Schmidt *v.* Air Products Canada Ltd., [1994] 2 S.C.R. 611

Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley *Appellants*

v.

Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans *Respondents*

and between

Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans *Appellants*

v.

Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley *Respondents*

Indexed as: Schmidt *v.* Air Products Canada Ltd.

File Nos.: 23047, 23057.

1993: December 1; 1994: June 9.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

on appeal from the court of appeal for alberta

Pensions -- Trusts -- Contracts -- Pension fund -- Surplus -- Entitlement to surplus in defined benefit pension plans -- One plan incorporating a trust fund and not contemplating the reversion of surplus assets to the company -- Second plan originally defined contribution plan but converted to defined benefit plan -- Second plan making no reference to the existence of a trust and specifically contemplating the reversion of surplus assets to the company -- Whether employer entitled to surplus -- Whether employer entitled to contribution holiday in situation where pension fund in surplus -- Employment Pension Plans Act, S.A. 1986, c. E-10.05, ss. 42(2), 58(a), (b), (c) -- Regulations to the Employment Pension Plans Act, Alta. Reg. 364/86, s. 34(9)(b)(i), (ii), (iii), (iv).

Stearns-Roger Canada Ltd. (Stearns) and Catalytic Enterprises Ltd. (Catalytic) merged and eventually became Air Products Canada Ltd. Both companies had defined benefit pension plans for their employees, and both plans were in surplus. Their pension plans and funds were amalgamated and evolved into two virtually identical Air Products Plans, one of which forms the subject of the appeal and cross-appeal; the senior management plan will be affected by the result.

In 1959, Catalytic instituted a contributory money-purchase plan incorporating a trust fund administered by a trustee. By 1966, the plan had been amended to become a contributory defined benefits plan. No provision existed as to the treatment of surplus funds until the plan was further amended

in 1978 to give the employer a purported discretion as to the distribution of any surplus which might remain upon the termination of the pension plan.

The first Stearns plan, created in 1970, was a contributory defined benefits plan until 1977, when it was amended to provide that employee contributions were to be of a voluntary nature only. All relevant versions of the Stearns plan gave the employer a discretion as to the distribution of any surplus which might remain upon the termination of the pension plan.

The amalgamated plan was a contributory defined benefits plan. The plan gave the company a discretion as to the distribution of surplus upon termination and provided for the automatic reversion to the company of any surplus remaining once benefits paid to a member had reached the maximum level specified in the plan. For several years the company transferred no assets to the fund but rather met its contributions from the actuarially determined surplus existing in the pension fund.

The Air Products pension plan was terminated following the sale of most of the company's assets. Actuarial calculations established that a substantial surplus would remain in the plan after all benefits had been paid. Both Air Products, and Gunter Schmidt, on behalf of the Air Products employees, applied to the Alberta Court of Queen's Bench for a declaration of entitlement to the surplus funds. Schmidt also sought a declaration that Air Products be required to repay the amount of fund surplus it had used to take a contribution holiday. The Court of Queen's Bench found that the portion of the surplus derived from the Catalytic fund was to be paid out to the employees,

and that Air Products was not entitled to take a contribution holiday utilising any part of the Catalytic surplus. The surplus traceable to the Stearns fund was found to belong to Air Products. An appeal by the company to the Alberta Court of Appeal in respect of the Catalytic surplus and the contribution holiday and a cross-appeal by the former Stearns employees in respect of the Stearns surplus were both dismissed.

At issue here is the question of entitlement to surplus monies remaining in an employee pension fund once the fund has been wound up and all benefits either paid or provision made for their payment. There is a further related issue as to whether or when employers may refrain from contributing to ongoing pension plans which are in "surplus". Both the appeal and cross-appeal are the same as before the Court of Appeal. The former Catalytic employees are the respondents on the appeal and the former Stearns employees are the appellants on the cross-appeal.

Held (Sopinka and McLachlin JJ. dissenting in part): The appeal by Air Products Canada Ltd. (File No. 23047) with respect to entitlement to any surplus traceable to the Catalytic fund should be dismissed and its appeal with respect to its entitlement to take a contribution holiday is allowed.

Held: The cross-appeal by Gunter Schmidt in his personal capacity and on behalf of the beneficiaries of the Stearns pension plans (File No. 23057) should be dismissed with respect to the entitlement of Air Products Canada Ltd. to all surplus remaining in the pension fund derived from the Stearns plan and to its entitlement to take a contribution holiday.

Per La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ.: Absent legislation to the contrary, a court must determine competing claims to pension surplus by a careful analysis of the pension plan and the funding structures created under it. First it must determine, using ordinary principles of trust law, if the pension fund is impressed with a trust. A trust will exist whenever there has been an express or implied declaration of trust and an alienation of trust property to a trustee to be held for specified beneficiaries. If the pension fund, or any part of it, is not subject to a trust, then any issues relating to outstanding pension benefits or to surplus entitlement must be resolved by applying principles which pertain to the interpretation of contracts.

Different considerations apply if the fund is impressed with a trust. The trust is not a trust for a purpose, but a classic trust governed by equity, and, to the extent that applicable equitable principles conflict with plan provisions, equity must prevail. The trust will in most cases extend to an ongoing or actual surplus as well as to that part of the pension fund needed to provide employee benefits. An employer may explicitly limit the operation of the trust so that it does not apply to surplus and, as a settlor of the trust, may reserve a power to revoke the trust. In order to be effective, the latter power must be clearly reserved at the time the trust is created. A power to revoke the trust or any part of it cannot be implied from a general, unlimited power of amendment.

Funds remaining in a pension trust following termination and payment of all defined benefits may be subject to a resulting trust. Before a resulting trust can arise, all of the trust's objectives must have been fully satisfied. Even when this is the case, the employer cannot claim the benefit of a

resulting trust when the terms of the plan demonstrate an intention to part outright with all money contributed to the pension fund. In contributory plans, it is not only the employer's, but also the employees', intentions which must be considered. Both are settlors of the trust.

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

The Catalytic plan and the trust agreement constituted a clear declaration of an intention to create a trust. The subject matter of the trust was defined and the beneficiaries were identified in the trust agreement by reference back to the plan. This classic trust established for the benefit of a defined group of persons was never terminated and so continues to exist. The parties contemplated that the trust would continue if a different trustee were named. The trust therefore was not terminated when, in 1974, the company transferred control of its pension fund to Confederation Life Insurance Company. Further,

the fact that the 1978 version of the Catalytic plan removed all reference to a trust could not have the effect of terminating the trust. Nor could any of the provisions of the 1984 investment contract entered into by Stearns Catalytic and Confederation Life have that effect.

The trust fund was comprised of all contributions made by both the company and the employees, together with any earnings of those monies. The fact that the 1959 plan was a defined contribution plan under which no surplus could arise does not affect this definition of the trust fund. The company could only claim the surplus remaining on termination by virtue of a resulting trust, or by validly revoking the trust. The purposes of the trust were not fully satisfied by the payment of all defined benefits. One of the objects of the trust was to use any money contained in the fund for the benefit of the employees. The benefits to which employees were entitled under the 1959 plan were not restricted to only those contributions made by the company on their behalf. Therefore, the trust objects could never be exhausted so long as some money remained in the fund and some eligible employees could be found. A resulting trust could not arise here. Air Products was only entitled to the surplus if it could have revoked the trust upon termination of the pension plan in 1988.

Both the trust agreement and all versions of the plan make some provision for what was to occur on termination of the plan. Although the company reserved a general amending power subject to the provisos that no amendments could reduce accrued benefits or allow the trust fund to be used in any way other than for the employees' exclusive benefit, the company did not clearly reserve a power to revoke the trust. Such a power could not be implied

under the broad general amendment power. Therefore, the 1978 amendment purporting to give the company the power to distribute surplus to itself, as well as the reversion clause of the 1983 plan, were invalid. Both represented attempts to revoke partially the 1959 trust in favour of the employees. Neither was within the scope of the control which the company reserved to itself at that time.

The relevant plan provisions which governed the taking of a contribution holiday were those contained in the 1983 Air Products plan. The wording of the plan implicitly authorized an actuary to consider the surplus when calculating the company's annual funding obligation. Since the plan allowed the company to take contribution holidays, it did not need to repay the actuarial surplus taken into account in the years when it made no contributions into the plan.

The first Stearns plan differed in two significant ways from the original Catalytic plan: it made no reference to the existence of a trust and it specifically contemplated the reversion of surplus assets to the company. A trust was never created notwithstanding the facts that the alleged subject matter of the trust, the pension fund, was defined under the two Stearns plans, that the employees were identified as those entitled to receive the fund monies and that the exclusive benefit and non-diversion clauses relied upon by the employees were consistent with the existence of a trust. Several other clauses were equally consistent with the non-existence of trust and clearly identified the plan as a contract to receive defined benefits. No intention to create a trust was apparent on the face of the documents.

A brochure distributed by the company to its employees in 1972 did not form a binding part of the pension plan documents and its influence on entitlement of plan surplus in 1988 was doubtful since it specifically stated that the plan would be subject to amendment from time to time. The statement contained in the brochure to the effect that the company intended to pay any remaining surplus to the employees could not in the circumstances of this case form the basis for an estoppel preventing the company from now claiming the surplus for itself. Documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined. Whether they do so depends on the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly the employees.

Since no trust was ever created under the Stearns plan and since the 1972 brochure was without legal effect, the issue of entitlement to the plan surplus had to be decided on the basis of an interpretation of the plan's provisions. The 1983 amendment of the pension plan was within the limits of the power of amendment because it did not reduce any "then existing" interest of the employees as the employees had no interest in the surplus remaining upon termination until the company exercised its discretion to give them an interest. The amendment did not violate the restriction that no amendments were to have the effect of diverting any part of the fund to purposes other than for the exclusive benefit of the participants, former participants, joint annuitants, beneficiaries, or estates. Although the 1970 plan did not deal with the issue, the reversion of surplus to the company was not inconsistent with the

non-diversion and exclusive benefit clauses. The prohibition on diversion of funds and the exclusive benefit clause applied from the outset only in respect of the defined benefits to which the employees were contractually entitled. They did not apply to the distribution of a plan surplus.

The company is entitled according to the plan's terms to any surplus remaining in the pension fund which can be traced to the former Stearns plans. It was also entitled to take a contribution holiday. The application of an actuarial surplus to current service funding obligations was permitted under the terms of the Air Products plan, and did not have the effect of reducing any benefits which had accrued to the employees.

The results in these appeals demonstrate the need for legislation. It is unfair that there should be a different result for these two groups of employees based only on a finding that a trust exists in one case but not the other. A legislative scheme should be set up to provide for the equitable distribution of surplus between employees and employers when pension plans are terminated.

Per Sopinka J. (dissenting in part on the appeal (File No. 23047)): The surplus in the Catalytic plan reverts to the employer. The imposition of a trust on all the monies in that plan, did not prevent the trust's being amended. The nature of the rights of amendment depends upon the terms of the plan and of the trust agreement, if any. Nothing in the Catalytic plan precluded the company's exercising the express power of amendment in the plan so as to provide for the return of surplus funds on termination of the plan.

The company from the outset reserved the power to amend the Catalytic plan so as to permit any surplus to be distributed to itself. The trust agreement's amending clause was subject to the plan and both the 1959 and the 1966 versions of the plan reserved broader powers of amendment to the company than did the trust agreement. Both plans provided that the company's power to amend the plan was limited only by the condition that accrued benefits could not be reduced. The right to receive surplus monies in the pension fund was not a benefit which had accrued to the members of the plan when the company amended the plan to permit the surplus to be distributed to itself. Moreover, even if such a right could be said to have accrued at the time of amendment, it is not a benefit contemplated by that provision.

A power of amendment, limited in that it cannot reduce accrued benefits, is not inconsistent with the fundamental purpose of a defined benefits pension trust. It should be given effect if sufficiently explicit to permit a change amounting to a partial revocation in law.

No magic exists in the use of the specific word "revocation". Both the creation of a trust and a limitation on the nature of a trust can be determined from the clear intention of the settlor. The power of amendment can be sufficiently explicit to include a power of revocation and the absence of the word "revocation" does not mean that a settlor's changes clearly having the effect of revocation would be fatally flawed. A formulaic approach should not be allowed to dislodge the clear intention of the parties.

Neither the company nor the employees foresaw the existence of a surplus when the plan was created and the employees had no reason to expect to receive more than their defined benefits. There was nothing inequitable in allowing the employer to take advantage of the broad amending power to distribute the surplus to itself, so long as it did nothing to reduce the level of benefits provided to the employees.

The tax motivations of the parties to pension plans, while generally of limited relevance in interpreting those plans, here supported a broad interpretation of the amending power. It was reasonable to infer that the Catalytic plan's broad amending power, in 1959 and subsequent versions, was retained in part to deal with changes in income tax legislation, given the plan's express direction that the company's contributions be tax deductible.

