CA020009
Vancouver Registry

Court of Appeal for British Columbia

BETWEEN:

IRVIN J. FROESE

PLAINTIFF
(APPELLANT)

AND:

MONTREAL TRUST COMPANY OF CANADA

DEFENDANT
(RESPONDENT)

AND:

99319 B.C. LTD., et al.

THIRD PARTIES

AND:

GEORGE E. ALLAN, et al.

FOURTH PARTIES

Before: The Honourable Chief Justice McEachern
The Honourable Mr. Justice Gibbs
The Honourable Mr. Justice Williams

I.G. Nathanson, Q.C. and G.B. Gomery	Counsel for the Appellant
J.H. Shevchuk and M.E. Currie	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia January 11 & 12, 1996
Place and Date of Judgment:	Vancouver, British Columbia May 22, 1996

<u>Written Reasons by:</u>
The Honourable Chief Justice McEachern

<u>Concurred in by:</u>
The Honourable Mr. Justice Williams

<u>Dissenting Reasons by:</u>
The Honourable Mr. Justice Gibbs (page 53, para. 126)

Court of Appeal for British Columbia

Irvin J. Froese

v.

Montreal Trust Company of Canada

AND:

99319 B.C. Ltd. et al.

AND:

George E. Allan et al.

Reasons for Judgment of Chief Justice McEachern

INTRODUCTION

1 The plaintiff began his employment with Johnson Terminals Limited, "the Company", in 1949. In 1959, the Company established a pension plan ("the plan") for some of its employees, and thereafter, the Company and those employees began making contributions to the plan.

2 Montreal Trust, "the defendant", accepted the responsibilities of "Trustee" of the plan under a Trust Agreement and Declaration of Trust ("the agreement"). The plan was made a part of the agreement. The Company and the defendant were parties to the agreement, although the participating employees, the *cestui*

trustent or beneficiaries, were not. The agreement originally appointed the defendant as investment manager of the plan but it was replaced in this function in 1985.

3 In 1983, by an amendment ("P-7") to the plan, the Company adopted an early retirement program which provided for "improved" or "enriched" pensions for designated employees, one of whom was the plaintiff.

4 The plaintiff retired on June 30, 1986, and was allocated an improved pension of $2,584 per month.

5 Company contributions for regular, current pensions became irregular after August, 1986, although a substantial payment of $30,000 was made in November, 1987. At the end of 1986, the Company substantially ceased making its required additional contributions for enriched, early retirement pensions.

6 The following tables disclose the irregular nature of Company contributions to these two kinds of pensions.

REGULAR EMPLOYER'S CURRENT SERVICE CONTRIBUTIONS

	Jan	Feb	March	April	May	June	July	Aug	Sep	Oct	Nov	Dec
1986		14,108	7,054	7,054		7,054	14,058	7,054			7.054	
1987										2,374.50*		
1988										No st.	30,000	No St.
1989							1,229	1025.20	1,229	2.458	1,229	1,229
1990		1,229	1,229	1,229								

* Does not appear on Document #79

EMPLOYER'S CURRENT SERVICE CONTRIBUTIONS FOR EARLY RETIREMENT

	Jan	Feb	March	April	May	June	July	Aug	Sep	Oct	Nov	Dec
1986	7,054	4,225	8,450	4,225	4,225	4,225*	4,225	4,225	4,225		4,225	10,370.25
1987		1,920.25			2,011.89	1,005.92	1.005.92					
1988										No st.		No St.
1989					2,458							
1990												

* Not shown in Doc. #79

7 The defendant did not react in any way to the Company's failure to make regular contributions; indeed, it continued to make monthly pension payments and to permit other withdrawals from the fund. Ultimately, in 1992, the pension plan had to be wound up; by that time, however, there was a serious shortfall. Existing regular pensions were actuarially pegged at 70%. The actuary recommended, however, that the reduction for enriched pensions be calculated not from the awarded amount, but rather from the amount the pension would have been without enrichment, and that extra

payments already made be "clawed back". As a result, the plaintiff's pension was reduced from $2,584.84 to $555.63. Although he dismissed the action, the trial judge held that there were no grounds for these additional deductions, and that the plaintiff should have received 70% of his enriched pension.

8 As the Company is insolvent, the plaintiff brought this action, for breach of duty and in tort, against the defendant only. The plaintiff asserts that he is entitled to recover the full amount of his pension from the defendant, alleging that the defendant is liable because it failed to warn the beneficiaries of the trust that the company was not making regular contributions and that the plan was at risk. The plaintiff's case, supported by a finding of the trial judge, is that up to the end of 1988, there were sufficient funds to provide full pensions under the plan. This finding was:

> I accept as accurate that, had the pension plan been wound up in 1987 or 1988, all the beneficiaries would have continued to receive their full pensions.

9 Instead, because the defendant took no action until 1992, the fund continued to be bled by payments and withdrawals until beneficiaries only received 70% of their pensions after enrichments were "clawed back".

10 In the alternative, the plaintiff claims damages for the defendant's failure to ensure that he would receive at least 70% of his pension.

11 The trial judge dismissed the action, largely on the ground that the defendant's role was a limited one, and that the terms of the agreement and the context in which the defendant acted, made it unnecessary for it to act prudently.

12 There can be little doubt that the terms of the agreement governed the relationship between the Company and the defendant. The plaintiff argues that his pension entitlement and the defendant's obligations to him are governed by the general law, which imposes a duty of care. The legal issue is: did the defendant owe duties to the beneficiaries additional to those imposed upon it by the agreement?

13 The basic document establishing the pension trust is the agreement which was called "Agreement and Declaration of Trust". The only parties are the Company and the defendant who is described as "the Trustee." However, the whole purpose for which the "Agreement and Declaration of Trust" were entered into, was for the benefit of the employees in their retirement years. The pension plan is attached to, and forms part of, the agreement. The second and fourth preambles of the agreement provide:

AND WHEREAS under the Plan certain funds will be contributed to the Trustee, which funds as and when received by the Trustee will <u>constitute a trust fund to be held for the benefit of the members in the Plan or their beneficiaries;</u>

(emphasis added)

***

AND WHEREAS the Company desires the Trustee to hold and administer such funds and the Trustee is willing to hold and administer such funds pursuant to the terms of this agreement;

14 Clause 11 of the Plan provides:

<u>COMPANY CONTRIBUTIONS</u>

11. The Company shall from time to time but not less frequently than annually, contribute such amounts as are not less than those certified to by an Actuary as necessary to provide for payment of the pension benefits accruing to members during the current year pursuant to the Plan and shall make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued to the credit of members after taking into account the assets of the Fund, the contributions of the members during the year and such other factors as may be deemed relevant.

15 The agreement also included numerous defendant's "exonerations":

Article FIRST

The Trustee shall not be responsible for the collection of any funds required by the Plan to be paid to the Trustee.

Article SECOND

The Trustee shall be under no liability for any payment made by it pursuant to the direction of the Company certified to be in accordance with the terms of the Plan and shall not be under the duty of making inquiries with respect to whether any payment directed by the Company is made in pursuance of the provisions of the Plan.

Article EIGHTH

No person other than the Company may ... bring any action against the Trustee with respect to the said trust and/or its actions as Trustee.

Article NINTH

[T]he Trustee ... shall [not] be responsible for the adequacy of the Trust Fund to meet and discharge any and all payments and liabilities under the Plan.

Article TWELFTH

This trust and Agreement may be terminated at any time by the Company and upon the termination of the trust and Agreement or upon the dissolution or liquidation of the Company the Trust Fund shall be paid out by the Trustee as directed by the Company ....

16 Originally, the defendant was the investment manager as well as the custodian of the fund. On May 31, 1985, the former function was transferred to another investment manager. After that time and until the winding-up in 1992, the defendant's role as administrator of the plan was to receive payments, follow investment directions, honour directions made by the Company for the payment of pension benefits, keep track of contributions, and generally keep the fund safe.

17 On May 27, 1985, the defendant received a copy of an internal Company memorandum which stated the Special Early Retirement Plan had created a liability which required an additional monthly Company pension contribution of $4,654 over the next 15 years. This obligation arose from generously enriched early pensions. Other similar memoranda were also received by the defendant.

18 The trial judge found that in 1986, and in later years, "the contributions of the Company to the pension fund were sharply reduced." As shown by the tables reproduced above, this "reduction" related not just to the extra contributions already mentioned, but also to the regular required contributions. There were practically no company contributions in 1987 and thereafter. There is evidence that this failure was not discovered by the defendant, but rather that it was brought to the defendant's attention by the actuary in August, 1991. The actuary reported in 1992 that:

> The last actuarial valuation made on an on-going basis was made as at January 1, 1986 and showed an unfunded actuarial liability of about $520,000. Our estimate of the increased actuarial liabilities as a consequence of the early retirement program was about $914,000 as at January 1, 1986 and other sources of gain and loss (notably higher than expected investment earnings) partially offset the costs of the early retirement program.
>
> ***
>
> We understand from discussions with the Company that, although some Company contributions were made following the delivery of our actuarial valuation report to the Company in December, 1986, the Bank of B.C. called its loans to the Company in July of 1987, in the amount of some $16 million and

> placed a monitor in the Company (until July 1988), and that the Company was during this period permitted to only pay the expenses to operate the Company in order to commence the liquidation of various corporate assets. <u>During this period no Company contributions were made and to the best of our knowledge and understanding, no Company contributions have been made since July, 1987.</u>
>
> (emphasis added)

19 The evidence discloses that these statements were substantially correct, although one payment of $2,458 was made in May, 1989.

