitutes an express trust or that their claim should attract the imposition of a constructive trust.
>
> (3) None of the claimants is entitled to succeed on the basis that their claim is a claim under a policy in respect of which priority is accorded to a policyholder by the provisions of s. 161(1)(*c*) of the *Winding-up Act.*
>
> (4) Specifically, with respect to the claims of the supplementary pensioners, the claim to a supplementary retirement income benefit does not constitute a "pension plan" to which the *Pension Benefits Act* applies.

[305] I was asked to answer the provisional liquidator's questions posed with respect to the supplementary pensioners not in pay in keeping with the following alternative assumptions:

(i) Assume, without deciding, that the making of the winding-up order terminated the employment of all members of the class whose employment was not previously terminated; and,

(ii) assume, without deciding, that the making of the winding-up order did not terminate the employment of any member of the class who was on August 11, 1994, an employee of Confederation Life Insurance Company.

[306] My conclusions with respect to the supplementary retirement income arrangements do not vary with whether the recipients are “In Pay” or “Not in Pay”, nor with whether the recipients are deemed to have been terminated by virtue of the winding-up order. Accordingly, it is not necessary to address these alternative assumptions further.

[307] All parties are entitled to their costs out of the estate. I may be spoken to with regard to the scale of those costs, and I am prepared to fix them if counsel cannot agree.

[308] In conclusion, I would like to express my appreciation to all counsel for their thorough, skilful and helpful assistance in dealing with these difficult questions.

SCHEDULE “A”

LIST OF COUNSEL

Benjamin Zarnett, Andrea W. Rowe and *Michele S. Altaras,* counsel for Peat Marwick Thorne Inc., Agent of the Superintendent of Financial Institutions, the Provisional Liquidator of Confederation Life Insurance Co.;

Mark Zigler, Susan Rowland and *Cynthia Weekes,* counsel appointed as representative counsel to represent the interests of retirees of Confederation Life Insurance Company;

Donald C. Matheson, Q.C., *Martha T. Milczynski* and *Clifton P. Prophet,* counsel appointed as representative counsel to represent the interests of Supplementary Pensioners “In Pay”; and counsel appointed as representative counsel to represent the interests of Messrs. Rhind and Burns in respect of their claims for payment from Confederation Life Insurance Companies Deferred Compensation Plan;

Ronald Robertson, Q.C., *Michael J. MacNaughton* and *Edmond F.B. Lamek,* counsel appointed as representative counsel to represent the interests of Supplementary Pensioners “Not In Pay”;

James H. Grout and *Aida Van Wees,* counsel appointed as representative counsel to represent the interests of all policyholders and claimants of Confederation Life Insurance Co. other than those persons described above;

Charles F. Scott and *David P.T. Roney,* counsel for the Canadian Life and Health Insurance Compensation Corporation;

Shaun M. Devlin and *Peggy A. McCallum,* counsel for the Superintendent of Pensions;

John R. Varley and *M. Jasmine Sweatman,* counsel for Deloitte & Touche which was appointed administrator of the Confederation Life Insurance Company Pension Plan for Canadian Salaried Employees by the Superintendent of Pensions;

Hart Schwartz, for the intervenor, Attorney General of Ontario;

R. Stephen Paddon, Q.C, and *Russell D. Laishley,* counsel for Prost Investments Limited, Grant Forest Industries Corporation, Domco Food Services Ltd., Sullivan Entertainment, The Miller McAsphalt Corp. and CCL Industries Inc., a group of policyholders;

Robb C. Heintzman, counsel for Price Waterhouse Limited, the liquidator for Confederation Trust Company;

Lawrence E. Ritchie, counsel for Avenor Inc., Coopérative Fédérée de Québec, Avenor Maritimes Inc., Bombardier Inc., ITT Industries of Canada Limited and AlliedSignal Canada Inc., a group of policyholders;

Jeffrey C. Carhart, counsel for the Association of Confederation Life Contractholders, Inc.;

Dana B. Fuller and *Derrick C.A. Tay,* counsel for Fidelity Management Trust Company, a policyholder; and,

Ian D. Morris, counsel for Daniel Wiseblott, a former employee of Confederation Life Insurance Company.

SCHEDULE “B”

The following are the classes of Claimants:

(i) *Retirees* of Confederation Life and their spouses and dependent children (the "Retirees") for the continued payment of their major medical, dental, and group life insurance;

(ii) (I) "*Supplementary Pensioners in Pay*", *i.e.,* former employees of Confederation Life claiming payment of supplementary pension benefits in accordance with the supplementary pension arrangement of Confederation Life, and who were receiving such payments as at the date of the Winding-Up Order but whose payments were subsequently terminated by the Liquidator (or, where such former employees are deceased, the persons claiming under them);

(II) "*Supplementary Pensioners Not in Pay*", *i.e.,* former employees of Confederation Life claiming payment of supplementary pension benefits in accordance with the supplementary pension arrangement of Confederation Life, and who had not commenced receiving payments as at the date of the winding-up order (or, where such former employees are deceased, the persons claiming under them); and,

(iii) *the former Chairman of the Board of Directors and the former President of Confederation Life for the payment of deferred compensation* pursuant to the deferred compensation plan of Confederation Life.

Order accordingly.