Per McLachlin J. (dissenting in part on the appeal (File No. 23047)): The surplus in defined benefit plans (as distinguished from defined contribution plans) should revert to the employer. Apart from the reference in the 1978 restatement which provided that surplus should go to the employer, the documents were silent on the question of surplus. The 1978 stipulation was a valid "amendment" to the original trust documents and ought to stand. Even if the 1978 stipulation were disregarded, however, the surplus would devolve on the employer under the doctrine of resulting trust.

Where a new situation arises and falls within an existing term of the contractual document, the courts must look at the factual context in which the

term was drafted and consider whether the new situation can reasonably be said to fall within this clause. If it does not, the court may nevertheless consider if a term covering the new situation can be implied, whether as a matter of fact, law or custom. The courts will not make a new contract or trust to which the parties have not agreed.

Article V in the 1959 trust agreement, which dealt with modification and termination, provided that no part of the fund be diverted to purposes other than for the exclusive benefits of those intended to benefit from it. This article was drafted in the context of a defined contribution plan under which no surplus could arise and should therefore not be read as applying to the surplus which arose under the later defined benefit plan. The 1978 provision stipulating that the surplus should go to the employer is valid and determines the issue.

Payment of the surplus to the employer does not constitute revocation of a trust. A trust cannot be revoked without express wording so permitting. The surplus was an unanticipated development never contemplated by the original trust and not addressed by any changes to the trust until 1978. The 1959 trust provisions do not apply to a surplus.

The trust did not require that the surplus in question be paid to the employees. In 1966, when the possibility of a surplus first arose because of the plan's conversion to a defined benefit plan, the trust provided no guidance as to where a surplus would go in the event of termination. The 1978 amendment made it clear that it was payable to the employer. Therefore, under the terms of the trust, the employer is entitled to the surplus.

Alternatively, if the 1978 amendment as to surplus is invalid, the doctrine of resulting trust requires that the surplus be available to the employer. The employer was responsible for ensuring a fund sufficient to meet all defined benefits owing to employees. Since the employer paid more than required for the purpose of the trust, the residual sum should return to the employer.

Even where employees contribute to a defined benefit plan, that contribution is taken to be fully satisfied by receipt of the defined benefits. The employee accepts this fixed amount in lieu of the greater or lesser amounts he or she might obtain on a defined contribution plan and in doing so exhausts his or her rights under the plan.

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By Cory J.

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March 26, 1992, unreported; *Bathgate v. National Hockey League Pension Society* (1992), 11 O.R. (3d) 449; *Martin & Robertson Administration Ltd. v. Pension Commission of Manitoba* (1980), 2 A.C.W.S. (2d) 249; *C.U.P.E.-C.L.C., Local 1000 v. Ontario Hydro* (1989), 68 O.R. (2d) 620; *Askin v. Ontario Hospital Association* (1991), 2 O.R. (3d) 641; *Maurer v. McMaster University* (1991), 4 O.R. (3d) 139; *Trent University Faculty Assn. v. Trent University* (1992), 99 D.L.R. (4th) 451; *Harris v. Robert Simpson Co.*, [1985] 1 W.W.R. 319.

By Sopinka J. (dissenting in part on the appeal (File No. 23047))

Re Reevie and Montreal Trust Co. of Canada (1986), 53 O.R. (2d) 595; *Re Campbell-Renton & Cayley*, [1960] O.R. 550; *Hockin v. Bank of British Columbia* (1990), 71 D.L.R. (4th) 11.

By McLachlin J. (dissenting in part on the appeal (File No. 23047))

Davis v. Richards & Wallington Industries Ltd., [1991] 2 All E.R. 563; *In re Courage Group's Pension Schemes*, [1987] 1 W.L.R. 495; *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F.Supp. 257 (1983); *In re C. D. Moyer Co. Trust Fund*, 441 F.Supp. 1128 (1977); *Pollock v. Castrovinci*, 476 F.Supp. 606 (1979); *Wilson v. Bluefield Supply Co.*, 819 F.2d 457 (1987); *Bryant v. International Fruit Products Co.*, 793 F.2d 118 (1986); *Audio Fidelity Corp. v. Pension Benefit Guaranty Corp.*, 624 F.2d 513 (1980); *Maurer v. McMaster University* (1991), 4 O.R. (3d) 139; *Askin v. Ontario Hospital Association* (1991), 2 O.R. (3d) 641; *Re Reevie and Montreal Trust Co.*

of Canada (1986), 53 O.R. (2d) 595; *Murphy v. McSorley*, [1929] S.C.R. 542; *Re Canada Trust Co. and Cantol Ltd.* (1979), 103 D.L.R. (3d) 109.

Statutes and Regulations Cited

Employment Pension Plans Act, S.A. 1986, c. E-10.05, ss. 42(2), 58(a), (b), (c).

Income Tax Act, S.C. 1970-71-72, c. 63.

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

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APPEALS from a judgment of the Alberta Court of Appeal (1992), 125 A.R. 224, 14 W.A.C. 224, 89 D.L.R. (4th) 762, 46 E.T.R. 21, dismissing an appeal and cross-appeal from an order of Moore C.J.Q.B. in Chambers (1990), 104 A.R. 190, 66 D.L.R. (4th) 230, 37 E.T.R. 64. The appeal by Air Products Canada Ltd. (File No. 23047) with respect to entitlement to any surplus traceable to the Catalytic fund should be dismissed and its appeal with respect to its entitlement to take a contribution holiday is allowed, Sopinka and McLachlin JJ. dissenting in part. The cross-appeal by Gunter Schmidt in his personal capacity and on behalf of the beneficiaries of the Stearns plans (File No. 23057) should be dismissed with respect to the entitlement of Air Products Canada Ltd. to all surplus remaining in the pension fund derived from the Stearns plan and to its entitlement to take a contribution holiday.

Dennis R. O'Connor, *Q.C.*, *Anne Corbett* and *Barry L. Glaspell*, for the appellants Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley.

Neil C. Wittman, *Q.C.*, and *Kenneth J. Warren*, for the respondents Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans.

Aleck H. Trawick and *Leslie O'Donoghue*, for the appellants on the cross-appeal Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans.

Dennis R. O'Connor, *Q.C.*, for the respondents on the cross-appeal Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley.

The judgment of La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ. was delivered by

CORY J. -- These two cases raise the issue of entitlement to surplus monies remaining in an employee pension fund once the fund has been wound up and all benefits either paid or provision made for their payment. There is a further related issue as to whether or when employers may refrain from contributing to ongoing pension plans which are in "surplus".

Some Definitions

At the outset it may be helpful to review briefly some of the technical terms which often appear in pension surplus cases. For a detailed explanation reference may be made to: G. Nachshen, "Access to Pension Fund

Surpluses: The Great Debate", in *New Developments in Employment Law* (Meredith Memorial Lectures, 1988), 1989; Deborah K. Hanscom, "A Surplus of Uncertainty: The Question of Entitlement After Hockin" (1991), 10 *Est. & Tr. J.* 258, and the articles contained in vol. 2 of the *Task Force on Inflation Protection for Employment Pension Plans, Research Studies* (1988).

Pension surpluses can only arise in "defined benefit" pension plans. In those plans, each employee belonging to the plan is guaranteed specific benefits upon retirement.

An ongoing pension fund is said to have an "existing" or "actuarial" surplus when the estimated value of the assets in the fund exceeds the estimated value of all of the liabilities (i.e., pension benefits owed employees) of the fund. When the calculated fund liabilities exceed the calculated fund assets, the plan is said to be in a state of "unfunded liability". Once the plan is wound up, assets and liabilities can be precisely determined. The fund will then be in a state of "actual" or "real" surplus or liability.

Contribution to a defined benefit plan is made each year on the basis of an actuary's estimate of the amount which must be presently invested in order to provide the stipulated benefits at the time the pension is paid out. The actuary's estimate of the present value of future benefits to members of the plan is known as the "current service cost". The obvious difficulties involved in predicting factors such as inflation rates, investment returns and the future employee levels of the company mean that the actuary's task is difficult and to a certain extent speculative. The assumptions made by actuaries in respect of

these and other factors will have a significant impact upon the determination of current service costs and the calculation of present levels of fund surplus or liability.

Defined benefit plans are to be distinguished from defined contribution (or "money purchase") plans, where set amounts are paid into the pension fund, and the benefits eventually paid equal the amount of the initial contributions plus any return which was obtained on the investment of those funds.

Either type of pension plan may be "contributory" (contributions by both employer and employee are mandatory) or "non-contributory" (only the employer's contributions are mandatory). In a non-contributory defined benefit plan, only the employer is obligated to contribute to the pension fund, although employees may have the option of making voluntary contributions in order to increase the benefits they will receive. In a contributory defined benefit plan, the employees must contribute a set amount, which may vary according to factors such as each employee's length of service and earnings, but is usually a defined percentage of salary. The employer's contribution to the fund is the amount over and above the employee contributions which the actuary determines is needed to cover the current service costs of the plan.

In the 1980s, a unique combination of conservative actuarial estimates and various economic factors caused many pension funds to accumulate large actuarial surpluses. Many employers sought to recapture this surplus by withdrawing excess monies from pension funds as an alternate

source of capital, by applying surplus funds to any required contribution to the pension plan (i.e., taking a "contribution holiday"), or by claiming a proprietary right in any excess remaining upon the termination of the plan once all the employee benefits had been provided for. Employee groups have resisted such actions, claiming that the pension plans were established for their benefit, that the employers never intended or expected to recover any contributions made to the fund, and that any surplus accruing because of fortuitous economic circumstances should be paid to them when the plans are terminated.

Factual Background

In 1983, two companies, Stearns-Roger Canada Ltd. ("Stearns") and Catalytic Enterprises Ltd. ("Catalytic") merged to form Stearns Catalytic, which subsequently became Air Products Canada Ltd. At the time of the merger, both Stearns and Catalytic had defined benefit pension plans for their employees, and both plans were in surplus. The pension plans and funds of Stearns and of Catalytic were amalgamated and evolved into two virtually identical Air Products Plans, one for employees of the Construction Division, and one for members of senior management. It is the employees' pension plan (the "Air Products plan") which forms the subject of the appeal and cross-appeal, although the results of the appeals will also affect the senior management plan.

Catalytic first instituted a pension plan for its employees in 1959. This plan was a contributory money-purchase plan which incorporated a trust fund administered by a trustee. By 1966, the plan had been amended to become

a contributory defined benefits plan. The Catalytic plan was further amended in 1978.

The first Stearns pension plan relevant to these appeals was created in 1970. It repealed and replaced an earlier defined contribution plan. The 1970 plan was a contributory defined benefits plan until 1977, when it was amended to provide that employee contributions were to be of a voluntary nature only. Pursuant to the plan, Stearns entered into a Group Annuity Policy with the Mutual Life Assurance Company. All relevant versions of the Stearns plan gave the employer a discretion as to the distribution of any surplus which might remain upon the termination of the pension plan. By contrast, no provision was made for the treatment of surplus in the Catalytic plans until the 1978 amendment to the plan purported to give the company a similar discretion.

The amalgamated Stearns Catalytic (later Air Products) plan was a contributory defined benefits plan. It was funded by means of an Investment Contract with the Confederation Life Insurance Company. The terms of the plan gave the company a discretion as to the distribution of surplus upon termination and also provided for the automatic reversion to the company of any surplus remaining once benefits paid to a member had reached a maximum level specified in the plan. For the years ending September 30, 1985, September 30, 1986, September 30, 1987 and January 31, 1988, the company transferred no assets to the Confederation Life fund. Rather, the company's contributions to the pension fund were paid from the actuarially determined surplus existing in the pension fund.

On January 31, 1988, following the sale of most of the company assets, the Air Products pension plan was terminated. Actuarial calculations established that once provision had been made for payment to the employees of Air Products Canada Ltd. of all benefits to which they were entitled under the terms of their plans, a surplus of $9,179,130 would remain in the employee pension plan.

In February, 1988, first Air Products, and then Gunter Schmidt on behalf of the employees of Air Products, applied to the Alberta Court of Queen's Bench for a declaration of entitlement to the surplus funds. Schmidt, on behalf of himself and the employees, also sought a declaration that Air Products be required to pay $1,465,400 into the pension fund. This sum represented the amount of fund surplus applied by Air Products to its contribution requirements from 1985 to 1988.

The Chief Justice of the Alberta Court of Queen's Bench (*Stearns Catalytic Pension Plans (Re)* (1990), 104 A.R. 190) found that the portion of the surplus which had been derived from the Catalytic fund was to be paid out to the employees, and that Air Products was not entitled to take a contribution holiday utilising any part of the Catalytic surplus. He therefore ordered the company to return $1,465,400 to the pension fund. In respect of the surplus which was traceable to the Stearns fund, the chambers judge held that it belonged to Air Products.