20 The trial judge made this finding:

> Since Montreal Trust kept track of both company and employee contributions, it must be taken to have been aware of the fluctuations of the company contributions.

21 With respect, one could just as easily read "cessation" for "fluctuations" of Company contributions.

22 I regard the above finding as crucial because it fixes the defendant with knowledge that contributions were not being made. The defendant had knowledge of the money going out of the fund, because it was writing the cheques. In addition, as custodian, the defendant could not have been unaware of a substantial loss suffered by the fund in the late 1987 stock market crash which was internationally notorious.

23 The trial judge made a number of findings favourable to the defendant. These include:

> From 1985, Montreal Trust says, it was on the outside, with no meaningful obligations to the beneficiaries and with no knowledge and no means of knowing whether the plan was healthy. It is true that the functions of Montreal Trust from 1985 were clerical and might as easily have been carried out by a bookkeeper with a cheque writing machine as by a big trust company.
>
> ***
>
> Since Montreal Trust kept track of both company and employee contributions, it must be taken to have been aware of the fluctuations of the company contributions. However, I am unable to find that Montreal Trust was in a position to recognize the implications of them. First, the company was entitled to take contribution holidays under the terms of the plan. That it did so was not necessarily sinister. Secondly, the level of company contributions was not on its face significant. The object of the managers of a pension plan of this kind is to keep it in a position where its assets are sufficient to cover present and future liabilities. This is where the actuary comes in: it sets the level of employer contributions.
>
> Analyzing the viability of a pension fund is an inexact exercise, involving much prediction. Short-term fluctuations in the value of the fund may be tolerable. Additionally, depending on the attrition rate among potential beneficiaries and changes in the employment structure of the company, fairly large employer contribution fluctuations may not be in themselves meaningful. Montreal Trust did not have a context in which what it knew or ought to have known was recognizably a warning signal: in particular, it was not privy to the periodic reports of the actuary.
>
> ***
>
> ...Montreal Trust was not managing the trust fund. In the discharge of the very limited duties it carried out after 1985, there was no scope for -- and, hence no obligation to undertake -- the exercise of prudent judgment.

24 The judge suggested that the Company was entitled to take "contribution holidays" under the terms of the plan and that therefore there was no reason for suspicion when the Company failed to make regular payments. The real facts are disclosed in the actuaries' draft report, Ex. 36, which states:

> The liabilities created by these early retirements were, in fact, met from excess investment earnings during 1986 and the first half of 1987. During 1986, excess investment earnings amounted to $336,000. In the first half of 1987, the gain from excess investment earnings was $787,000. Thus, at June 30, 1987 there was an estimated surplus of $15,000. Part IV of the Plan text was then drafted to provide additional benefits to several executives. The October 1987 stock market crash placed the Plan in a significant deficit and the Plan has never recovered since then.

25 The trial judge found that the defendant did not have the benefit of these valuations, but this lack of information, in my view, works against the defendant because it emphasizes the importance of known missed contributions. As will be seen, however, the defendant did in fact have sufficient information to permit it as a prudent administrator to recognize the serious risk facing the beneficiaries.

26 The trial judge further found that the level of Company contributions may not have been significant because the defendant might assume that the contribution shortfall would be covered by investment income. Even in "buoyant" economic times, however, the Company's failure to make required contributions should have been a danger signal to a prudent trustee. It is difficult to imagine

a more significant indication of trouble than the virtual termination of contributions from the principal contributor to the plan. There is no evidence the defendant noticed this failure or that it made any inquiries. Even though "Article First" provides that the Trustee is not responsible for the collection of any funds required to be paid to the Trustee, that should not exonerate the Trustee from making inquiries as to why contributions from the principal contributor to the Plan had not been made.

27 The judge concluded that the defendant did not have a "recognizable warning signal." It is difficult to accept this finding. It is based upon the view that the defendant did not have notice of or access to the entire pension picture. With respect, that is only a part of the analysis. The train engineer who misses a signal is not excused because he did not know there was another train on the track. The defendant in this case missed warning signals for regular contributions from August, 1986, to the end of 1988, and for enriched contributions during most of 1987 and 1988. Even if the defendant did not know the entire pension equation, did its knowledge of the Company's failure to make required contributions give rise to any duty on the part of the defendant to take steps to protect the interests of the beneficiaries? In my view, that question can only be answered in the negative if the judge was right in concluding that the defendant had no obligation to exercise prudence.

28 It must be remembered that throughout this period, the defendant was paying pensions and permitting withdrawals from the fund when contributions required to support them were not being paid. Section 11 of the plan required the defendant, even in its limited role as administrator, to be aware of such matters even if it were oblivious to the losses suffered in the market crash and to the other circumstances of the company. Also, as must be noted, any inquiry into the reason for the missing payments would inevitably have led the defendant to an understanding of the larger circumstances and the dangers facing the beneficiaries. Everything that was later discovered could have been predicted with reasonable accuracy in 1987 or 1988.

29 This inaction on the part of the defendant fully justifies the judge's finding:

> It seems fair to say that, in the critical years from 1986, no one was taking responsibility for the interests of the employees: not the company, not the actuary and, by its own admission, not Montreal Trust.

LEGAL RELATIONSHIPS

30 It will be useful to discuss the legal relationships between the parties. This is a question on which there is very little authority but some helpful commentary.

31 In his seminal work, ***The Law of Trusts in Canada***, 2nd ed. (Toronto: Carswell, 1984), Professor Donovon Waters foresaw some of the problems that arise in this case. First, in a pension context, starting at p. 104, he distinguished between custodial and managing trustees and suggested, in a footnote, that custodial trustees will usually have duties and liabilities expressly restricted to the building and safekeeping of investment instruments. I assume he includes "building" in this passage because he also suggests that even a custodial trustee may not be able to avoid responsibility for bad investments directed by the investment managers.

32 At p. 438, Dr. Waters predicted great expansion in the use of trust concepts in the pension industry and he commented that "some difficult questions are going to face Canadian legislatures." He concluded that "the indenture is of key importance because it determines the role and duties of the trustee." As will be seen, however, contractual responsibilities to the settlor do not tell the whole story.

33 In considering the future of trusts in Canada, at p. 1145, Dr. Waters observed that "broadly stated principles of equity" will apply to many and varied areas of business and commercial life. As if he knew this case would arise, he suggested, "[t]here is likely to be a call for new formulations of the duty of the trustee to account" but he went on to ask whether, with sometimes thousands of beneficiaries:

> [w]hat sort of accounts ought they therefore to receive, and with what frequency? If accounting takes place to the employer only, there is another nice question as to whether there has been any proper accounting at all. Can it be relevant that it is the *employer* who created the trust, even if it is also the case that the trust is non-contributing on the employer's part? Associated with this issue is the question of information. What information concerning the trust and its investment policies is the trust beneficiary entitled to demand...

34 Several provinces have recently enacted Pensions benefits legislation. In British Columbia, the ***Pension Benefits Standards Act*** S.B.C. 1991, c. 15, requires a pension administrator to "act honestly, in good faith and in the best interests of the members and former members and any other persons to whom a fiduciary duty is owed," and to "exercise the care, diligence and skill of a reasonably prudent person under comparable circumstances." The statute specifically states that these requirements exist "in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of a trustee."

35 There have been some useful commentaries about the Ontario legislation with particular reference to some of the issues that must be decided in this case. I refer particularly to ***The Role and Responsibilities of Trustees in Pension Plan Trusts: Some Problems of Trust Law***, by Robert P. Austin in T.G. Youdan, ed., ***Equity, Fiduciaries and Trusts*** (Toronto: Carswell, 1989), pp. 111-129; ***Legal Issues Arising Out Of The Use of Business Trusts in Canada***, by Maurice C. Cullity Q.C., also in Youdan, pp. 181-

204; and ***Doing One's Duty: Pension Plan Administrators, Agents and Trustees***, by Patricia J. Myhal, (Sept. 1991) 11 Estates and Trusts Journal, pp. 10-43; and ***Record-Keepers or Whistle-Blowers? A Look at the Role of Pension Fund Custodians***, by Dona L. Campbell, (Sept. 1995) 15 Estates and Trusts Journal, pp. 26-47. While I have found these articles most helpful, they must be considered in the light of developing jurisprudence, particularly the recent decision of the Supreme Court of Canada in ***Schmidt v. Air Products Canada Ltd.***, [1994] 2 S.C.R. 611, which was decided while the present case was at bar. As stated by Cory J., writing for the majority, at p. 639:

> ...If there has been some express or implied declaration of trust, and an alienation of trust property to a trustee for the benefit of the employees, then the pension fund will be a trust fund.
>
> If no trust is created, then the administration and distribution of the pension fund and any surplus will be governed solely by the terms of the plan...

36 Further, at p. 643, Cory J. said:

> When a pension fund is impressed with a trust, that trust is subject to all applicable trust law principles.

37 I pause to note that the partially dissenting passage in the judgment of McLachlin J. in ***Schmidt***, and the earlier passage from ***Merrill Petroleums Limited et al v. Seaboard Oil Company et al*** (1957), 22 W.W.R. 529 (Alta. S.C.T.D.), both quoted by the trial judge, related to ascertaining the terms of the trust, and do not touch upon the

question I am considering which is whether there are trust obligations additional to the specific terms of the trust indenture or agreement.

38 I agree, as found by the trial judge, that the Supreme Court of Canada has laid to rest any question about the status of the defendant herein as a "true trustee".

39 I therefore conclude that there is what academics call an "overarching" obligation upon a custodial or administrative trustee to pay attention to the interests of the beneficiaries additional to its contractual duties provided in the trust indenture. This obligation is not unlimited: it arises only within the function assigned to or assumed by the trustee.

40 In her article at p. 32, Ms. Campbell confirms that even a custodial trustee owes a duty of care at common law. I am, however, dubious about the authority of some of her examples, including ***Metropolitan Toronto Pension Plan v. Aetna Life Insurance Co.*** (1992), 98 D.L.R. (4th) 582 (Ont. Ct. (Gen. Div.)), which was really a case between contracting parties, and ***Ford v. Laidlaw Carriers Inc.*** (1993), 50 C.C.E.L. 165 (O.C.J (Gen. Div), reversed in part by an Endorsement, [1994] O.J. No. 2663 (Ont. C.A.), where the court was critical of a custodian's lack of knowledge about the terms of the plan it was administering, and cited with approval dicta from ***Bartlett v. Barclay's***

Bank, [1980] 1 All E.R. 139 at 152, which stresses the higher duty expected of a professional trustee. In ***Ford***, the Court of Appeal did not impose liability upon the administrator, because it corrected its errors before any harm was done, and because the real cause of the loss was a deliberate misrepresentation to the employee-beneficiaries on the part of the Company. However, the trial judgment in that case includes many passages of interest in this case. At p. 238, the trial judge said:

> Since a trustee's fundamental duty and obligation is owed to the beneficiaries, a competent trustee would have advised the employees (beneficiaries) that what Laidlaw was proposing to do was not permitted under the plan.

41 Of special interest in Ms. Campbell's article is her section on the responsibility of custodians to monitor contributions. This is specifically required by the Ontario Act. However, at p. 40, Ms. Campbell comments: "it would be difficult to argue that a pension fund trustee bears no responsibility ...[as part of its duty of care] to monitor the adequacy of contributions and to ensure that required contributions are made to the fund in a timely fashion."

42 Ms. Campbell also raises the question of whether a custodian has any responsibility to "react" to events. She notes that this seems to be indicated in the ***Aetna*** case, but in a recent English Case, ***Galmerrow Securities Ltd. v. National Westminster Bank***, an unreported

decision of Harmon J., Chancery Div., released December 20, 1993, a custodial trustee was not found liable where a fund decreased substantially in value. In that case, as in the case at bar, the trustee did not have investment powers or authority to replace the manager.

43 One cannot read the literature on this question without being struck by an understandable trend towards increased responsibility on the part of trustees, including custodial trustees, to exercise reasonable care for the position of the beneficiaries. In this respect, there are references in the literature to the fact that pension beneficiaries are usually dependent upon decisions or choices made by others such as administrators, investment managers, or actuaries. There is also concern that the party establishing the plan, usually an employer, appoints the other players. There are opportunities for conflicts of interest unless care is taken at all levels to protect the vulnerable and necessarily passive beneficiaries, who literally "trust" others to protect their pensions. Trust companies often speak proudly of the vast amounts they have "under administration". In this case it is necessary to consider what responsibilities should be imposed upon such a function.

44 In a relative vacuum of direct authority, and with the above and other matters in mind, I have considered what conclusions can be reached about the relationships between the parties.

45 First, it is obvious that the relationship between the Company with the investment manager, the actuary and the defendant is largely contractual. The primary duties and responsibilities are defined in the documents which create these relationships. I say "largely contractual" because duties of care arising out of such close relationships will also arise in many circumstances. For example, both the investment manager and the actuary obviously owed a contractual duty to the Company, and possibly also to the beneficiaries although I need not decide that question in this case.

46 Second, in a pension context, as already mentioned, a custodial trustee will almost invariably owe a common law duty of care to the beneficiaries, though such a duty of care is not unlimited. It arises only within the scope of the trustee's engagement. A custodian-administrator, for example, would not usually have a duty of care relating to actuarial or investment functions. An administrator, however, has an opportunity, and I think an obligation, to recognize reasonably apparent danger signals. The real question in this case, in my judgment, is whether a prudent, alert pension administrator must respond not just to ordinary administrative matters, but also to unusual events within its cognizance that puts the beneficiaries at risk. Thus, in my view, the responsibility of a custodial or administrative trustee in particular circumstances should include at least the function of a watchdog. With respect, therefore, I question the

analogy mentioned by the trial judge between a custodian-administrator and "anyone with a cheque writing machine". I shall discuss that question later.

47 Third, although the question was not argued, I have considered whether the beneficiaries are contractually bound to the defendant as third party beneficiaries to the agreement. As already mentioned, there is both an agreement and a plan. There can be no doubt the beneficiaries are participants in the plan and bound by it in the sense that while they have a right to whatever it provides for them, they have no right to anything more out of the fund than what the plan provides.

48 Under conventional contract law, as non-parties, the beneficiaries are strangers to the agreement. Recently, however, the law has recognized third party rights in some special circumstances. ***London Drugs Ltd. v. Kuehne & Nagel International Ltd.***, [1992] 3 S.C.R. 299 is an example. With respect, and without the benefit of counsel's assistance, I can find no juridical reason to impose the burdens of the defendant's exonerations upon the passive members of the plan. It will be remembered that the principal reason the employees in ***London Drugs*** were protected by the limitation of liability in the employers contract with the plaintiff customer was because the employees were performing the actual obligations of their employer under the contract. One of the common law duties owed by the defendant in the case at bar was to protect the

interests of the non-party beneficiaries. It would make little sense to superimpose a general duty of care toward beneficiaries upon the defendant and then to apply contractual exonerations to that duty of care. There are good juridical reasons to maintain the doctrine of contractual privity between the defendant and the beneficiaries in the circumstances of this case. Furthermore, applying the test adopted by the majority at p. 448 of ***London Drugs***, there is nothing in the language of the agreement that suggests its terms should be imposed upon the beneficiaries as if they were parties.

49 Accordingly, I conclude that the beneficiaries should not be treated as parties to the agreement. Counsel did not suggest otherwise.

50 Lastly, returning to what I stated a moment ago, the foregoing does not decide this case against the defendant because its responsibility can only be assessed in a factual context, and legal truth can usually be found only in the details. I turn, therefore, to consider the conduct of the defendant in the circumstances disclosed by the evidence.

THE DUTY TO WARN

51 As already mentioned, the trial judge found that the defendant, because it was not managing the trust fund, had "no

scope" for -- and, hence no obligation to undertake -- the exercise of prudent judgment.

52 This case, of course, can be approached from at least two perspectives. First, one can take the approach taken by the trial judge, which was that the agreement alone defined the duties and obligations of the defendant and that, accordingly, the defendant was under no duty to be prudent; if it failed in that connection, it was protected against liability by the many exoneration clauses within the Agreement. The defendant alleges in its factum, and the judge found, that even if it appreciated the significance of the uneven (or absent contributions), it had no express duty, and therefore no obligation, to volunteer information to beneficiaries.

53 If this is the correct approach then I would agree that the plaintiff must fail on this branch of his appeal.

54 The trial judge did not consider the broader approach, that although the plaintiff is not a party to the agreement, duties in trust and tort may arise because of the close financial relationship between the beneficiaries and the defendant. What stands out in this case is that the defendant did not seem to consider or appreciate until 1991 that it had duties which it then described as "fiduciary duties" to the beneficiaries.

55 The question is whether, in these circumstances, the defendant in 1987 and more particularly in 1988, given its state of knowledge, could as a matter of law, fail to advise the beneficiaries that required contributions were not being made. The defendant must have known that if it did not so advise the beneficiaries, it is unlikely anyone else would.

56 For the reasons already mentioned, the defendant's "exonerations" provide no defence to the plaintiff's claim. Was the defendant's duty of care so limited that it was not required to react?

57 The trial judge framed the question as whether there was any obligation to volunteer information to the beneficiary. With respect, I think that is far too narrow. In my view, "true" trustees have obligations of prudence to protect not just the corpus of the trust, but also the interest of the beneficiaries from the ongoing operation of the plan.

58 I postulate a simple example. Assume that the Company appoints an investment manager, and that that manager instructs the trustee to invest the corpus, or so much thereof as the plan permits, in the subordinated securities of the company. (This is an extreme example because most plans provide investment rules that must be followed.) Absent such rules, can it seriously be argued that a trustee owes no larger, general duty of prudence respecting

the trust which transcends the four corners of the agreement? In this respect, I agree with the comments of Dickson J. (as he then was) in ***Fales v. Canada Permanent Trust Co.***, [1977] 2 S.C.R. 302, at p. 316, although stated in a different context. He said, no matter how wide their discretionary powers:

> ...a trustee's primary duty is preservation of the trust assets, and the enlargement of recognized powers does not relieve him of the duty of using ordinary skill and prudence, nor from the application of common sense.

59 In my view, there is more involved in this case than volunteering information. In the ordinary course of its contractual responsibility as administrator or custodial trustee, the defendant became aware, as found by the trial judge, that required contributions were not being made. In view of the fact that payments were flowing out of the fund, a prudent administrator, in my view, was required to make inquiries of the Company and possibly of the actuary which would have permitted the defendant to make a prudent decision about what should be done to protect the beneficiaries. The duty of care it owed to the beneficiaries did not permit it to do nothing when the plan was at risk. Simple inquiries would have filled in any gaps that existed in the defendants understanding of the context.