An appeal by the company to the Alberta Court of Appeal in respect of the Catalytic surplus and the contribution holiday and a cross-appeal by the former Stearns employees in respect of the Stearns surplus were both dismissed.

The appeal and the cross-appeal before this Court are the same as before the Court of Appeal. The facts and the plans at issue in the appeal and the cross-appeal are sufficiently different that they must be dealt with separately. In order to avoid confusion, I will not refer to the parties as appellants or respondents but to either "Air Products" or "the company" (appellants on the appeal and respondents on the cross-appeal); and to "the employees" or "the plan members". The former Catalytic employees are the respondents on the appeal and the former Stearns employees are the appellants on the cross-appeal.

I. Judgments Below

Alberta Court of Queen's Bench (1990), 104 A.R. 190

The chambers judge noted that two provisions in the 1983 amalgamated pension plan were of particular importance. Under Section 18.05, any surplus remaining in the amalgamated fund following termination of the plan and distribution of all defined benefits was to revert to the company. Section 1 of the plan provided that the benefits provided by the plan were in lieu of any benefits to which employees may have been entitled under any of the previous plans and also that the benefits paid under the 1983 plan "in no event shall be less than the benefits to which they were entitled under these

Prior Plans" (at p. 201). It was this phrase which required the court to review the Stearns and the Catalytic plans which had existed prior to 1983.

Following a careful examination of the history and terms of all the relevant pension plans, Moore C.J. decided that Air Products was entitled to the surplus funds under the Stearns Plan and that the employees were entitled to the surplus funds under the Catalytic plan. He further held that the company was not entitled to apply any actuarial surplus from the Catalytic fund towards its contributions to the pension fund in the period 1985-88, but that the relevant plan provisions did permit the company to use the existing surplus in the Stearns fund to pay its contribution to the pension fund.

The Chief Justice first considered the Stearns plans. He noted, at pp. 206-207, that Article 14.1 of the 1970 Stearns pension plan, incorporated as Article 14.3 in the 1977 plan, provided:

> Notwithstanding any surplus remaining after all benefits referred to in this Sub-section 14.1(c) have been provided, such surplus may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions at the time, be returned to the Company or may be used for the benefit of Participants, former Participants, beneficiaries or estates in such equitable manner as the Company may in its discretion determine. [Emphasis of the Chief Justice.]

In his view the concluding words of this section gave the company a discretion as to the distribution of the surplus. He rejected the employees' suggestion that the 1977 plan was amended to remove this discretion, holding instead that the alleged "1982 amendments" to the plan were never more than a draft version which was not adopted and never registered. The Chief Justice

considered that Article 14.3, when read together with Article 13.4 of the 1977 Plan, which permitted funds to be returned to the company with the consent of the Minister of National Revenue and the Superintendent of Pensions, modified a more general clause which prohibited any amendment, termination, or diversion of the fund other than for the exclusive benefit of the employees.

Therefore, on a construction of the plan provisions as a whole, Moore C.J. concluded at p. 208:

> From the moment the prior Stearns Plan was terminated in 1969, the company had the right to any surplus as it had from the outset reserved out to itself any surplus. The plan had ended and the company could reserve out the surplus. The company at this point did not enter into a trust agreement but purchased an annuity contract. Insofar as the Stearns Plan is concerned, we are dealing with a defined benefits plan and once all the defined benefits have been satisfied or provided for (as is the case), the balance or any surplus is to be disposed of at the discretion of the company. The plan was not established to create a fund to be divided up among the employees, but rather to provide them with specific pensions on retirement.

He concluded that the Stearns fund was never impressed with a trust, nor could one be implied to any part of the Air Products fund which evolved from the prior Stearns plans. The company's right to control the allocation of surplus was determined in 1970, and the amalgamation of the Stearns and the Catalytic plans did not create any employee entitlement to such surplus.

The Chief Justice next considered the Catalytic plans. The first began in 1959 as a defined contribution plan. Unlike the original Stearns plan, this plan was never terminated. Rather it was amended several times over the

following twenty-five years. The 1959 plan included a Trust Agreement entered into between Catalytic and the Canada Trust Company for the administration of the pension fund. It contained a provision prohibiting the company from recovering any sums paid into the fund, and an amendment provision which prohibited any amendment which had the effect of reducing members' benefits. These three features were also present in the 1966 restatement of the Catalytic Plan, although by then the plan had been changed from a money purchase plan to a defined benefits plan.

Moore C.J. noted that although in 1974 the agreement between Canada Trust and Catalytic was terminated and replaced by an investment contract with Confederation Life, there was no evidence that the trust itself had terminated. He was therefore of the opinion that the trust was still in place in 1978 when Catalytic purported to amend the plan in order to give itself the right to any surplus remaining upon termination.

Moore C.J., at p. 210, felt that in 1959 Catalytic had created a trust,

> [t]he sole object of . . . which . . . was to provide retirement benefits for the employees, not the company. . . . The fund became a trust fund for the benefit of the Catalytic employees.

He was particularly struck, at p. 210, by the wording of the 1959 Trust Agreement:

> It states in clear terms that no amendment shall authorize or permit any part of the Fund to be used for or diverted to purposes other than for the exclusive benefit of such persons or their estates. This

> wording cannot be ignored and in my view it overrides any attempt to amend the trust to give the surplus to the company.

Moore C.J. therefore held that the 1978 amendment was invalid. He further relied upon *Re Reevie and Montreal Trust Co. of Canada* (1986), 53 O.R. (2d) 595, and *C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd.* (1989), 66 O.R. (2d) 535, aff'd (1990), 39 E.T.R. 1, in support of his conclusion that, by virtue of the trust in their favour, the former employees of Catalytic were entitled to their portion of the surplus remaining in the Air Products Fund.

Moore C.J. dealt lastly with the issue of the contribution holidays taken by the company. He observed that, under the provisions of the amalgamated plan, Air Products reserved the right to pay its annual contribution to the fund out of existing surplus. He therefore held that the company could validly use this surplus for its contribution obligations in the years 1985-88, but that, as a result of the existence of the trust in favour of the Catalytic employees, the contribution could not have been taken from the Catalytic share of the actuarial surplus.

Alberta Court of Appeal (1992), 125 A.R. 224 (McClung, Foisy and Major JJ.A.)

The Court of Appeal affirmed the judgment of Moore C.J., adding only two brief comments. The former Stearns employees argued again that the Stearns plan had been amended in 1982 so as to give them title to the surplus. The court noted that the chambers judge held that the draft provision the

employees relied upon never became part of the plan and found no evidence to suggest that he was wrong in this conclusion.

Secondly, the Court of Appeal dealt with the employees' argument that the company was bound by the terms of an employee benefits brochure issued in 1982 to give the surplus to the employees. Under the heading "Future of the Plan" that brochure provided (p. 227):

> In the event there is a surplus in the fund after all benefits have been paid, it is the Company's intention the surplus will be distributed in an equitable manner to the employees active in the Plan at the date of termination.

The chambers judge had noted the existence of this brochure, but did not comment on its legal effect in his judgment.

The Court of Appeal held that the evidence surrounding the brochure was insufficient to alter the plan provisions giving Stearns a discretion as to use of the surplus. The facts were distinguishable from the case of *Re Collins and Pension Commission of Ontario* (1986), 56 O.R. (2d) 274. In *Re Collins* the company had given "repeated assurances" to the employees concerning the surplus in the course of collective bargaining, and it knew that the employees were aware of the surplus and expected to receive it. In this case there was no evidence that any employees knew of or relied upon the Stearns brochure. Finally, the court held that the Stearns employees had failed to demonstrate that the brochure estopped the company from appropriating the surplus, or that the

company acted unfairly in the exercise of its discretion to distribute the excess funds.

II. Issues on Appeal

A. *The Appeal (The Catalytic Plan)*

1. Whether the Court of Appeal erred in finding that Air Products was not entitled to the monies deriving from the Catalytic Plan which remained in its employee pension fund following termination of the pension plan and provision of all benefits.

2. Whether the Court of Appeal erred in finding that Air Products was not entitled to take existing actuarial surplus deriving from the Catalytic Plan into account in determining the amount of its annual funding obligation.

B. *The Cross-Appeal (The Stearns Plan)*

1. Whether the Court of Appeal erred in holding that Air Products was entitled to take the surplus remaining in its employee pension fund which was derived from the Stearns plan following termination of the plan and provision of all benefits.

2. Whether the Court of Appeal erred in finding that Air Products was entitled to use existing actuarial surplus not derived from the

Catalytic plan in order to fund its required annual contribution to the Air Products plan during the years 1985-88.

III. The Legislative Framework

Two separate regimes affect Canadian employer pension plans in surplus. Each province now has in place some form of pension benefits legislation designed to protect member benefits by ensuring that employers meet their funding obligations and that pension funds remain solvent. The federal income tax authorities have also attempted to regulate employer pension plans in order to limit the tax relief which employers and employees can obtain for their contributions to pension funds. Some of the provincial statutes have recently begun to deal with the issue of surplus upon plan termination or of contribution holidays. The tax regulation pertaining to surplus has to date taken the form of non-binding Information Circulars rather than legislation.

A. *The Income Tax Act*

Under the *Income Tax Act*, S.C. 1970-71-72, c. 63, certain tax benefits are granted to those contributing to registered pension plans. Contributions by employers and employees to a registered pension plan are tax deductible; plan earnings are exempt from taxation, and the taxation of employee benefits is deferred until they are received by the employee. The Act also contains two ceilings, one on the amount which an employer can deduct from income in respect of current service contributions to an employee pension

plan, and the other on the maximum benefit which each employee can derive from the employer's deductible contributions.

In addition, on December 31, 1981, Revenue Canada issued Information Circular No. 72-13R7. This circular contains two significant requirements for the registration of pension plans. First, s. 39 of the circular requires that all plans provide that any existing actuarial plan surplus in excess of the employer's normal current service costs over a two-year period must either be refunded to the employer or used to take a contribution holiday. The circular also sets a maximum limit on the benefits which an employee can recover under a plan, and in s. 13.1 stipulates that all pension plans must contain a provision permitting actual surplus to be refunded to employers upon termination of the plan. However, these requirements were never incorporated into the *Income Tax Act* or its Regulations during the lifetime of the Air Products plan or its predecessors.

One of the results of the Information Circular has been that many pension plans which originally were silent on the issue of surplus or which stated that employer contributions to a plan were "irrevocable" have been amended to provide that any surplus should be refunded to employers upon termination of the plan. Air Products cites the Information Circular in support of its position, presumably as evidence that Revenue Canada supports employer ownership of a surplus. The employees in turn emphasize the non-binding effect of the circular and contend that the employer's motivation for amending the plan is not a relevant consideration in determining its legal effect.

Several years ago I agreed with Zuber J.A. of the Ontario Court of Appeal that the Information Circular is of limited legal significance: *King Seagrave Ltd. v. Canada Permanent Trust* (1986), 13 O.A.C. 305 (C.A.), aff'g (1985), 51 O.R. (2d) 667 (H.C.). I am still of that opinion. At the time the pension plans which are the subject of these appeals were wound up, the requirements contained in the circular did not have binding legal force. The circular did not purport to clarify any provisions of the *Income Tax Act*, and the fact that some pension plans may have been amended to comply with its provisions does not alter my approach to the surplus entitlement issue.

B. *Provincial Legislation*

No Canadian province has yet dealt directly with the issue of ownership of or entitlement to pension surplus by legislation. The preferred approach in most jurisdictions has been to provide that the withdrawal or transfer of actuarial surplus can only be accomplished when certain specified conditions have been met. See, for example, the Ontario *Pension Benefits Act*, R.S.O. 1990, c. P.8. The British Columbia *Pension Benefits Standards Act*, S.B.C. 1991, c. 15, requires that all pension plans must contain clauses providing for the arbitration of disputes concerning entitlement to surplus or contribution holidays. Manitoba has also enacted an interesting variation on the treatment of surplus funds. Section 26(2) of its *Pension Benefits Act*, R.S.M. 1987, c. P32, provides that no existing surplus may be withdrawn from a pension fund unless the Pension Commission "believes it equitable to do so".

The B.C. and Manitoba provisions represent welcome legislative steps. Regrettably, a comprehensive approach to the issues arising from pension surplus has yet to be enacted in any part of this country. The courts have on a number of occasions been required to determine the allocation of pension surplus. Yet the courts are limited in their approach by the necessity of applying the sometimes inflexible principles of contract and trust law. The question of entitlement to surplus raises issues involving both social policy and taxation policy. The broad policy issues which are raised by surplus disputes would be better resolved by legislation than by a case-by-case consideration of individual plans. Yet that is what now must be undertaken.