60 Thus, within the scope of its duties as administrator, it is my view that the defendant breached its duty of care to the

beneficiaries when it failed to respond to the discontinuance of Company contributions.

61 Once it is concluded that the defendant had a duty to respond to this discontinuance of Company contributions, it follows that the defendant was obliged to inform the beneficiaries that the plan was at risk.

62 A further matter that must be considered is the $30,000 payment made by the Company for regular pensions in November, 1988. It might be argued that this payment supports the views of the trial judge that the Company indeed appeared to be taking a "holiday" and that the defendant, not being required to make collections, was entitled to assume that payments would be made as required.

63 I am unable to accept that view. That payment, except for the $2,374.50 paid in October, 1987, was the first payment for regular pensions since November, 1986, a period of 23 months. At the date of that payment, there had been only four undersized payments for enriched pensions in early 1987, and none in the first eleven months of 1988.

64 In my view, the defendant as a prudent trustee had an obligation to respond appropriately before the $30,000 payment was made.

65 Because he was dismissing the plaintiff's action, the trial judge did not undertake any damages assessment. The plaintiff called an actuary to estimate the plaintiff's loss at $291,216, which includes a past loss, after giving credit for pension payments actually received of $49,904, plus the present value of the future loss, as of the date of trial in March, 1994, of $241,312.

66 On the other hand, the defendant urges that, if necessary, the question of damages ought to be sent back to the trial court because of the need for decisions on the life expectancy of the plaintiff, and on the difficult questions of mitigation or contributory negligence arising because of evidence that the plaintiff knew, or suspected from his own sources, that the plan was underfunded.

67 I agree that this question should be remitted to the trial court. In this judgment, I have pronounced only on the obligation of the defendant to warn the plaintiff of the risks created by the failure of the Company to make required payments. The defendant is not foreclosed from arguing such other defences as it may be advised.

THE WINDING-UP

68 In the alternative, the plaintiff claims that the defendant failed to protect him during the winding-up of the plan. Specifically, the plaintiff argues that the defendant could not properly appropriate the corpus of the trust to purchase 70% pensions for other members with funds to which he was equally entitled. If the plaintiff succeeds on this ground of appeal, he would be returned to the equivalent of a 70% pension.

69 It appears from the evidence that in 1985, the Company was expecting substantial numbers of early retirements consequent upon the downsizing of the company's operations. Accordingly, the advice of the actuary was requested. He drafted an amendment to the plan, called P-9, which specified several kinds of improved benefits and necessary funding requirements. Clause 7 imposed restrictions on the amount of pensions that could be paid, and clause 8 provided that in the event of termination or winding-up, clause 23(c) of the plan (which provides for the distribution of the assets upon "termination" of the entire plan) would apply only:

> ... to that portion of the additional pension benefits which can be financed by the extent of the special payments made in respect of such benefits.

70 If adopted as an amendment to the plan, clause 7 of P-9 might have limited the amount of the plaintiff’s pension, and clause 8 would have permitted distribution for enriched pensions, upon a winding-up, only to the extent such enrichments had been funded by

special Company contributions. P-9 was not adopted until 1991, however, and clauses 7 and 8 were not included in that amendment. It may have been for this reason that the trial judge found that the plaintiff's original pension was a proper one under the plan.

71 The basis for the plaintiff's reduced pension (below 70%) resulted from a recommendation of Mr. Taylor, the plan's actuary, that the plaintiff's original pension represented an overpayment, and that a drastic "claw-back" was necessary to correct the account. P-9, as originally drafted, was the basis for this recommendation because the actuary concluded, wrongly in the case of the plaintiff, that some of these enriched pensions did not comply with its terms.

72 The trial judge dealt with the merits of this claw-back this way:

> When he [Taylor] decided that Mr. Froese had been overpaid, Mr. Taylor was out of his own field of expertise. The basis for his decision was the absence of formal documentation in the files of Johnston Terminals.
>
> Non-lawyers attach much more significance to "technicalities" than lawyers do, despite popular belief to the contrary. No competent lawyer would have been buffaloed by the state of Mr. Froese's personnel file. The pension of Mr. Froese had gone to the Board of Johnston Terminals, it had been approved, and there was express documentation of that, although certain documents of a standard type were either missing or had never come into existence. The rationale for concluding that Mr. Froese had been overpaid "permitted form to triumph over substance", in the words of the Ontario Court of Appeal in ***Truckers Garage Inc. v. Krell***.

> I agree with the contention of Mr. Froese that his pension could have passed muster under the applicable laws and regulations.
>
> I conclude that the amount of the original pension was lawful and proper.

73 I accept the judge's conclusions in this respect. As the plaintiff cannot recover his loss from the Company, he must succeed, if at all, against the defendant, who decided to reduce the plaintiff's pension and then to give up the fund, even though it knew that funds deducted from the plaintiff's pension would be used to purchase annuities for other beneficiaries.

74 I next propose to review some of the history leading up to the reduction of the plaintiff's pension and the winding-up on the plan.

75 A memo dated October 28, 1991, based largely upon information obtained from the actuary, discloses several significant facts which I shall paraphrase as follows:

> 1. The plan was in a deficit position probably since the market crash in [October] 1987;
>
> 2. Prior to 1987, the Company authorized additional payments to select pensioners, including some senior executives, as an inducement for them to retire early. The liability for funding these additional pensions was that of the Company.
>
> 3. The Company did not have resources to contribute the amounts necessary to overcome the deficit, and was suggesting that both the actuary and the defendant had some responsibility in this connection;

> 4. The defendant was not anxious to advance any claim against the actuary because his firm was a considerable source of new business for the defendant;
>
> 5. The Company expected that it would have to renege on its commitment to the unfunded pensioners.

76 On November 20, 1991, in another memo, the defendant recognized its own potential liability. It states the purpose of the memo to Head Office "is to formally report to you a potential liability we may have regarding the above mentioned pension plan."

77 In December, 1991, the defendant was expecting calculations from the actuary for the wind-up of the plan. That this question was very much in the mind of the defendant's officers is demonstrated by a letter dated January 15, 1992, from the defendant to the actuary seeking information and asking hard questions. It ends with this statement:

> I would appreciate hearing from you at your earliest convenience regarding these concerns we have expressed. In order for all parties to ensure that any payouts from the Plan are effected in accordance with the provisions of the Plan, we may be required to engage external legal counsel. <u>As well, we would want to ensure that the funded status of the Plan is clarified to our satisfaction in order to enable us to properly discharge our fiduciary obligations to the Plan Members.</u>
>
> (emphasis added)

78 On January 15, 1992, in a memo to Head Office, the defendant wrote:

> As this issue gets more contentious each day, I think it is time to engage external legal counsel to ensure that the interests of beneficiaries are handled appropriately.

79 On February 4, 1992, the defendant's officers met with the actuary, Mr. Taylor, who advised that certain pensions were enriched between 1985 and 1988, and that while "some of them were proper, others were doubtful and others were probably invalid." Recipients of questioned payments are not identified in this memorandum.

80 The next day, the defendant received a copy of a legal opinion obtained by the Company dated August 23, 1991. This opinion assumed contributions by employees and the Company were suspended as of December, 1988 (which was not true: employees' contributions, as the defendant knew, continued into 1990). Notwithstanding this, the opinion concluded, correctly I think, that the plan had not been terminated. This opinion estimates a $2.5 million shortfall, of which $1 million was attributed to the market crash, and $1.5 million to "unauthorized payments." The evidence does not disclose how this latter amount is calculated. I suspect it relates largely to the payment of enriched pensions and not primarily to alleged miscalculations of original pensions.

81 On March 20, 1992, the actuary, Mr. Taylor, submitted a comprehensive report which was obviously the basis for the

recalculation, reduction and claw-back of the plaintiff's pension. The following comments about the report are necessary.

82 The report states:

> We have estimated that the assets of the plan will be sufficient to only finance 70% of basic pension benefits. The amount of individual reduction will vary, with an estimated reduction of 30% or more, but the final calculations of these reductions will depend on the procedure used to wind-up the plan and, in turn, the wind-up procedure will have to take into account certain aspects of trust law and the plan text. In particular, the wind-up procedure will have to take into account the financial consequences of the corporate downsizing which was effected through the early retirement program. This program commenced in 1983 and, we understand, ended in 1987.

83 The report stated that 36 out of 96 current pensioners were provided with early retirement improvements under either P-7 or P-9, although he discovered that some amendments, prepared in 1985, were not ratified until "a later date". This obviously refers to P-9, which we now know was not adopted until 1991.

84 Under the heading "Company Contributions", it was stated:

> We understand from discussions with the Company that, although some Company contributions were made following the delivery of our actuarial valuation report to the Company in December, 1986, the Bank of B.C. called its loans to the Company in July of 1987, in the amount of some $16 million and placed a monitor in the Company (until July 1988), and that the Company was during this period permitted to only pay the expenses to operate the Company in order to commence the liquidation of various assets. During this period no Company contributions were made and to the best of our knowledge and understanding, no Company contributions have been made since July, 1987.

> Despite the suspension of Company contributions from July, 1987 [for early retirement pensions], the pension plan continued to credit benefits for service, and employee contributions continued to be deducted and remitted to the plan trust until December 31, 1988.
>
> **Solvency Valuation at June 30, 1987**
>
> As a result of the Company only being permitted to pay operating expenses, the Company was concerned as to the solvency status of the plan and instructed us to make an estimated solvency valuation as at June 30, 1987. Based on data supplied to us, which we considered to be reliable, we estimated that the plan had a small surplus on a solvency basis, of about $15,000, and that this surplus had developed primarily because of gains from investment returns up to that date.

85 With apparent regard to Granholm and J. Miller, the report states:

> In the course of a previous review of the plan records and financial statements we identified certain payments that appear to have been made from the plan trust in error, to 2 retired members. These payments involve amounts that were due from the Company to the ex-employee, and this matter is now the subject of discussions between the Company and Montreal Trust. Our solvency valuation has accounted for these payments as amounts due to the plan and trust, and we understand that steps are being taken to recover these over-payments, either through the corporate trustee, Montreal Trust, or by way of a charge against future pension benefit entitlements.
>
> If these over-payments are not recovered, together with investment earnings thereon, this will have an adverse effect on retired members over and above our current calculations. Our recommendation on the procedure to be adopted to recover these over-payments is given later. The accumulated value of these over-payments to date is about $200,000.

86 With possible reference to the plaintiff, it is stated:

> In the course of setting out the procedure for wind-up, we requested and were provided in December, 1991 with the personnel files of all of the employees, and have made our best efforts to review those files to determine which pensioners were early retirements, and how the pension benefit improvement was calculated. At this time, some of the individual files show no records of how the calculations were done. A few of the early retirement improvements are not consistent with Amendment P-9 and we are forwarding material on these cases to the Retirement Committee.

87 It is obvious the actuary concluded the plaintiff had been substantially overpaid and this error on his part was carried right through into the wind-up of the plan.

88 On page 8 of the report, the actuary clearly indicates that he believed that P-9 included the missing clause 8, and that all enriched pensions for retirees after January 1, 1983, would be subject to that clause. The defendant must have been aware that this was factually incorrect because, as administrator of the plan, it must have known that clause 8 had never been adopted.

89 Under the heading "Terms of Wind-Up" the actuary stated:

> 3. <u>Under paragraph 8 of Amendment P-9</u>, none, or virtually none, of the improvements in pension benefits provided to early retirements has been financed by additional special payments by the Company. <u>Under clause 8 of this amendment, upon termination or wind-up of the plan, these additional pension benefits will have to be discontinued.</u>
>
> 4. If the plan is wound-up effective as of December 31, 1988, which is when the plan discontinued future service credits, then, <u>applying paragraph 8 of Amendment P-9,</u> all improvements in pension benefits that were paid after that date should now be recovered. This recovery would be by way of implementing a charge on an individual basis

> against future pension benefits such that the charge has a current actuarial equivalent value of all such payments made since December 31, 1988, accumulated to date at a market rate of interest.
>
> (emphasis added)

90 On page 10 of the report, the actuary referred to several outstanding matters that were yet to be resolved, and said a legal opinion would be required "on the final wind-up of the plan". "Correspondingly," he advised, "it is not possible to finally wind-up this plan until these matters have been resolved or clarified." As will be seen, no such opinion was ever obtained.

91 The report then recommended, as an interim measure, the immediate reduction of pensions to 70% of what would have been paid without enrichment, and a claw-back of payments already made. It also included a recommendation that:

> ...when the plan is finally wound-up, and assuming that the interim measure described above shall be adopted as the final calculation of the future pension benefit entitlements of each member, then the beneficial interests of each member shall be calculated...for winding-up the Plan.

92 Thus, without clause 8 in the amended P-9, it was not necessarily correct, as assumed in the report, that pension improvements would only be payable upon a winding-up to the extent that special funding had been provided.

93 I pause to mention that, in cross-examination, the actuary admitted that the report contained several errors and that it was misleading.

94 Clause 8 was the basis for reducing <u>enriched</u> pensions. In proper cases, a claw-back for <u>miscalculated</u> pension payments could be recovered by way of set off. The plaintiff suffered deductions back to a lower level and for a claw-back of benefits paid although there was no reason for him to suffer deductions on either ground.

95 On March 20, 1992, a trust officer of the defendant wrote a memo questioning the accuracy of the actuary's report and its fairness to Granholm and J. Miller. He noted:

> Recovery of pymts [sic] due to errors in original calculations have not been specified.

But nevertheless, he advised:

> I told [the actuary] in principal [sic] the report and method of calculation looked fine. We do have a fiduciary resp. [sic] to the beneficiaries and could not commit without review by our legal counsel.

96 Obviously with prior knowledge of this report, the Company wrote and sent a letter to the plaintiff dated March 19, 1992. This letter (the Douglas letter) enclosed a copy of the report, and advised in part:

Effective April 1, 1992:

> Basic pension benefits are reduced to 70% of the current amount;
>
> For those members who retired before January 1, 1983 and who also received an enhanced pension benefit in addition to their basic pension, the enhanced pension benefit is reduced to 70% of the current amount;
>
> For those members who retired after January 1, 1983 and who also received an enhanced pension benefit in addition to their basic pension, the enhanced pension benefit is discontinued. Also for these members, payments of these enhanced pension benefits made since December 31, 1988 are to be recovered by way of a reduction in future pension entitlements. The amount to be recovered is calculated as prior payments of enhanced pension benefits plus interest at 12% p.a. up to October 31, 1991. This amount is then set equal to the estimated market value of an annuity, so as to calculate the amount of reduction needed;
>
> Similarly, in cases where any excess payments or miscalculated payments have been identified in the audit, prior payments of this type, plus interest, are to be recovered by way of an additional reduction.

97 Attached to the plaintiff's copy of this letter was a statement showing that his pension should originally have been calculated without improvements; that is, at $1,746 rather than what he had been receiving, namely $2,584. This new pension amount was then reduced by 30% to $1,222.59. In order to recover past improvements, a claw-back of $658.50 was applied, leaving a final pension of $564.09. This letter does not mention winding-up the plan, but that possibility is mentioned in the report.

98 Thus, the report of the actuary, which does not identify the plaintiff except possibly as one whose file had been examined, was

adopted by the Company and by the defendant as a valid basis for a recalculation of the plaintiff's pension, a reduction of 30%, and a claw-back, for the reasons already stated. These reasons included both alleged error in the original calculation, and an acceptance that enrichments could not be paid in the forthcoming wind-up because of clause 8 of P-9, which had never been adopted. The recommendations were subject to a detailed legal opinion which was never obtained.

99 Three days later, on March 23, 1992, the Company delivered a Resolution to the defendant in the following terms:

> JOHNSTON TERMINALS & STORAGE LTD.
>
> "The Board of Directors reviewed the report dated March 20, 1992, prepared by Mr. Les Taylor of The Wyatt Company regarding wind-up the Pension Plan, a copy of which is attached hereto and forms part of these minutes.
>
> UPON MOTION DULY PROPOSED AND SECONDED IT WAS UNANIMOUSLY RESOLVED THAT the Board accept the recommendations contained in The Wyatt Company report.
>
> UPON MOTION DULY PROPOSED AND SECONDED IT WAS UNANIMOUSLY RESOLVED THAT the Board instruct the Pension Committee to advise Montreal Trust to amend benefit payments to all plan members effective April 1, 1992, in accordance with The Wyatt Company Report and the calculations contained therein."

100 There must have been some accompanying schedule showing the amount of reductions to be paid to individual members because the plaintiff's monthly pension was reduced as of April 1.

101 At this point, the defendant obtained a legal opinion on April 6, 1992. The opinion was based only on the agreement, the plan and amendments, the actuarial report, and the Resolution just quoted. It advised only that, on the basis of the foregoing documents, it would be proper for the defendant to amend benefit payments to all plan members on April 1, 1992, in accordance with the actuarial report and its calculations. The author obviously assumed the correctness of the report, and clearly took a narrow view of the defendant's obligation to the beneficiaries, particularly individual beneficiaries who were being singled out for special treatment. Although the report identified only two retired members (Granholm and J. Miller) who were said to be in receipt of erroneous benefits, the plaintiff's pension entitlement, and possibly that of other pensioners, was also re-calculated. The opinion does not mention the agreement's certification requirement, nor does it purport to advise on the proposed winding-up of the plan.

102 After this, there was period of inactivity. The defendant's attitude is probably summarized by its solicitor, who noted, in a memo to file dated March 31, that the Director's Resolution had "modified" the plan and that, "[U]nder the circumstances, it seems that the only course of action, given the shortfall in the assets of the fund is to do as recommended by the [actuaries'] Report." With respect, I do not agree that the Resolution modified the plan.

If it did, it would be invalid because s. 23(a) of the plan protects earned benefits.

103 It is unfortunate that the defendant did not respond in any way to the different and unequal treatment recommended for individual pensioners, or to the larger responsibilities it admitted it owed to the beneficiaries.

104 The plan was finally wound up in July, 1992, by transferring the corpus of the fund to a life insurance company for the purchase of reduced individual annuities. The Company's instruction for the disbursement of the fund is contained in a letter to the defendant dated July 31, 1992:

> Herewith your authorization to disburse funds and follows:
>
> - To Montreal Trust usual management fees to 2 p.m., July 31/92. We do not expect to be charged for your outside legal counsel. You should take into account that there will be no assets in the trust at month-end closing. Please notify Wyatt by fax of your final number.
>
> - To Wyatt, fees to 2 p.m. July 31, 1992, to be notified to you by fax.
>
> - Refund payments to deferred pensioners, Wyatt will fax to you the amounts. These are to be held in a suspense account, under the same registration number, pending completion of "roll-over" documentation.
>
> - Philips Hager North will not charge for July since there are no month-end closing assets.
>
> Balance of trust at 3 p.m. to be transferred to Standard Life, attention Don Liesch.