The pension plans under consideration are governed by the Alberta *Employment Pension Plans Act*, S.A. 1986, c. E-10.05 (proclaimed into force January 1, 1987). Section 42(2) of the Act requires that all plans provide for the allocation of surplus on termination to either the employer, the employees, or both. Section 58 prohibits employer withdrawal of surplus from an ongoing fund unless such withdrawal is specifically permitted in the plan and the permission of the Superintendent of Pensions is obtained.

Withdrawal, together with the issue of contribution holidays, is also referred to in s. 34(9) of the Regulations to the Act (Alta. Reg. 364/86) which provides:

> 34 . . .
>
> (9) Where the actuarial valuation report . . . reveals that the plan has surplus assets,

. . .

> (b) when the unfunded liabilities have been amortized or where no unfunded liability exists, the surplus assets may be
>
> (i) used to increase benefits,
>
> (ii) left in the plan,
>
> (iii) if the plan does not so prohibit, applied to reduce the employer contributions referred to in subsection (3)(a), or
>
> (iv) where no solvency deficiency exists and subject to section 58 of the Act and section 39 of this Regulation, paid or transferred to the employer.

The *Employment Pension Plans Act* and its regulations do no more than establish that surplus entitlement must be determined by the wording of the plan. Contribution holidays are permitted provided they are not prohibited by the plan. The previous legislation governing pensions in Alberta, the *Pension Benefits Act*, R.S.A. 1980, c. P-3, did not deal with either surplus remaining on termination or with contribution holidays. As a result, the primacy of the wording of individual pension plans has never been displaced by legislation, and it is therefore those specific provisions which must be considered.

IV. Relevant Pension Plan Provisions

The parties most helpfully compiled a summary of the history and relevant provisions of all the pension plans and related documents pertinent to these appeals. An abbreviated version of this summary, taken from the Agreed Statement of Facts, is attached as an appendix to these reasons.

V. Analysis

A. *Surplus Entitlement*

An employer who creates an employee pension plan agrees to provide pension benefits to retiring employees. At first, employers undertaking this obligation paid retired employees directly from company income. Gradually, the practice of creating separate pension funds emerged following the passage of regulations designed to protect employees from the bankruptcy or termination of the company, coupled with the realization of employers that the cost of providing pensions is reduced if money is put aside on behalf of present employees for their future benefit.

Pension funds thus began to be structured in several different ways. Investment contracts and trust funds eventually proved to be the most popular forms of pension plan funding for employers since they provided the requisite degree of "irrevocability" of contribution to entitle an employer to obtain tax relief on its pension contributions. The relatively recent phenomenon of pension plan surplus has created an inevitable tension between employers who claim that they never lose their entitlement to monies which they contribute to the fund but which are not needed to provide agreed benefits, and employees who assert that all pension fund monies belong to them. It is suggested that if employers are not able to retrieve surpluses, they will be tempted to fund existing plans less generously. I cannot agree. First, unless the terms of the plan specifically preclude it, an employer is entitled to take a contribution holiday. Second, most pension plans require the level of employer contribution to be determined by an actuary. The employer will not be able to reduce the level of contribution unilaterally below that required according to standard

actuarial practice. Third, employers are required by legislation to make up any unfunded liability. Finally, the fact that some employers cannot recoup surplus on termination is unlikely to influence the conduct of employers as a whole. In order to obtain registration, plans created since 1981 must make provision for distribution of surplus on termination. It is generally only in pre-existing plans that the problem of ownership of surplus arises and, as the results of these appeals demonstrate, even then employee entitlement to the surplus is not automatic.

Entitlement to the surplus will often turn upon a determination as to whether the pension fund is impressed with a trust. Accordingly, the first question to be decided in a pension surplus case is whether or not a trust exists.

1. Trust or Contract?

Employer-funded defined benefit plans usually consist of an agreement whereby an employer promises to pay each employee upon retirement a pension which is defined by a formula contained in the plan. A pension fund is created pursuant to the plan, either by way of contract or by way of trust. Whether or not any given fund is subject to a trust is determined by the principles of trust law. If there has been some express or implied declaration of trust, and an alienation of trust property to a trustee for the benefit of the employees, then the pension fund will be a trust fund.

If no trust is created, then the administration and distribution of the pension fund and any surplus will be governed solely by the terms of the plan.

However, when a trust is created, the funds which form the *corpus* are subjected to the requirements of trust law. The terms of the pension plan are relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust. The contract or pension plan may influence the payment of trust funds but its terms cannot compel a result which is at odds with the existence of the trust.

Typically, when a pension fund is subject to a trust, several issues arise: Are such trusts for a purpose or are they "classic" trusts? What part of the pension fund is subject to the trust? To what extent can a settlor-employer alter the terms of a trust in order to appropriate the fund surplus for itself? Is the surplus subject to a resulting trust? Let us consider the nature of the trust in this case.

2. Purpose or `True' Trust?

Air Products has suggested that the Catalytic pension fund was not subject to an express trust but instead to a trust for a purpose. Relying on *dicta* of the British Columbia Court of Appeal in *Hockin v. Bank of British Columbia* (1990), 71 D.L.R. (4th) 11, the company argues that a trust set up as part of a pension plan constitutes a trust whose sole purpose is to provide defined benefits to members. Once those benefits have been provided the purpose is fulfilled, the trust expires and the terms of the pension plan alone determine entitlement to any remaining fund surplus. I cannot accept this proposition.

Trusts for a purpose are a rare species. They constitute an exception to the general rule that trusts for a purpose are void. (See D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at pp. 127-28.) The pension trust is much more akin to the classic trust than to the trust for a purpose. I agree with the following comments of the Pension Commission of Ontario in *Arrowhead Metals Ltd. v. Royal Trust Co.* (March 26, 1992), unreported, at pp. 13-15, cited by Adams J. in *Bathgate v. National Hockey League Pension Society* (1992), 11 O.R. (3d) 449, at p. 510:

> Purpose trusts are trusts for which there is no beneficiary; that is, they are trusts where no person has an equitable entitlement to the trust funds. Funds are deposited in trust in order to see that a particular purpose is filled; people may benefit, but only indirectly. . . .
>
> People are clearly direct beneficiaries of pension trusts. Pension trusts are established not to effect some purpose, such building [*sic*] a recreation centre, but to provide money on a regular basis to retired employees. It misconceives both the nature of a purpose trust and of a pension trust to suggest that pensions are for purposes, not persons. It is important to recognize that the characterization of pension trusts as purpose trusts results in the pension text, a contract, taking precedence over the trust agreement. That is, in making common law principles of contract paramount to the equitable principles of trust law. It is trade [*sic*] law that where common law and equity conflict, equity is to prevail. In light of that rule, it seems inappropriate to do indirectly that which could not be done directly.

To repeat, the first step is to determine whether or not the pension fund is in fact a pension trust. This will most often be revealed by the wording of the pension plan itself, but may also be implied from the plan and from the way in which the pension fund is set up. A pension trust is a "classic" or "true" trust and not a mere trust for a purpose. If there is no trust created under the pension plan, the wording of the pension plan alone will govern the allocation

of any surplus remaining on termination. However, if the fund is subject to a trust, different considerations may govern.

3. The Definition of the Trust Fund

Before proceeding to an examination of the actual effect of the trust, one more brief investigation must be undertaken. That is the determination of whether all of the monies contained in a given pension fund are subject to the trust, or whether the surplus remaining after termination is separate from the remainder of the fund and thus not subject to the trust. In creating a pension plan and accompanying trust, an employer may be able to define the subject matter of the trust so as to include only the amount necessary to cover the employee benefits owed. However, very specific wording will be necessary before an ongoing surplus will be excluded from the operation of the pension trust.

The definition of the trust fund in the pension plan and in the trust agreement will usually establish that any surplus monies form part of the trust. In *Re Reevie and Montreal Trust Co. of Canada*, *supra*, for example, part of Canada Dry's pension plan, cited at p. 596 of the judgement of Zuber J.A., provided:

> 10.1 A Trustee shall be appointed by the Board of Directors from time to time and a Trust Agreement executed between the Board of Directors and such trustee, under the terms of which a Trust Fund shall be established to receive and hold all Contributions payable by the Members and the Company, interest and other income, and to pay the benefits provided by

> the Plan and any of its expenses not paid directly by the Company. [Emphasis added.]

In the absence of any more specific definition of the content of the trust fund in either the plan or the trust agreement such a phrase establishes that all money in the care of the trustee is subject to the trust in favour of the employees. The wording of the plan in *Hockin*, *supra*, at p. 13, was even more explicit:

> (h) "Fund" means the trust consisting of all sums of money and other property as shall from time to time be paid or delivered to the Trustee in accordance with the provisions hereof, all investments and proceeds thereof and all earnings, profits and other accretions thereto, less all payments and deductions that are made therefrom as herein provided.

I would have thought that the wording of this clause would make it clear that any existing surplus formed a part of the trust and was subject to the provisions of the trust.

The definition of the trust fund should not be confused with the issue of the definition of the benefits to which the employee/beneficiaries are entitled according to the terms of the pension plan. As the examples demonstrate, the trust fund will normally include all monies contributed to the pension fund, including both any ongoing actuarial surplus and any surplus on termination.

4. Amendment of the Trust

When a pension fund is impressed with a trust, that trust is subject to all applicable trust law principles. The significance of this for the present appeals is twofold. Firstly, the employer will not be able to claim entitlement to funds subject to a trust unless the terms of the trust make the employer a beneficiary, or unless the employer reserved a power of revocation of the trust at the time the trust was originally created. Secondly, if the objects of the trust have been satisfied but assets remain in the trust, those funds may be subject to a resulting trust.

The settlor of a trust can reserve any power to itself that it wishes provided the reservation is made at the time the trust is created. A settlor may choose to maintain the right to appoint trustees, to change the beneficiaries of the trust, or to withdraw the trust property. Generally, however, the transfer of the trust property to the trustee is absolute. Any power of control of that property will be lost unless the transfer is expressly made subject to it.

Employers seeking to obtain a pension surplus have frequently made the argument that they reserved a power to revoke, or to revoke partially the pension trust fund they set up for the benefit of their employees. This approach has had mixed results. The inconsistency of the decisions on the revocation of pension trusts exists on two levels. At one level, the different decisions can be explained on the basis of the wording of the particular amending clause and the limitations put upon it in each case. However, the decisions also reveal a more fundamental difference of opinion as to whether the revocation of trusts is

possible when a settlor has reserved a broad power of amendment. This difference must be resolved in this case.

The differing approaches to revocation of the trust are perhaps most starkly illustrated by the cases of *Reevie*, *supra*, and *Hockin*, *supra*. In both of these cases, a trust fund was established pursuant to a pension plan which contained a broad power of amendment. Each amending power was subject only to the proviso that no amendment could reduce members' entitlement to accrued benefits.

The court in *Reevie* relied upon a passage from Waters to the effect that it is a cardinal rule of trust law that a settlor can only revoke his or her trust when the settlor has expressly reserved the power to do so and found that the broad amendment power reserved by Canada Dry did not amount to an express reservation. The Court in *Hockin*, on the other hand, preferred the approach of McLennan J. in *Re Campbell-Renton & Cayley*, [1960] O.R. 550 (H.C.).

In *Re Campbell-Renton & Cayley*, the settlors of a private trust sought to revoke the trust in order to set up a more tax-beneficial trust in England. After considering the unlimited power of amendment contained in the trust agreement, McLennan J. stated at pp. 552-53:

> I am advised that there is no decision either in England or in this country as to whether or not a power to alter and amend includes the power to revoke or perhaps it would be better to say includes a power to amend in such a way as to permit the revocation of the trust instrument but there is American law on the subject and statements in 3 *Scott's Law of Trust*, 2nd ed., pp. 2393, 2402-3, 2413, 2395 and

> 2416 and at the latter citation it is stated that an unrestricted power to amend is equivalent to a power to revoke.

McLennan J. elected to follow the American jurisprudence on this point, as did the court in *Hockin* at p. 19 which relied upon the following more recent excerpt from Scott (*The Law of Trusts* (4th ed. 1989), vol. 4, at pp. 346-48):

> 330.1. Where the creation of a trust is evidenced by a written instrument that purports to include the terms of the trust, and there is no provision in the instrument expressly or impliedly reserving to the settlor power to revoke the trust, the trust is irrevocable. The intention to reserve a power of revocation need not be manifested by an express provision to that effect; it can be indicated by the use of language from which it may be inferred.

Based upon this authority, the B.C. Court of Appeal concluded at p. 19 that "[a] power to amend includes the power to revoke unless revocation is precluded by specific wording of the power to amend". With respect, I cannot agree with this position.

In my view the nature and purpose of the trust as it has evolved in Canada is consistent with a more restrictive interpretation as to when the trust instrument will permit a unilateral revocation of the trust. One of the most fundamental characteristics of a trust is that it involves a transfer of property. In the words of D. W. M. Waters, *Law of Trusts in Canada*, *supra*, at p. 291:

> . . . the trust is a mode of disposition, and once the instrument of creation of the trust has taken effect or a verbal declaration has been made of immediate disposition on trust, the settlor has alienated the property as much as if he had given it to the beneficiaries by an out-and-out gift. This almost self-evident proposition has to be reiterated because it is sometimes said that the trust is a mode of

> "restricted transfer." So indeed it is, but the restriction does not mean that by employing the trust the settlor inherently retains a right or power to intervene once the trust has taken effect, whether to set the trust aside, change the beneficiaries, name other beneficiaries, take back part of the trust property, or do anything else to amend or change the trust. By restriction is meant that he has transferred the property but subject to restrictions upon who is to enjoy and to what degree. The mode of future enjoyment is regulated in the act of transferring, but the transfer remains a true transfer.

The judgment of the B.C. Court of Appeal in *Hockin*, if followed to its logical conclusion, would mean that the presence of an unlimited power of amendment in a trust agreement entitles a settlor to maintain complete control over the administration of the trust and the trust property. That result is inconsistent with the fundamental concept of a trust, and cannot, in my opinion, be sustained without extremely clear and explicit language. A general amending power should not endow a settlor with the ability to revoke the trust. This is especially so when it is remembered that consideration was given by the employee beneficiaries in exchange for the creation of the trust. In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour. The wording of the pension plan and trust instrument are usually drawn up by the employer. The employees as a rule must rely upon the good faith of the employer to ensure that the terms of the specific trust arrangement will be fair. It would, I think, be inequitable to accept the proposition that a broad amending power inserted unilaterally by the employer carries with it the right to revoke the trust. The employer who wishes to undertake a restricted transfer of assets must make those restrictions explicit. Moreover, amendment means change not cancellation which the word revocation connotes.

Furthermore, prior to the 1981 circular, the amendment power in most trust arrangements was specifically made broad and ambiguous at the behest of the employer, who was entitled to tax relief on funds designated for employee pensions only if those funds were committed irrevocably to a trust or some other funding arrangement. The tax motivations of the respective parties to pension plans are not particularly relevant to a judicial interpretation of the trust. However a court should not be eager to sanction a result which would allow an employer to represent to the Minister of National Revenue that it has irrevocably committed funds to an employee pension plan, only to later purport to revoke the pension trust in order to recoup surplus funds.

As a result I find that, at least in the context of pension trusts, the reservation by the settlor of an unlimited power of amendment does not include a power to revoke the trust. A revocation power must be explicitly reserved in order to be valid.

5. The Resulting Trust

A resulting trust may arise if the objects of the trust have been fully satisfied and money still remains in the trust fund. In such situations, the remaining trust funds will ordinarily revert by operation of law to the settlor of the fund. However, a resulting trust will not arise if, at the time of settlement, the settlor demonstrates an intention to part with his or her money outright. This is to say the settlor indicates that he or she will not retain any interest in any remaining funds.

Several Canadian cases have dealt with the resulting trust in relation to pension surplus cases. In *Re Canada Trust Co. and Cantol Ltd.* (1979), 103 D.L.R. (3d) 109 (B.C.S.C.), the pension plan had been terminated. The plan provided that upon termination, assets were to be applied to four listed categories of beneficiaries. All the beneficiaries were paid in accordance with this provision, and a surplus remained in the fund. The trustee of the fund, Canada Trust, sought directions from the court as to how to deal with the surplus.

Gould J. held, at p. 111, that the "purposes of this trust simply did not exhaust the fund and the outcome here, *i.e.*, a surplus balance of $31, 163.38, was not foreseen by the respondent. . . . The situation appears to be one where a resulting trust arises by operation of the law." This conclusion could well be questioned in light of another provision in the plan (at p. 110) which provided that "no alteration, amendment or termination of the Plan or any part thereof shall permit any part of the trust fund to revert to or to be recoverable by the Company or to be used for or diverted to purposes other than the exclusive benefits of members . . .". Perhaps the decision can be explained on the basis that the employees were not parties before the court and did not contribute to the plan which was funded solely by the employer.

In most cases, the existence of a non-reversion clause will be evidence of a permanent intention to part with the trust property and it will preclude the operation of the resulting trust. The trust agreement in *C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd.*, *supra*, contained the following clause, at p. 538:

> No part of the capital or income of the fund shall ever revert to the Company or be used for or diverted to purposes other than for the exclusive benefit of the employees and former employees under the plan except as therein and herein provided.

I agree with Montgomery J.'s conclusion, at p. 540, that these provisions "effectively dispose of the respondents' arguments that the surplus is subject to the doctrine of resulting trust". The employer had absolutely and irrevocably waived its interest in any surplus that might arise upon the termination of the pension fund despite the contributions it had made to that fund.

The exigencies of tax law are such that preferential tax treatment will only be afforded to registered pension plans. Registration, originally contingent upon clear evidence that the employer's contribution would be irrevocable, now requires a plan to provide that, following termination of the plan, any remaining surplus in excess of the statutory maximum level of employee benefits must revert to the employer. Therefore, the provisions of most registered pension plans will normally themselves exclude the possibility of a resulting trust's arising. That is not to say that the resulting trust will never have a place in the context of pension funds. Yet the practical reality is that the factual circumstances which could trigger the operation of a resulting trust will rarely occur in pension surplus cases.

The relevant documents in this case are such that it is not necessary to examine all of the difficult issues which can arise in relation to resulting trusts. Nonetheless, when a resulting trust arises in respect of a contributory plan, I would be inclined to prefer the view of Nitikman J. in *Martin &*

Robertson Administration Ltd. v. Pension Commission of Manitoba (1980), 2 A.C.W.S. (2d) 249, to that of Scott J. in *Davis v. Richards & Wallington Industries Ltd.*, [1991] 2 All E.R. 563 (Ch.Div.). Nitikman J. held that where employers and employees are (by virtue of their contributions) settlors of the trust, surplus funds remaining on termination can revert on a resulting trust to both employers and employees in proportion to their respective contributions. Scott J., on the other hand, held that employees cannot benefit from a resulting trust since, by the mere act of contributing to the fund, they manifest an intention to part irrevocably with their money.

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

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

B. *Contribution Holiday*

Two issues arise in respect of the contribution holiday. The first is whether or not, in the calculation of an employer's required annual contribution to a pension plan, consideration of actuarial surplus in an ongoing pension fund is permitted by law. The second is whether a consideration of that surplus is permitted or prohibited under the terms of a specific plan.

Both parties to the appeals accept that, subject to the plan provisions, the application of an existing surplus to contribution obligations was at all relevant times permitted by Alberta law. This proposition seems incontrovertible in light of the provisions of the *Employment Pension Plans Act* and *Pension Benefits Act* referred to earlier. It also accords with the provisions of Information Circular No. 72-13R7, *supra*. Therefore the provisions of the plan must determine the issue.

Before turning to the Air Products plan, it may be helpful to review the cases which have dealt with contribution holidays. The Ontario Court of Appeal held in *C.U.P.E.-C.L.C., Local 1000 v. Ontario Hydro* (1989), 68 O.R. (2d) 620, that Ontario Hydro could not take a contribution holiday when its employee pension plan was in surplus. The pension plan for Hydro employees was unusual in that it was established pursuant to a statute which enacted the employer's obligation to contribute. Section 20(4) of the *Power Corporation Act*, R.S.O. 1980, c. 384 (as cited by Robins J.A. at p. 623), provided:

20. . . .

> (4) The Corporation *shall* contribute towards the cost of the benefits mentioned in subsection (1) *the amount of the difference between the amount of the contributions of the employees and the amount of the cost of the benefits as determined by actuarial valuations*. [Emphasis of Robins J.A.]

Robins J.A. held that this clause was unequivocal and required Hydro to contribute each year the difference between the cost of the benefits for that year as determined by an actuary and the contributions of the employees. The existence of an ongoing fund surplus was irrelevant to this obligation. Robins J.A. explicitly added at p. 630 that s. 20(4) should not be treated:

> . . . as tantamount to stating that "the corporation shall make contributions to the plan on such basis as may be determined by the actuary from time to time" or "the corporation shall contribute to the plan an amount determined by an actuary in accordance with generally accepted actuarial principles". While clauses of that kind may not be uncommon, particularly in private pension plans, the statutory provisions regulating this plan and under which it operates are not to that effect. Under the formula mandated by the Act, an actuarial valuation is required only for the purpose of ascertaining the cost of the benefits. The actuary is not empowered to set the over-all level of corporation contributions on such basis as he may determine, notwithstanding that his determination may be by reference to generally accepted actuarial principles.

Subsequent cases have limited the application of *Ontario Hydro*. In *Askin v. Ontario Hospital Association* (1991), 2 O.R. (3d) 641, the Ontario Court of Appeal considered a plan (at p. 644) which required that "[e]ach Contributing Member Hospital shall make contributions to the Plan on a basis determined by the Actuary from time to time". Carthy J.A. held that this provision allowed the employers to take a contribution holiday. He distinguished *Ontario Hydro* in this way, at p. 651:

> To repeat for clarity, the *ratio* I take from the *Ontario Hydro* case is that, if a specific calculated contribution is mandated by statute or by the plan itself, it is an indirect use of trust funds to apply surplus to meet that obligation. The intended *ratio* of the present case is that, where the specific method of calculation is not mandated, it is inoffensive and in accordance with statutory authorization and normal actuarial practice to consider a surplus as one factor in the calculation of the contribution.

A contribution holiday was also permitted in *Maurer v. McMaster University* (1991), 4 O.R. (3d) 139 (Gen. Div.). The relevant plan provision there (at p. 144) provided that "[t]he University shall pay into the Fund each year the amount required to fund fully the current service cost of the Plan, as determined by the Actuary, after allowing for the Members' required contributions". Haley J. considered that the words "as determined by the Actuary" modified the phrase "the amount required to fund fully the current service cost of the Plan", and therefore held that the provision enabled the University to use the actuarial surplus to offset current contributions.

Most recently, the Ontario Divisional Court applied *Ontario Hydro* and held that the specific contribution requirements contained in its pension plan prohibited Trent University from taking a holiday from its contributions to its employee pension plan (*Trent University Faculty Assn. v. Trent University* (1992), 99 D.L.R. (4th) 451).

Finally, I note that the taking of a contribution holiday was contemplated by the court in *Reevie*, *supra*, even though in that case employees were held to be entitled to the fund surplus upon termination. The thought was expressed in this manner at pp. 600-601:

> While the plan continues to operate, a surplus will simply afford a cushion against years during which the fund performs poorly, or, it may lead to the reduction of future contributions. If the plan is discontinued, other considerations will arise.

All of these cases are perfectly consistent with one another. Together they demonstrate only that whether or not a contribution holiday is permissible must be decided on the basis of the applicable plan provisions. I can see no objection in principle to employers' taking contribution holidays when they are permitted to do so by the terms of the pension plan. When permission is not explicitly given in the plan, it may be implied from the wording of the employer's contribution obligation. Any provision which places the responsibility for the calculation of the amount needed to fund promised benefits in the hands of an actuary should be taken to incorporate accepted actuarial practice as to how that calculation will be made. That practice currently includes the application of calculated surplus funds to the determination of overall current service cost. It is a practice that is in keeping with the nature of a defined benefits plan, and one which is encouraged by the tax authorities.

An employer's right to take a contribution holiday can also be excluded by the terms of the pension plan or the trust created under it. An explicit prohibition against applying an existing fund surplus to the calculation of the current service cost, or other provisions which in effect convert the nature of the plan from a defined benefit to a defined contribution plan, will preclude the contribution holiday. For example, the presence of a specific formula for calculating the contribution obligation, such as those considered in the *Ontario*

Hydro and *Trent University* cases, prevents employers from taking a contribution holiday. However, whenever the contribution requirement simply refers to actuarial calculations, the presumption will normally be that it also authorizes the use of standard actuarial practices.

The former Catalytic employees successfully argued before the chambers judge that to permit a contribution holiday is to permit an encroachment upon the trust fund of which they are the beneficiaries. I do not agree. As noted earlier, the trust property usually consists of all the monies contributed to the pension fund. To permit a contribution holiday does not reduce the corpus of the fund nor does it amount to applying the monies contained in it to something other than the exclusive benefit of the employees. The entitlement of the trust beneficiaries is not affected by a contribution holiday. That entitlement is to receive the defined benefits provided in the pension plan from the trust and, depending upon the terms of the trust to receive a share of any surplus remaining upon termination of the plan.