105 The procedure for winding-up the plan is specified in s. 23(c) which provides in part:

> (c) Termination
>
> The Company may at any time, by resolution of its Board of Directors, terminate the Plan by filing with the Trustee a certified copy of the resolution of the Board of Directors authorizing the termination of the Plan and trust.
>
> ***
>
> When the assets have been allocated as heretofore provided, the Trust Fund shall be terminated. The interests of those members, retired members, former members, their beneficiaries and joint annuitants described in paragraph (ii) shall be paid to a life insurance company to purchase immediate or deferred life annuities, with payments commencing at age sixty-five (65) ...

It is clear, however, that such termination may only be done in accordance with the terms of the Agreement.

106 It is apparent that the plaintiff was wrongly deprived of a substantial part of his pension because no one questioned or checked the conclusions or assumptions of the actuary. The defendant argues that it was not a part of its responsibility to check the calculations made with respect to every beneficiary. In a case such as this, there could be thousands of employees and it would be unreasonable to expect the trustee to descend into that kind of detail.

107 But it is necessary to consider whether the casual approach taken with regard to these drastic measures conformed with the defendant's duty of care. The Company resolution merely adopted the recommendation of the actuary's report, which is expressly stated to be subject to a number of other matters and to a legal opinion that was not obtained, except to the extent already described. The report was singularly lacking in detail about the plaintiff or any beneficiaries for whom re-calculations or claw-backs were being recommended. It appears the defendant accepted without hesitation or inquiry the calculations submitted with the report.

108 After the April 1 reduction in benefits, the actuary explored the purchase of annuities as authorized by s. 23 of the plan, and eventually settled upon a specific insurance company. Except for the letter of instructions, however, neither the Company nor the defendant passed in a formal way upon the final disposition of the fund, or upon the amount of the individual annuities. The defendant acted solely upon the report, the resolution and the Company's letter of instruction. It is unnecessary to consider whether the foregoing was sufficient as between the Company and the defendant. It is another question whether it was sufficient as between the defendant and the beneficiaries. I add that, in my judgment, the April and July directions given to the defendant by the Company were parts of a single scheme to carry out the recommendations of the actuary’s interim report which, as I have

said, was not a final report, and was manifestly premised incorrectly.

109 The result of all these procedures was to put the fund beyond the reach of the plaintiff whose pension entitlement had been incorrectly and permanently reduced by over $2,000 a month. I say "incorrectly" because of the findings of the trial judge.

110 The first question is whether the defendant owed any duty of care in connection with the wind-up of the plan. I have no doubt on that question. As administrator of the plan, it was clearly within the area of the defendant's responsibility to ensure that the plan was properly wound up.

111 The second question is whether the defendant breached its duty of care to the plaintiff as a beneficiary during the wind-up of the plan.

112 So far as I can ascertain, the defendant had no authority from the Company to carry out the recommendations of the actuary apart from the March 20, 1992, resolution quoted above, and the directions contained in the letter of July 31, 1992. In fact, at trial, the resolution was the basis upon which the defendant tried to justify what it had done to the plaintiff's pension. The actuary gave this evidence:

Q Sir, is it your position that the wind-up, the division of assets on wind-up is ultimately justified by the fact that the board of directors approved your report?

A It was then.

Q I see. Was it your position that it really didn't matter what amendment P-9 said?

A No.

Q Did it matter at all that P-9 wasn't enacted if you chose to wind-up the plan?

A I'm sorry, yes.

Q That was your position?

A That was my understanding that, yes, in the actual final adjustment to cheques for April 1st.

113 The defendant's Factum on this appeal states at p. 15:

> In any event, Montreal Trust is protected by the exculpatory language in paragraphs 2,3 and 4 of Clause Ninth. Under paragraph 2, Montreal Trust was entitled to rely upon the Company's resolution and the Wyatt report received in March 1992 and the directions it received in July 1992 to transfer funds to Standard Life. Paragraph 2 also specifically stated that Montreal Trust did not have to make any investigation or inquiry. Paragraph 3 stated that Montreal Trust was not responsible for the adequacy of the Trust Fund to meet and discharge liabilities under the Plan. Paragraph 4 provided more generally that Montreal Trust was only liable if it was negligent or wilfully misconducted itself. The evidence demonstrated that Montreal Trust was not negligent and it did not wilfully misconduct itself.

114 The Trust Agreement provides:

> SECOND: Subject to the provisions of Article THIRD hereof, the Trustee shall from time to time on the written directions of the Company <u>certified to be in accordance with the terms of the Plan</u> make payments out of the Trust Fund to such persons in such manner, in such amounts and for such

> purposes as may be <u>certified to be in accordance with the terms of the Plan</u> and upon any such payment being made, the amount thereof shall no longer constitute a part of the Trust Fund.
>
> The Trustee shall be under no liability for any payment made by it pursuant to the direction of the Company <u>certified to be in accordance with the terms of the Plan</u> and shall not be under the duty of making inquiries with respect to whether any payment directed by the Company is made in pursuance of the provisions of the Plan.
>
> ***
>
> NINTH: The Trustee shall not be liable for the proper application of any part of the Trust Fund, if payments are made in accordance with the written directions of the Company <u>certified to be in accordance with the terms of the Plan</u> as herein provided, nor shall the Trustee be responsible for the adequacy of the Trust Fund to meet and discharge any and all payments and liabilities under the Plan. All persons dealing with the Trustee are released from inquiry into the decision or authority of the Trustee and from seeing to the application of any moneys, securities or other property paid or delivered to the Trustee.
>
> The Trustee shall not be liable hereunder except for its own negligence or wilful misconduct.
>
> (emphasis added)

115 The plaintiff argues that neither the said resolution nor any other documentation constituted authority to make payments out of the fund for the purchase of 70% (or less) annuities because of the absence of any certification as required. As a beneficiary, untrammelled by any contractual "exonerations", the plaintiff asserts a right to sue the defendant for loss caused by these wrongful payments. The trial judge dealt with this argument as follows.

> Mr. Froese argued that, in acquiescing to the "overpayment" reduction, Montreal Trust did not receive from Johnston Terminals a direction which included the words "certified to be in accordance with the terms of the Plan", thus taking the instruction out of the ambit of the protection of Article SECOND of the trust deed. While it may be said that, generally, the law has moved away from formalities, it equally may be said that those which are used in modern times may be taken to have been consciously accepted. Here, we have the glimmerings of an obligation on the part of Montreal Trust to demand a solemn step on the part of Johnston Terminals, in order to immunize itself from liability. The certification requirement, however, was meant to govern the liability of Montreal Trust to Johnston Terminals for a wrongful payment. It is addressed to payments made. What we are dealing with here are payments refused. Additionally, the second branch of Article SECOND, which is several, negatives any duty of inquiry.
>
> More to the point, Article TWELFTH provides that, on the termination of the trust, the trust fund shall be paid out by the Trustee as directed by the Company. Here, Johnston Terminals, with the collaboration of Mr. Taylor, directed Montreal Trust to purchase the annuity on the basis of the "overpayment" analysis which I have found to be wrong. Under the trust deed, Montreal Trust was entitled to rely on these instructions.
>
> It is not that Mr. Froese is bound by the terms of the trust deed. He is not. Among other things, he is not caught by Article EIGHTH, which purports to immunize Montreal Trust from any action brought by him. It could not be more obvious that this provision has no effect against him. It is, rather, that the obligations of Montreal Trust were defined in those parts of the trust deed which continued to apply to it after 1985.
>
> Montreal Trust was entitled to accept the instructions of Johnston Terminals as to the overpayment and the clawback. It had no obligation of independent investigation.

116 It is apparent that the trial judge considered that the defendant's contractual responsibility (and exonerations) defined the limits of its duty. With respect, I think that is wrong. As I have already mentioned, the agreement defines the function --

custodian-administrator -- within which the duty of care operated, but that does not saddle the beneficiaries with all the terms of the agreement. It follows, in my view that the trial judge was also wrong when he concluded the defendant was entitled to accept (and act upon) these casual, uncertified instructions without question and without prudence.

117 In my view, there was no need for the defendant to make independent inquiries or investigations in order to know that the beneficiaries, or some of them, were at risk. At the very least, the defendant knew or should have known that the report upon which the entire winding-up was based was seriously flawed; it knew the Company was seriously in default and adverse in interest to the beneficiaries; it knew the proposed winding-up amounted to forgiveness of the Company's default; it knew the report recommended and the Company confirmed that the files of individual beneficiaries had been "reviewed" and were being treated differently on questionable legal grounds; it knew no legal opinion had been obtained; it knew, because of the failure of the Company to make required contributions, that the defendant itself might have some responsibility; and it must have observed that the Company had not certified that the alienation of the entire fund in the manner and for the purpose proposed was authorized by the plan.

118 In these circumstances, in my view, it was imprudent and negligent to hand over the fund regardless of the question of certification. The defendant breached its duty of care to the plaintiff when it gave up the fund in these circumstances. I recognize that, as a "real trustee", the defendant was in an impossible position, but that did not permit it arbitrarily to adopt a course of convenience. It was required to be careful and as trustee to maintain an even hand between these obviously conflicting interests. It could not do so by putting the fund out of the reach of beneficiaries it knew were being arbitrarily deprived of substantial parts of their pensions.