Once funds are contributed to the pension plan they are "accrued benefits" of the employees. However, the benefits are of two distinct types. Employees are first entitled to the defined benefits provided under the plan. This is an amount fixed according to a formula. The other benefit to which the employees may be entitled is the surplus remaining upon termination. This amount is never certain during the continuation of the plan. Rather, the surplus exists only on paper. It results from actuarial calculations and is a function of the assumptions used by the actuary. Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is

crystallized only when the surplus becomes ascertainable upon termination of the plan. Therefore, the taking of a contribution holiday represents neither an encroachment upon the trust nor a reduction of accrued benefits.

Similar reasoning explains why I cannot accept the proposition that an employer entitled to take a contribution holiday must also be entitled to recover surplus on termination.

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

C. *Summary*

In the absence of provincial legislation providing otherwise, the courts must determine competing claims to pension surplus by a careful analysis of the pension plan and the funding structures created under it. The first step is to determine whether the pension fund is impressed with a trust. This is a determination which must be made according to ordinary principles of

trust law. A trust will exist whenever there has been an express or implied declaration of trust and an alienation of trust property to a trustee to be held for specified beneficiaries.

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

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

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

Funds remaining in a pension trust following termination and payment of all defined benefits may be subject to a resulting trust. Before a resulting trust can arise, it must be clear that all of the objectives of the trust have been fully satisfied. Even when this is the case, the employer cannot claim

the benefit of a resulting trust when the terms of the plan demonstrate an intention to part outright with all money contributed to the pension fund. In contributory plans, it is not only the employer's but also the employees' intentions which must be considered. Both are settlors of the trust. Both are entitled to benefit from a reversion of trust property.

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

Let us see how these principles should be applied to the agreements presented in this case.

VI. Application to the Facts

A. *Surplus Entitlement*

1. The Catalytic Plan

The plan provided under Article V that all contributions would be paid to a trustee to be held and administered in accordance with a trust agreement which formed part of the plan. The plan also contained the following definitions in Section II:

> 12. "Trust Agreement" means the agreement entered into between the Company and the Trustee establishing the Trust Fund;
>
> 13. "Trustee" means the Canada Trust Company, or such other successor trust company, if any, as the Board may appoint;
>
> 14. "Trust Fund" means the pension fund established pursuant to the Trust Agreement and to which contributions are made after January 1, 1959, by the Company and by contributing members and from which pensions and other benefits under this Plan are to be paid.

A trust agreement was executed between the company and Canada Trust, which contained the following:

> AND WHEREAS under the PLAN contributions will be made to the Trustee which when received by the Trustee shall constitute a Pension Trust Fund (hereinafter called the "FUND") to be held and administered for the benefit of such persons or their estates as may from time to time be designated in or pursuant to the PLAN;
>
> . . .

ARTICLE I

ESTABLISHMENT OF TRUST

1. This Agreement is hereby made a part of the PLAN.

2. The Company may pay or cause to be paid from time to time to the Trustee upon the trusts of this Agreement money or property acceptable to the Trustee for the purpose of the PLAN, all of which together with the earnings, profit and increments thereon and property from time to time substituted therefore shall constitute the FUND hereby created and established. [Emphasis added.]

These provisions establish that a trust was created in 1959. The plan and the agreement constitute a clear declaration of an intention to create a trust. The subject matter of the trust is defined as all contributions made by the company and by employees together with all the earnings of those contributions; the beneficiaries are defined in the Trust Agreement by reference back to the Plan. This is a classic trust established for the benefit of a defined group of persons.

As Moore C.J. noted, there is no evidence that this trust was ever terminated. I agree with that finding. It must then be assumed that the trust continues to exist. This conclusion is strengthened by the definition of "Trustee" in the original plan, which accepts that Canada Trust might not always be in charge of the fund. Thus it can be seen that the parties contemplated that the trust would continue if a different trustee was named. It follows that the trust was not terminated when, in 1974, the company transferred control of its pension fund to Confederation Life Insurance Company pursuant to the terms of an investment contract which is not included in the evidence. Further, the fact that the 1978 version of the Catalytic plan

removed all reference to a trust could not have the effect of terminating the trust. Nor could any of the provisions of the 1984 investment contract entered into by Stearns Catalytic and Confederation Life have that effect.

What then is the effect of this trust? The preamble to the Trust Agreement, the underlined portion of Article I.2 of that agreement, and the definition of "Trust Fund" contained in the 1959 Plan, taken together, make it clear that the trust fund was comprised of all contributions made by both the company and the employees, together with any earnings of those monies. The fact that the 1959 plan was a defined contribution plan under which no surplus could arise does not affect this definition of the trust fund. These provisions in themselves refute the company's argument that only that portion of the fund necessary to cover the benefits defined in the plan was subject to the trust.

All monies in the Catalytic pension fund were impressed with a trust. It follows that the company could only claim the surplus remaining on termination by virtue of a resulting trust, or according to the terms of the trust itself. No resulting trust arises in this case. In my opinion, the purposes of the trust were not fully satisfied by the payment of all defined benefits. One of the objects of the trust was to use any money contained in the fund for the benefit of the employees.

This objective can be implied from the "exclusive benefit" and "non-diversion" clauses contained in the original trust agreement. Furthermore, Section XI of the plan provided that all contributions on behalf of employees who left the company prior to the vesting of their rights as members should be

forfeited to the fund and "allocated among the Company Accounts of the remaining Members at that date".

Section XV of the plan governed an employee's pension entitlement. It reads:

> SECTION XV AMOUNT OF PENSION
>
> When a Member retires, the proceeds of his Member's Account, if any, and of his Company Account . . . shall be used in their entirety to purchase for the Member an Annuity from an insurance company . . . . [Emphasis added.]

These clauses demonstrate that all money in the fund was to be used for the benefit of employees. Even though originally the plan was one of "defined contribution", the entitlement of each employee was never limited to the contributions made on his behalf. Collectively, the entitlement of all eligible employees was to all monies contained in the fund, whether the money resulted from contributions made on their behalf or "windfall" funds resulting from the withdrawal of employees from the plan prior to the vesting of their rights.

These provisions, specifically incorporated by reference into the 1959 Trust Agreement, clearly indicate that one of the objectives of the trust was to divide all monies in the fund among eligible members. The corollary to this is that the trust objects are not exhausted so long as some money remains in the fund and some eligible employees can be found. Therefore, a resulting trust cannot arise in this case.

Air Products is only entitled to the surplus, if at all, under the terms of the trust. In this case both the trust agreement and all versions of the plan make some provision for what was to occur on termination of the plan. The question is which of the different provisions dealing with termination governed in 1988? The answer depends upon the validity of the amendments purportedly made by the employer since 1959.

Section XXII of the 1959 plan provided:

> 3. In the event of termination of the Plan, the Company cannot recover any sums paid to the date thereof and each Member of the Plan shall receive the proceeds of his Member's Account and his Company Account as of the date of such termination. . . .

This section was reproduced in nearly identical form in the 1966 plan. The issue of entitlement to surplus was not specifically addressed until the plan was amended again in 1978. Section 17.05 of the 1978 plan provided that any surplus remaining on termination was to be distributed according to the directions of the company. The 1983 Air Products Plan contained the same stipulation (renumbered to become Section 18.05), and added an additional clause imposing a maximum level of benefits recoverable by an employee and stating that any surplus remaining once that maximum level had been reached was to revert to the company.

The validity of these amended provisions depends upon the original 1959 documents. Section XXII.2 of the pension plan prohibited any amendment which would operate to reduce the benefits which had accrued to

the employees prior to the date of the amendment. The Trust Agreement contained the following provision:

ARTICLE V

MODIFICATION AND TERMINATION

> 1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided . . . that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time. . . .

The company therefore reserved a general amending power subject to the provisos that no amendments could reduce accrued benefits or allow the trust fund to be used in any way other than for the employees' exclusive benefit. The company did not expressly reserve for itself the power to revoke the trust. Such a power cannot be implied under the broad general amendment power.

I cannot accept that when the Catalytic Plan became a defined benefit plan in 1966, the parties did not intend Article V of the Trust Agreement to apply to any surplus which might arise. Although the Trust Agreement was not altered, several provisions contained in the 1959 plan were modified in the 1966 version of the plan. The nature of the modifications indicates that the parties considered the effect of changing to a defined benefit plan and made the necessary amendments to the 1966 plan. In these circumstances, the parties

must be taken to have intended that the unaltered provisions of the plan and the Trust Agreement should continue to apply to the new arrangement. Article V therefore continued to apply to all monies in the pension fund after 1966.

In the result, the 1978 amendment purporting to give the company the power to distribute surplus to itself, as well as the reversion clause of the 1983 plan, are invalid. Both represent attempts to revoke partially a trust in favour of the employees which was established in 1959. Neither is within the scope of the control which the company reserved to itself at that time.

I agree with the Chambers Judge and the Court of Appeal that, by virtue of a continuing trust in their favour, the employees are entitled to those surplus funds which are derived from the Catalytic plans.

B. *Contribution Holiday*

The relevant plan provisions which govern the taking of a contribution holiday are those contained in the 1983 Air Products Plan. As the employees point out, the Chambers Judge, when considering this issue, mistakenly quoted the contribution provisions from the 1977 Stearns plan. The Stearns plan expressly reserved to the company the right to pay its contributions from surplus. It is therefore necessary to consider whether the actual provisions of the 1983 plan would affect the result he reached.

Section 4.03 of the Air Products plan (which is identical to s. 4.03 of the 1978 Catalytic plan) provides that:

4.03 Company Contributions

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

The employees submit that this section, like the contribution clause in the *Ontario Hydro* case, provides a fixed formula according to which the annual contribution obligation must be calculated. On this approach, the standard actuarial practice of applying surplus to current service funding obligations is excluded. Instead, Section 4.03 requires the company to contribute an amount equal to not less than the sum of:

(i) the amount necessary to provide the retirement benefits accruing to members during the current year, and

(ii) the amount required to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the *Pension Benefits Act*, after taking into account the assets of the Pension Fund and all other relevant factors.

Where no amount is required under (ii), the employees submit that the Company's minimum annual contribution is the amount determined under (i).

In my view, the words "after taking into account the assets of the Pension Fund and all other relevant factors" must qualify all of the preceding phrase beginning with "as necessary. . .". Such an interpretation is consistent with the natural grammatical construction of Section 4.03. The absence of a comma between the phrases "to provide the retirement benefits accruing to Members during the current year pursuant to the Plan" and "to make provision for the proper amortization of any initial unfunded liability or experience deficiency" supports this position. Further, to agree to the interpretation suggested by the employees would be to accept that the company either overlooked or decided not to take advantage of the chance to take into account a surplus in the ongoing plan in determining its contributions. This seems to me unlikely since elsewhere in the amended provisions specific reference is made to a potential surplus on termination. There is as well the Revenue Canada circular which requires employers to take contribution holidays when the actuarial surplus exceeds certain levels. It is more likely that in 1983 the company simply assumed that the wording of Section 4.03 permitted the consideration of an actuarial surplus in the calculation of the current service cost.

The Air Products Plan, like those considered in *Askin* and *Maurer*, *supra*, is not one which specifically mandates regular contribution on a specified basis which would leave an actuary no discretion to employ the standard actuarial practice of considering existing surplus. The wording of the

plan itself implicitly authorizes an actuary to consider an actuarial surplus when calculating the company's annual funding obligation.

As a result, I am of the opinion that the plan did allow the company to take contribution holidays. The appeal should be allowed in respect of the order made by the courts below requiring Air Products to pay $1,465,400 (which represents the actuarial surplus applied to the current service costs in the years when the company made no contributions) into the plan.

2. The Stearns Plan

The Stearns employees also claim entitlement to the surplus remaining in the pension fund. They argue that the original Stearns fund was subject to a trust in their favour. Even if no trust existed, the employees say that the company is obligated by the provisions of a 1972 employee pension brochure and by the existence of a fiduciary duty to exercise its discretion to distribute the surplus in favour of the employees.

The 1970 Stearns plan differs in two significant ways from the original Catalytic plan. Firstly the Stearns plan makes no reference to the existence of a trust; secondly, it specifically contemplates the reversion of surplus assets to the company in these words:

ARTICLE XIV

Amendment or Termination of the Plan

14.1 . . .

c) . . .

Notwithstanding any surplus remaining after all benefits referred to in this Sub-section 14.1 (c) have been provided, such surplus may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions at the time, be returned to the Company or may be used for the benefit of Participants, former Participants, beneficiaries or estates in such equitable manner as the Company may in its discretion determine.

This provision remained in the 1977 version of the Stearns plan and was then replaced in 1983 by Section 18.05 of the Air Products plan which, as observed earlier, provided for the automatic reversion of surplus to the company. The employees seek to establish the existence of a trust in order to make the further argument that the 1983 amendment to the plan was invalid as an unauthorized partial revocation of the trust.

(a) *Was the Stearns Fund Impressed with a Trust*?