119 I test my conclusions by asking what the position of the defendant should be if, as a "real trustee", it had received even a certified direction to hand over the fund for a purpose it knew would put it beyond the reach of the beneficiaries. Breach of trust, or at least negligence, spring immediately to mind. I have no difficulty concluding that the defendant breached its duty of care to the plaintiff and it is not necessary to select just one of those courses of action. The plaintiff is entitled to succeed on both. Such breach, in my judgment, directly caused or contributed to the cause of the losses I have described.

120 I do not say that the defendant was required to check every calculation or to satisfy itself that every member of the plan was treated with perfect correctness, as that might be an impossible task in a large or even medium-size pension plan. A trustee must, however, respond to obvious issues of danger to beneficiaries which were, in this case, easily identified by the defendant upon reading the actuary's report. At the very least, prudence required the defendant to act on the basis of independent, informed advice when it knew from reading the report and the consequent calculations that one or more of the beneficiaries were being deprived of substantial portions of their pensions on highly doubtful grounds. The defendant also had the option of seeking the opinion of the court but there is no suggestion in the evidence that that was ever considered.

121 I have also been concerned by the failure of the plaintiff to take any steps to prevent the dispersal of the fund. His solicitor was in touch with the defendant shortly after March 20, 1992, but nothing further was heard from him. In this respect, however, the report contemplated a legal opinion, and the plaintiff was entitled to assume that such an opinion would be obtained before the plan was wound up as suggested in the report. In any event, the plaintiff was not obliged to bring proceedings prior to the winding-up of the plan.

122 Thus I conclude that the plaintiff is also entitled to succeed on his alternative argument. I suppose it is possible that, but for the reduction and claw-back of the plaintiff's and some other pensions, all other pensions might have been less than 70%. I leave that to counsel to consider. The plaintiff is entitled to have his pension supplemented by an award of damages, either by way of periodic payments, or by a present value lump sum to bring his pension up to 70% (or as may be adjusted) of his original pension.

123 I would not like to leave the impression that custodial trustees will always be subject to liability beyond the terms of the trust agreement. The Trustee does, however, have (and has in law always had) a general duty of care to beneficiaries which, on the facts of this case, was not discharged.

124 The defendant claims relief under the ***Trustee Act*** R.S.B.C. 1979, c. 414. With respect, I would not accede to that application. The defendant contributed in a substantial way to a serious loss suffered by the plaintiff and I would not deprive him of his remedy on a discretionary basis.

125 I would allow the appeal to the extent I have mentioned. I would remit to the trial court the question of whether the plaintiff is entitled to damages for the failure of the defendant to warn him in 1987 or 1988 that his pension was at risk. The

plaintiff is entitled to damages at least in an amount sufficient to restore him to a 70% or lesser adjusted pension as directed above.

"The Honourable Chief Justice McEachern"

I AGREE: "The Honourable Mr. Justice Williams"

Reasons for Judgment of The Honourable Mr. Justice Gibbs:

126 The appellant seeks reversal of an order in the court below dismissing his claim against the defendant. The third and fourth party proceedings have been severed and are being held in abeyance pending the decision on this appeal.

127 The claim sounds in tort. It is founded upon allegations of breach of duty on the part of Montreal Trust in the administration of a pension fund forming part of a pension plan. The plan was set up by Johnston Terminals Ltd. in July of 1959 and terminated in March of 1992 at a time when there were insufficient funds to meet all of the plan membership entitlements.

128 The plaintiff was receiving a pension when the plan was terminated. On termination his pension was sharply reduced hence this proceeding. He claims compensation from Montreal Trust of approximately $240,000 to restore that to which he says he was entitled and would have enjoyed but for the aforesaid breaches of duty.

129 There is no claim against Johnston Terminals even though it seems clear that failure by Johnston Terminals to maintain an adequate level of employer funding during the latter years of the plan was the direct cause of the plaintiff's loss.

130 Montreal Trust was not a party to the pension plan under which the pension fund was created. But the settlor, Johnston Terminals, made provision in the plan for Montreal Trust to perform functions under contract limited to custody and management of the pension fund including the investment of it in a permitted class of securities:

> <u>TRUST FUND</u>
>
> 2. All contributions of the members and of Johnston Terminals & Storage Ltd. and of its subsidiary companies as set forth in Exhibit A hereto (hereinafter called "the Company") will be paid into the Trust Fund (hereinafter called "the Fund") established under the terms of the Trust Agreement executed between the Company and Montreal Trust Company and dated July 1, 1959
>
> The Fund will be administered by the Montreal Trust Company until or unless a successor trustee or trustees are appointed. The Trustee shall invest the fund in securities and loans of a class permitted by The Pension Benefits Act, 1967 of Alberta (hereinafter referred to as "the Alberta Act") and any regulations thereunder or any amendment thereto.

131 Johnston Terminals retained all of the other responsibilities for the management and operation of the pension plan. Montreal Trust is not mentioned anywhere else in the plan.

132 Under Clause 11 of the pension plan Johnston Terminals covenanted each year to make a contribution to the pension fund sufficient in amount, when added to the value of the assets of the fund and the employee contributions, to fund the pension plan liabilities:

COMPANY CONTRIBUTIONS

> 11. The Company shall from time to time but not less frequently than annually, contribute such amounts as are not less than those certified to by an Actuary as necessary to provide for payment of the pension benefits accruing to members during the current year pursuant to the Plan and shall make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued to the credit of members after taking into account the assets of the Fund, the contributions of the members during the year and such other factors as may be deemed relevant.

133 As the annual contribution of Johnston Terminals turned in part upon the value of the pension fund assets, the investment performance of the pension fund was of significant interest to Johnston Terminals. Over time it became dissatisfied with the investment performance and finally, on May 23, 1985, it transferred the investment responsibilities from Montreal Trust to M. K. Wong Associates. It is common ground that a precipitous fall in stock market values in October of 1987 had a seriously adverse impact on the value of the assets in the pension fund.

134 With the removal of the investment responsibilities Montreal Trust was left, in terms of the pension plan and at the critical times, only with the obligation to administer the pension fund.

135 After 1986 Johnston Terminals made only sporadic contributions to the pension fund. The fund was not sufficiently endowed to be self funding in the long term although the trial judge found as a

fact, not disputed by either party, that there would have been sufficient to meet the plan requirements if the fund had been wound up in 1987 or 1988. Under Clause 23 of the pension plan Johnston Terminals was empowered to terminate the plan and distribute the fund by resolution of the board of directors. That formal termination step was not undertaken until March of 1992.

136 The allegations of breach of duty against Montreal Trust are contained in paras. 6, 17 and 21 of the statement of claim. There are three, all expressed as breach of trust or, alternatively, negligence:

1) failure to ensure that the plan was fully funded;
2) failure to warn plan members of the failure of Johnston Terminals sufficiently to fund, and
3) purchase of annuities in a reduced amount without the consent of the appellant and knowing of his "claim".

137 Here is the precise text of the relevant paragraphs of the statement of claim:

> 6. By virtue of s. 11 of the Johnston Pension Plan and the defendant's position as trustee, or, in the alternative, the duty of care owed to the plaintiff by the defendant, it was the defendant's obligation:
>
> (1) to take the necessary steps to ensure that the Plan was fully funded or, in the alternative,

> (2) to notify the members of the Plan, the cestuis que trustent, including the plaintiff, of Johnston's failure to fund.
>
> . . .
>
> 17. The defendant committed a breach of trust, or in the alternative, was negligent, in failing to fulfill its obligations as set out in paragraph 6 above in response to Johnston's failure to fund its Pension Plan after 1986, and as a result, the Plaintiff has suffered loss and damage.
>
> . . .
>
> 21. The defendant purchased the annuities in breach of trust or, in the alternative, negligently, without the plaintiff's knowledge or consent, with knowledge of the plaintiff's claim, and thereby made it impossible for the plaintiff to receive from the funds held in trust for the Johnston Pension Plan the amounts the plaintiff was entitled to receive.

138 A significant aspect of these alleged breaches of duty is that none of the three is specifically imposed upon Montreal Trust in either the pension plan or the separate contract between Johnston Terminals and Montreal Trust. It follows that the duties alleged to have been breached must flow from the common law and attach by necessary implication to the duties that are specifically imposed by the trust instrument. It is upon this basis that the appellant rests his case, contending that the pension plan is the trust instrument and, in para. 4 of the statement of claim, that "The defendant [Montreal Trust] is the trustee of the Johnston Pension Plan". However, the liability structure collapses if these latter contentions are not supported by the evidence, and they are not, at least to the extent of rendering Montreal Trust liable.

139 On the evidence this is not a traditional trust case where there is a single trust instrument and a single trustee duty bound to follow the terms of the trust instrument. Here there are two trust instruments each with a scope different from the other and each with its own trustee. At p. 104 of the *Law of Trusts in Canada*, 2 Ed., 1984, Dr. D.W.M. Waters described the relationship when there are two trustees with responsibilities divided between them, as is the case, and in the circumstances present, in the case at bar:

> The custodian trustee is a person, natural or corporate, who is vested with title to the trust property, while the management of the trust is left in the hands of other trustees who are known as the managing trustees. In Canada the term is used in connection with pension or other investment trusts when the portfolio is vested in so-called custodian trustee, but the investment policy and decisions are determined by investment managers or consultants.

140 The Montreal Trust responsibilities were confined by Clause 2 of the pension plan to administration of the trust fund created by contributions. It was, therefore, the custodian trustee vested with title to trust property. The management of the trust (the pension plan) was left with Johnston Terminals which thereby fulfilled the role of managing trustee.

141 It is obvious from this division that the burden on the appellant at trial was to fix Montreal Trust with liability notwithstanding the limited role allotted to it. The appellant

sought to discharge the burden by contending that Montreal Trust became trustee of the pension plan by way of incorporation of the pension plan by reference into the separate agreement through the wording of the first recital in the separate agreement:

> WHEREAS the Company has adopted a Profit Sharing Pension Plan for certain of its employees (hereinafter referred to as "the Plan"), a copy of which as amended from time to time is attached hereto and forms a part hereof;
>
> . . .

142 The contention cannot be sustained. The reference does no more than fix Montreal Trust with knowledge, constructive or actual, of the terms of the pension plan. It does not purport to impose pension plan trustee (managing trustee) duties upon Montreal Trust. Neither do any of the other provisions of the separate agreement or the pension plan. There are, therefore, no duties specifically allotted by either the separate agreement or the pension plan to Montreal Trust to which the common law duties alleged in the statement of claim to have been breached can attach by necessary implication. The consequence is that the appellant has not, on the evidence, made out the case advanced in the statement of claim. The trial judge came to the same conclusion although he reached it by a different route, commencing with a misunderstanding of the nature of the appellant's case.

143 It is apparent from para. 9 of his reasons that the trial judge thought that the appellant's case against Montreal Trust was based upon the separate agreement whereas it was not. The claim was made entirely upon the pension plan and the proposition that Montreal Trust was the trustee of the pension plan. There is no mention of the separate agreement in the statement of claim. However, the trial judge's misapprehension about the foundation for the claim led him to analyze the separate agreement and in the process to perform the very useful function of assessing the validity of the alleged breaches of duty against the background of the specific provisions of the separate agreement.

144 The trial judge concluded that he should be guided in his analysis by a passage from the judgment of McLachlin, J. at p. 703 of ***Schmidt* v. *Air Products Canada Ltd.***, [1994] 2 S.C.R. 611 and by a passage from p. 557 of the judgment of Egbert, J. in ***Merrill Petroleums* v. *Seaboard Oil*** (1957), 22 W.W.R. 529 (Alta. S.C.).

145 In ***Schmidt*** McLachlin, J. said:

> The primary rule in construing an agreement or defining the terms of a trust is respect for the intention of the parties or, in the case of a trust, the intention of the settlor. The task of the court is to examine the language of the documents to ascertain what, on a fair reading, the parties intended. Unless there is a legal reason preventing it, the courts will seek to give effect to that intention. The search for an answer to the problem before us must therefore focus primarily on the documents relating to the plans and the intention of the

> parties, if any, with respect to a surplus arising under a defined benefits plan.

146 Applying the primary construction rule from ***Schmidt*** there can be no doubt that neither the settlor nor the parties intended Montreal Trust to be trustee of the pension plan. The clear intention was that Montreal Trust would be confined to the role of fiscal agent and that is what the trial judge found Montreal Trust to be after the investment responsibilities were taken away in 1985:

> It is true that the functions of Montreal Trust from 1985 were clerical and might as easily have been carried out by a bookkeeper with a cheque writing machine as by a big trust company. (Para.26)

147 The passage from ***MerrillPetroleums*** describes the priority sequence of a trustee's duties as between those imposed by the trust instrument and those imposed by general principles of the common law:

> While it is also true that there are certain general obligations imposed by law on any trustee (e.g., the duty not to profit from the trust at the expense of the beneficiaries) the more specific obligations and duties of a trustee are set forth in the instrument creating the trust--in other words, except for those general duties imposed by law on all trustees, the terms of a trust are to be found within the four corners of the trust instrument. The three-way agreement sets forth in considerable detail the right, duties and obligations of the "operator" or trustee, and the trustee is bound to follow the provisions of this agreement even though the instrument might in some instances run counter to the

> general law of trusteeship. In other words, the first duty of this trustee (as of all trustees) was to follow implicitly the terms of the trust instrument, and, secondly, to observe those general principles of trustee law which did not run counter to the express terms of the trust.

148 The emphasis in this excerpt is upon the duty of the trustee "to follow implicitly the terms of the trust instrument", and to observe general principles of trustee law which do not "run counter to the express terms of the trust". Although there are no provisions in the separate agreement which impose on Montreal Trust the affirmative duties alleged in the statement of claim to have been breached, some of the provisions are instructive in the sense that they tend to negative the notion of implied duties of the kind alleged because such implied duties would "run counter" to express terms in the separate agreement.

149 For example, clause FIRST and the third paragraph of clause NINTH of the separate agreement stand in stark contrast to the alleged duty to ensure that the plan was fully funded:

> FIRST: The Trustee shall receive any contributions paid to it in cash or other property acceptable to it. All contributions so received together with the income therefrom (hereinafter referred to as "the Trust Fund") shall be held, managed and administered pursuant to the terms of this Agreement. <u>The Trustee shall not be responsible for the collection of funds required by the Plan to be paid to the Trustee</u>.
>
> [Emphasis added]

. . .

> The Trustee shall not be liable for the proper application of any part of the Trust Fund, if payments are made in accordance with the written directions of the Company certified to be in accordance with the terms of the Plan as herein provided, nor shall the Trustee be responsible for the adequacy of the Trust Fund to meet and discharge any and all payments and liabilities under the Plan. All persons dealing with the Trustee are released from inquiry into the decision or authority of the Trustee and from seeing to the application of any moneys, securities or other property paid or delivered to the Trustee.
>
> [Emphasis added]

150 And likewise Clause TWELFTH is a complete answer to the alleged breach in respect to the purchase of annuities. Montreal Trust purchased annuities as directed by Johnston Terminals. In so doing it "followed implicitly the terms of the trust instrument" in the words of ***Merrill Petroleums***. Clause TWELFTH required it to obey Johnston Terminals instructions:

> TWELFTH: This trust and Agreement may be terminated any time by the Company and upon the termination of the trust and Agreement or upon the dissolution or liquidation of the Company the Trust Fund shall be paid out by the Trustee as directed by the Company subject to the provisions of Article THIRD hereof.

151 As for the alleged breach by way of failure to warn the trial judge was unable to find any such obligation either in law or in equity. Moreover, his findings of fact are to the effect that even if there were such a duty Montreal Trust was not sufficiently informed to be aware of the existence of circumstances which would warrant warnings about the sufficiency of the employer's funding:

> 28 Since Montreal Trust kept track of both company and employee contributions, it must be taken to have been aware of the fluctuations of the company contributions. However, I am unable to find that Montreal Trust was in a position to recognize the implications of them. First, the company was entitled to take contribution holidays under the terms of the plan. That it did so was not necessarily sinister. Secondly, the level of company contributions was not on its face significant. The object of the managers of a pension plan of this kind is to keep it in a position where its assets are sufficient to cover present and future liabilities. This is where the actuary comes in: it sets the level of employer contributions.
>
> 29 Analyzing the viability of a pension fund is an inexact exercise, involving much prediction. Short-term fluctuations in the value of the fund may be tolerable. Additionally, depending on the attrition rate among potential beneficiaries and changes in the employment structure of the company, fairly large employer contribution fluctuations may not be in themselves meaningful. Montreal Trust did not have a context in which what it knew or ought to have known was recognizably a warning signal: in particular, it was not privy to the periodic reports of the actuary.

152 It follows from the above that even on the ***Merrill Petroleums*** concept of "general principles of trustee law" the allegations of breach in the statement of claim cannot be sustained.

153 It is unfortunate that this case took a wrong turning in the court below such that the real issues seem to have gone out of focus. As pointed out earlier, the trial judge mistakenly understood the action to be based upon the separate agreement which he regarded as a collection of "exonerations" of Montreal Trust. Consequently, his judgment was not directed first to determining whether the claim had been established and then, only if necessary,

considering the "exonerations". Instead he dealt primarily with the "exoneration" provisions and found against the plaintiff. That approach led the appellant to rest two of the three grounds of appeal on what the trial judge decided about the effect of what the appellant referred to as "insulating provisions" (exonerations) in the separate agreement. Only the third ground directly addressed a head of liability advanced in the statement of claim, namely, the failure to warn.

154 With respect to the duty to warn ground the appellant relied heavily upon the description of the duties of a trustee found in ***Fales* v. *Canada Permanent Trust***, [1977] 2 S.C.R. 302. Obviously ***Fales*** is an important case in the continuing development of the law relating to trustees, but it is of no assistance to the appellant here. What is says applies in the circumstances of this case with full force to the managing trustee of the pension plan, Johnston Terminals, but has no application to Montreal Trust in its limited, subsidiary, custodian trustee capacity.

155 Notwithstanding the confusion which crept into this case, the real issues became apparent on the appeal and were sufficiently and adequately canvassed. In that connection, even though not all of the trial judge's reasoning is germane, he did make valuable findings of fact and draw conclusions which were generally on point and relevant to the allegations of fault in the statement of claim.

And he made the correct disposition of the case even though he arrived at the end result by an unorthodox route.

156 The burden was on the appellant in this appeal to demonstrate that he ought to have had judgment in the court below. In my opinion he has failed to discharge that burden and so the appeal must stand dismissed.

157 There is one further observation to be made and that is that nothing in these reasons is to be understood as subscribing to the personal opinions of the trial judge which he saw fit to pronounce in paras. 52 and 53 of his judgment.

"The Honourable Mr. Justice Gibbs"