Neither the 1970 nor the 1977 Stearns plans make any reference to a trust nor provide for the creation of a trust agreement. The plan was funded by means of a Group Annuity Policy entered into between the company and the Mutual Life Assurance Group. The employees contend that the terms of the pension plan clearly implied a trust onto this fund. In particular, the employees rely upon the following provisions of the plan:

13.2 No part of the Fund shall be used for or diverted to purposes other than for the exclusive benefit of Participants and their beneficiaries. . . .

14.1 . . .

> b) No amendment shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants . . .

This plan, together with the 1972 Brochure and the 1977 Stearns plan, are said to constitute the trust documents.

It is true that the alleged subject matter of the trust, the pension fund, was defined under the two Stearns plans, and that the employees were identified as those entitled to receive the fund monies. Furthermore, the exclusive benefit and non-diversion clauses relied upon by the employees above are consistent with the existence of a trust. Nonetheless, I am not convinced that a trust was ever created. Certain phrases, such as the exclusive benefit and non-diversion clauses identified above, are commonly found in plans which do create pension trusts. They may point to the existence of a trust but of themselves they cannot be taken as demonstrating an intention by the employer to create a trust.

The company identifies several other clauses which it claims are equally consistent with the non-existence of trust, and clearly identify the plan as a contract to receive defined benefits. These individual clauses are of little assistance in determining whether a trust came into existence. Rather, all of the documents relied upon by the employees must be construed in their entirety in order to see whether an intention to create a trust can be imputed to the company. I do not see any such intention apparent on the face of these documents.

Unlike the Catalytic plan, the Stearns plan makes no mention of any trust, trust fund or trustee. The Stearns fund was not created pursuant to a trust agreement but pursuant to a contract. This is so even though by 1970 the use of the trust in the creation of private employer pension plans had become a well-established practice. The absence of any reference to a trust in these circumstances indicates that there was a deliberate decision to avoid the use of a trust. Any argument that the employer merely "omitted" to state explicitly its intention to create a trust is difficult to accept.

At the time of the 1970 plan, the employer tax benefits to be gained from the creation of a "trusteed"[*] pension fund were equally available to employers who preferred to purchase a group insurance policy.

Finally, the employees contend that three documents -- the 1970 and the 1977 plans and the 1972 employee brochure -- made up the trust deed. On this approach, it would seem that the employer's intention to create a trust was not perfected until seven years after the creation of the fund. There was no significant change in circumstances between 1970 and 1977 which warrants a finding that a trust which did not exist at the inception of the plan suddenly came into existence in 1977.

I do not think that the Stearns pension fund was ever subject to a trust.

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[*] See Erratum [2006] 1 S.C.R. iv.

(b) *The Pension Brochure*

The Stearns employees relied upon the effect of a pension brochure which was distributed to employees in 1972. They urged us to accept that clauses contained in that document must be taken to have fixed the employer with an equitable obligation to distribute any surplus remaining on termination to the employees.

The brochure is entitled "Stearns-Roger Canada Ltd. -- Employee Benefits". In his supplementary affidavit, Gunter Schmidt stated that he received the brochure, which is dated June 1, 1972, when he joined the company in 1973. It consists of eight pages of text in which the operation of the pension plan is explained in some detail. The brochure contains the following relevant provisions:

> Future of the Plan
>
> It is the intention of the Company that the plan will continue indefinitely but of necessity they reserve the right to amend, modify or terminate the plan at any time. . . . In the event that there is a surplus in the fund after all benefits have been paid it is the Company's intention that the surplus will be distributed in an equitable manner to the employees active in the plan at the date of termination.
>
> General
>
> This outline has been prepared to acquaint you with the provisions of your plan. Please read it carefully.
>
> The precise terms of the plan are contained in the official plan text and Insurance company contract which may be read by any employee on request at the Calgary Office of the Company.

. . .

> The company reserves the right to revise or discontinue any of the benefit plans at any time.
>
> The above are transcripts from the various insurance policies and contracts. If more detailed information is desired our insurance group will be pleased to answer questions.

The employees assert that this brochure formed a binding part of the pension plan documents and that the statement contained in it to the effect that the company intends to pay any remaining surplus to the employees estops the company from now claiming the surplus for itself.

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

Foisy J. explained why courts will in specified circumstances bind an employer to the terms of a pension brochure in *Harris v. Robert Simpson Co.*, [1985] 1 W.W.R. 319, at p. 327:

> If it were otherwise then an employer could provide the employee with a brochure claiming to represent the significant and material terms in the company's pension plan. Yet the "true" plan could vary significantly from this representation without the employee's knowledge. In such a case it cannot be said that the "true" agreement prevails, as to do so would leave the door open to mischief.

In other words it would be unfair or unacceptable if an employer were to attract and retain employees by making representations as to the pension benefits available upon which the employees could be expected to rely and then resile from those representations as being contrary to the actual pension terms.

The 1972 brochure does not purport to have any contractual effect. It does, however, contain a detailed outline of an employee's entitlements under the plan, although it states that it is merely a "transcript" of the various policies and that the benefits can be amended by the company. The brochure is worded in a way that is declarative of the rights of individual employees under the plan. For example, the plan states "The Life Insurance is payable in the event of your death from any cause. . . . If you should become totally and permanently disabled while insured and prior to age sixty your life insurance will remain in force as long as you remain so disabled but you must furnish proof of disability . . . ."

The only notable exception to this didactic style is contained in the clause concerning the future of the plan. The brochure there sets out the "intention" of the company. This is a declaration of intention as to a future act, but it does not in any way indicate that the company is undertaking an obligation to allocate surplus to the employees.

The brochure is potentially misleading. Yet there is no evidence as to the effect that this brochure had on the employees of the company. All that is known is that the brochure was distributed to the employees of the company in

June, 1972, and that Mr. Schmidt received a copy in 1973 when he joined the company. There is no indication that Mr. Schmidt was induced to join the company on the basis of the terms of the brochure, or that he even read it. There is no evidence that either the employees or their union relied upon the brochure in such a way as to affect their position during collective bargaining sessions. This may be contrasted to the situation in *Re Collins and Pension Commission of Ontario*, *supra*, where the Ontario Divisional Court found, at p. 277, that a booklet describing the terms of the pension plan, together with the plan itself, led to a belief amongst plan members that the company had no right to claim any part of the fund.

Finally, I have some doubts as to the extent to which a brochure issued in 1972 can influence entitlement to plan surplus in 1988 particularly since it specifically states that the plan will be subject to amendment from time to time. As a brochure describing pension benefits becomes outdated, it becomes increasingly difficult for employees to rely upon it as the source of a supplementary obligation undertaken by the employer.

I agree with the Court of Appeal that the brochure provisions concerning the treatment of surplus did not, on the evidence adduced in this case, amount to a promise intended to affect the legal relationship between the parties. It cannot form the basis for an estoppel as there is no evidence of inducement or reliance upon it by the employees.

(c) *Interpretation of the Plan Provisions*

Since no trust was ever created under the Stearns plan and the 1972 brochure did not have any legal effect, the issue of entitlement to the plan surplus must be decided on the basis of an interpretation of the plan's provisions.

The position of the employees is that Section 18.05 of the Air Products Plan was an invalid amendment. Therefore, they argue that Article 14.1(c) of the 1970 plan (Article 14.3 of the 1977 plan) still applies, that that section gives the company a discretion as to whether distribute surplus to employees or to itself, and that the employer owes a fiduciary duty to the employees which compels it to exercise that distribution discretion in favour of the employees.

Moore C.J. did not explicitly deal with the validity of the 1983 amendment. He decided that, even under the 1977 version of the plan, the employer was entitled to take the surplus. The issue of fiduciary duty was not raised before him.

It may be helpful to begin by examining the 1983 amendment. Whether or not the surplus reversion clause contained in Section 18.05 of the Air Products plan is valid must be determined by reference to the amendment clause contained in both the 1970 and the 1977 plans:

> 14.1 The Company retains the right to amend or modify or terminate the Plan in whole or in part, at any time and from time to time, and in such manner and to such extent as it may deem advisable, subject to the following provisions:
>
> a) No amendment shall have the effect of reducing any Participant's, former Participant's, joint annuitant's, beneficiary's, or estate's then existing interest in the Fund;
>
> b) No amendment shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants, former Participants, joint annuitants, beneficiaries, or estates;

In my opinion, the 1983 amendment of the pension plan was within the limits of this power of amendment. The amendment does not violate Article 14.1(a) because at the time it was enacted it did not reduce any "then existing" interest of the employees. Under the prior plans, the employees had no interest in the surplus remaining upon termination until such time as the company exercised its discretion to give them an interest. The removal of a mere potential interest in the funds was within the company's amending power.

Nor do I think that the amendment violated the limitation on the amending power contained in Article 14.1(b). I agree with Moore C.J. that this restriction on amendment was in the nature of a general protection of the benefits and rights of the plan participants and that it must be read in the light of other provisions dealing with specific rights including the treatment of surplus. He considered that two particular provisions in the 1977 plan overrode any conflict with the more general terms of the amendment power. I agree. This was also true of the corresponding provisions in the 1970 plan. The relevant 1970 clauses are that part of s. 14.1(c) which gives the employer a discretion as to the allocation of surplus, and:

> 13.2 No part of the Fund shall be used for or diverted to purposes other than for the exclusive benefit of Participants and their beneficiaries. No Participant, retired Participant, survivor or beneficiary under the Plan, or any other person, shall have any interest in or right to any part of the earnings of the Fund, or any rights in or to or under such Fund or any part of the assets thereof, except and to the extent expressly provided in this Plan.

The amending power contained in Article 14.1(b) must therefore be read in light of the fact that the employee rights under the plan are limited by s. 13.2 (and indeed throughout the plan) to the benefits defined in the plan, as well as by the stipulation that the company has the right to distribute surplus as it chooses. The 1970 plan does not deal with the issue of whether the reversion of surplus to the company is inconsistent with the non-diversion and exclusive benefit clauses contained in Article 13.2. I do not think it is. The prohibition on diversion of funds and the exclusive benefit clause applied from the outset only in respect of the defined benefits to which the employees were contractually entitled. They did not apply to the distribution of a plan surplus. The revamped version of Article 13.2, which appeared as Article 13.4 in the 1977 plan, and upon which Moore C.J. based his conclusion, clarified this point but did not change the substance of the original provisions.

> 13.4 No part of the Fund shall be used for, or diverted to, purposes other than for the exclusive benefit of Participants, their designated Beneficiaries, or estates, <u>except to the extent that surpluses, as certified by the Actuary, may be returned to the Company with the approval of the Minister of National Revenue and the Superintendent of Pensions</u>. . . . No Participant, retired Participant, survivor, or designated Beneficiary under this Plan, or any other person, shall have any interest in or right to any part of the Fund except and to the extent expressly provided in this Plan. [Emphasis added.]

Whether measured against the 1970 or the 1977 plan provisions, Section 18.05 of the Air Products Plan was a valid amendment. The company is entitled according to its terms to any surplus remaining in the pension fund which can be traced to the former Stearns plans. This is the conclusion which must be reached on an interpretation of the contract. The issue of a fiduciary duty does not arise.

(d) *The Contribution Holiday*

For the reasons given on the appeal, Air Products was entitled to take a contribution holiday. The application of an actuarial surplus to current service funding obligations was permitted under the terms of the Air Products Plan, and did not have the effect of reducing any benefits which had accrued to the employees.

(e) *The Need for Legislation*

The results in these appeals demonstrate the need for legislation. In both appeals the pension fund was created to benefit the employees. During the contribution holiday enjoyed by the employer they continued to pay into the pension fund. They had a real stake in the fund which was created for their benefit and funded in part by their contributions. It seems unfair that there should be a different result for these two groups of employees based only upon a finding that a trust was created in one case but not in the other. In my opinion there should be a legislative scheme set up for determining the proportion of the surplus which should be awarded to the employer and the employees. It could

be based at least in part upon their contributions to the creation of the surplus. Principles of equity and fairness should encourage legislators to draft a scheme to provide for the equitable distribution of any surplus in pension plans that are terminated.

VII. Disposition

In the result, I would dispose of these appeals as follows:

The Appeal

1. The former Catalytic Employees are entitled to any surplus remaining in the pension fund which derives from former Catalytic plans. The appeal is dismissed on this ground and the order of the Court of Appeal varied accordingly.

2. Air Products was entitled under the terms of its pension plan to take a contribution holiday. The appeal is allowed on this ground.

The Cross-Appeal

1. Air Products is entitled to all surplus remaining in the pension fund which derives from the former Stearns plan.

2. Air Products was entitled to take a contribution holiday.

The cross-appeal is dismissed on both grounds. In light of the potentially misleading provisions contained in the brochure prepared and circulated by the employer, there should be no costs against the employees.

The costs of all parties on the appeal should be paid out of the Catalytic pension fund on a solicitor and client basis.

Similarly the costs of all parties on the cross-appeal should be paid out of the Stearns pension fund on a solicitor and client basis.

APPENDIX A

The following is an edited version of the Agreed Statement of Facts provided by the parties. The full text of the document is incorporated in the reasons of the Chief Justice of the Alberta Court of Queen's Bench.

I. HISTORY OF CATALYTIC PLANS

A. THE 1959 CATALYTIC PLAN

The 1959 Catalytic Plan was a money purchase plan which contained the following provisions:

SECTION V TRUST FUND

All contributions made by the members and the Company will be paid to the Trustee to be administered subject to the provisions of the Act governing the investment of Pension funds, and in accordance with the terms of the Trust Agreement which forms part of this plan and of which this plan is Exhibit "A".

All benefits on the death or break of service of a Member shall be payable from the Trust Fund. All benefits on the retirement of a Member shall be payable as set forth in Section XV.

Expenses of the Trust Fund shall be paid out of the Fund unless paid by the Company.

SECTION VIII MEMBERS' ACCOUNTS

The Pension Committee shall keep for each Member of the Plan two accounts as follows:

1. Member's Account

   Here will be kept a cumulative record of any contributions made by the Member and the interest income and capital gains and losses realized and unrealized allocated thereon in accordance with Section X.

2. The Company Account

   Here will be kept a cumulative record of the amounts allocated to the Member as follows:

   (a) the Company's contribution allocated in accordance with Section IX.

   (b) The interest income and capital gains and losses realized and unrealized allocated in accordance with Section X.

   (c) The forfeitures allocated in accordance with Section XI.

SECTION XXII FUTURE OF THE PLAN

1. The Company hopes and expects to continue the Plan and the payment of contributions hereunder indefinitely but such continuance is not assumed as a contractual obligation. The Company expressly reserves the right, by action of its Board, to amend or terminate the Plan in whole or in part, if in the opinion of the Company future conditions warrant such action.

2. No amendment to the Plan shall operate to reduce the benefits which have occrued (*sic*) to the Members of the Plan prior to the date of amendment.

3. In the event of termination of the Plan, the Company cannot recover any sums paid to the date thereof and each Member of the Plan shall receive the proceeds of his Member's Account and his Company Account as of the date of such termination. No other employees will become eligible to become Members and no further contributions will be made by the Company.

. . .

B. TRUST AGREEMENT

As contemplated by the 1959 Catalytic Plan, Catalytic entered into an agreement dated September 8, 1959 (the "Trust Agreement") with Canada Trust Company whereby Canada Trust, as trustee, was to hold, invest and administer the fund. The Trust Agreement provided:

ARTICLE I

ESTABLISHMENT OF TRUST

1. This Agreement is hereby made a part of the PLAN.

2. The Company may pay or cause to be paid from time to time to the Trustee upon the trusts of this Agreement money or property acceptable to the Trustee for the purpose of the PLAN, all of which together with the earnings, profit and increments thereon and property from time to time substituted therefore shall constitute the FUND hereby created and established.

3. The Trustee hereby accepts the trusts herein set out and agrees to hold, invest, distribute and administer the FUND in accordance with the provisions of this Agreement.

ARTICLE V

MODIFICATION AND TERMINATION

> 1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof.
>
> 2. This Agreement may be terminated at any time by the Company upon at least sixty (60) days' prior written notice to the Trustee, and with its termination, or upon the dissolution or liquidation of the Company, the FUND shall be paid out by the Trustee as directed by the Company.

C. THE 1966 CATALYTIC PLAN

The 1966 Catalytic Plan changed the benefit formula from a money purchase formula to a defined benefit formula. . . . [E]ffective October 1, 1966 the plan provided that:

> . . . the Company shall not less frequently than annually make such contributions as are necessary to provide the benefits accruing to Members during the current year and to amortize any initial unfunded liability or experience deficiency in accordance with the provisions of The Pension Benefits Act of Ontario. (Section VI)

The provisions regarding the future of the plan remained unchanged from Section XXII of the 1959 Catalytic Plan.

The money purchase portion of the Catalytic 1959 and 1966 Plans was segregated and is administered separately from the funds generated in the defined benefit plans. No surplus was or could be generated from the money purchase portion of the 1959 and 1966 Catalytic Plans.

D. THE 1978 CATALYTIC PLAN

This plan was a defined benefit plan. . . . [It] provided . . .:

. . .

SECTION 2 -- DEFINITIONS

2.12 "Funding Agency" means the trustees, trust company or insurance company that the Company may appoint to hold and invest the Pension Fund or the Pooled Pension Trust Fund or such successor trustees, trust company or insurance company as the Company may appoint from time to time to hold and invest the Pension Fund or the Pooled Pension Trust Fund.

2.13 "Funding Agreement" means the agreement entered into between the Company and the Funding Agency establishing and maintaining the Pension Fund.

2.18 "Pension Fund" means the fund established pursuant to the Funding Agreement to which contributions are made by the Members and Company and from which retirement and other benefits under the Plan are to be provided.

SECTION 4 -- CONTRIBUTIONS

4.03 The Company shall contribute from time to time, but not less frequently than annually, such amounts as are not less than those certified by the Actuary as necessary to provide the retirement benefits accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the Pension Benefits Act, after taking into

account the assets of the Pension Fund and all other relevant factors.

. . .

SECTION 17 -- AMENDMENT TO OR TERMINATION OF THE PLAN

17.01 Continuation of Plan

The Company expects and intends to maintain this Plan in force indefinitely but necessarily reserves the right to amend or discontinue the Plan either in whole or in part, if, in the opinion of the Company, future conditions warrant such action, subject always to the requirements of the Department of National Revenue and the provisions of the Pension Benefits Act.

17.02 Amendment of Plan

No amendment to the Plan shall operate to reduce the pension benefits which have accrued to Members thereunder prior to the date of such amendment.

17.03 Discontinuance of Plan

Should the Plan be wholly terminated, the Company shall not be obligated to make any further contributions to the Plan and the assets held under the Pension Fund shall be allocated for the provisions of the accrued benefits to which the Members, their Beneficiaries and their joint annuitants are entitled in such equitable manner as may be determined by the Company in consultation with the Actuary until all liabilities under the Plan have been met. Such benefits may be provided through the purchase of annuity contracts from insurance companies licensed to transact business in Canada, in the form elected by the Members, or through the continuation of the Funding Agreement for this purpose. If the assets of the Pension Fund are not sufficient to provide the aforementioned accrued benefits, the Pension Fund shall be allocated in a manner approved under the Pension Benefits Act.

. . .

17.05 Distribution of Benefits

If, after full provision has been made for the accrued benefits payable to the Members, their Beneficiaries and their joint annuitants, there should remain any excess assets

> in the Pension Fund, such excess shall be used as the Company or liquidator or trustee in bankruptcy, if appropriate, may direct. Any distribution of the Pension Fund resulting from termination of the Plan shall be in accordance with the applicable provisions of the Pension Benefits Act and the Income Tax Act, and with the rules and regulations of the Department of National Revenue with respect to registered pension plans.

. . .

II. A HISTORY OF THE STERNS PLANS

A. THE 1962 STEARNS PLAN

On January 1, 1962, Stearns obtained a Group Annuity Policy (GA577) from the Mutual Life Assurance Company for the purpose of providing retirement benefits to its employees. No surplus was or could have been derived pursuant to this plan.

B. THE 1970 STEARNS PLAN

Stearns established a pension plan effective January 1, 1970 for the retirement of and payment of pensions to its employees.

. . .

As required by Article 13.1 of this plan, the Company entered into a Group Annuity Policy (GA1328) with the Mutual Life Assurance Company and

a fund was established by transfer of the assets from the 1962 Stearns Plan and by contributions from the employees and the Company.

The 1970 Stearns Plan provided that:

ARTICLE I

DEFINITIONS

Fund shall mean the Fund to be established under the Deposit Administration Policy issued by the Insurer by transfer of assets from the Prior Plan and by contributions by the Participants and the Company from which the benefits of the Plan are to be provided.

ARTICLE II

ESTABLISHMENT OF THE PLAN

. . .

2.2 Prior to the Effective Date, certain Employees of the Company had accumulated retirement benefits under the Prior Plan. The Prior Plan shall be terminated 31 December 1969 and all benefits earned thereunder shall be transferred to the Plan. All benefits accrued under the Prior Plan transferred to the Plan shall become a liability of the Plan and shall be paid in accordance with the provisions of the Plan. Future contributions by such Employees and Employees who become eligible on and after the Effective Date shall be made under the Plan.

ARTICLE IV

CONTRIBUTIONS

4.3 (a) The Company will contribute each year to the Fund such amounts as determined by the Actuary, which, when added to the Participant's contributions made under Section 4.1 will provide the regular benefits described in the Plan and will provide for funding in accordance with the tests for solvency prescribed by the regulations under the Pension Benefits Act.

(b) It is expressly stipulated that the Company will not make any additional contributions corresponding to or in respect of the additional voluntary contributions made by a Participant as provided for in Section 4.2 or 4.4.

ARTICLE XIII

RETIREMENT FUND

13.2 No part of the Fund shall be used for or diverted to purposes other than for the exclusive benefit of Participants and their beneficiaries. No Participant, retired Participant, survivor or beneficiary under the Plan, or any other person, shall have any interest in or right to any part of the earnings of the Fund, or any rights in or to or under such Fund or any part of the assets thereof, except and to the extent expressly provided in this Plan.

ARTICLE XIV

Amendment or Termination of the Plan

14.1 The Company retains the right to amend or modify or terminate the Plan in whole or in part, at any time and from time to time, and in such manner and to such extent as it may deem advisable, subject to the following provisions:

a) No amendment shall have the effect of reducing any Participant's, former Participant's, joint annuitant's, beneficiary's, or estate's then existing interest in the Fund;

b) No amendment shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants, former Participants, joint annuitants, beneficiaries, or estates;

Article 14.1(c) set out the following scheme of distribution to be instituted upon termination of the plan:

c) If it should become necessary to discontinue the Plan, the assets of the Fund shall be used, to the extent adequate, for the following purposes:

. . .

> Notwithstanding any surplus remaining after all benefits referred to in this Sub-section 14.1 (c) have been provided, such surplus may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions at the time, be returned to the Company or may be used for the benefit of Participants, former Participants, beneficiaries or estates in such equitable manner as the Company may in its discretion determine.

C. BROCHURE . . .

On June 1, 1972, Stearns issued to its employees a brochure entitled `Employee Benefits' which provided that:

> Future of the Plan
>
> It is the intention of the Company that the plan will continue indefinitely but of necessity they reserve the right to amend, modify or terminate the plan at any time. If it becomes necessary to terminate the plan at some future date, all employees would be granted 100% vesting, regardless of their service. No part of the assets of the fund will be available to the Company until all benefits earned under the plan to the date of termination have been paid. In the event there is a surplus in the fund after all benefits have been paid it is the Company's intention the surplus will be distributed in an equitable manner to the employees active in the plan at the date of termination.

D. THE 1977 STEARNS PLAN . . .

By an amendment dated January 1, 1977, Stearns amended the 1970 plan. . . .

The 1977 Stearns Plan contained . . . the following provisions:

ARTICLE I

DEFINITIONS

1.14 Fund means the corpus and all earnings, appreciations, or additions thereon and thereto held by the Funding Agency under the Funding Agreement.

1.15 Funding Agency means the Trust Company, Trustees, Insurance Company or successors thereof as the Company may appoint to hold the Fund pursuant to the Funding Agreement.

1.16 Funding Agreement means the agreement or contract entered into between the Company and the Funding Agency establishing the Fund.

ARTICLE IV

CONTRIBUTIONS

4.1 The Company will contribute to the Fund, not less frequently than annually, such amounts which are not less than those certified by the Actuary as being necessary to provide benefits accruing during each Plan Year and to make provision in accordance with the Pension Benefits Act for the amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued after taking into account the assets of the Fund and such other factors as may be deemed relevant. The Company reserves the right, however, subject to the provisions of Article XIII, to pay its contributions from such surpluses as may accumulate and shall be determined in a valuation of the Funds' assets and liabilities certified by an Actuary.

4.2 Participants shall not be required to contribute to the Plan.

ARTICLE XIII

ESTABLISHMENT OF THE FUND

13.4 No part of the Fund shall be used for, or diverted to, purposes other than for the exclusive benefit of Participants, their designated Beneficiaries, or estates, except to the extent that surpluses, as certified by the Actuary, may be returned to the Company with the approval of the Minister of National Revenue and the Superintendent of Pensions and except as provided in Sub-section 14.2 (d) of Article XIV. No Participant, retired Participant, survivor, or designated Beneficiary under this Plan,

or any other person, shall have any interest in or right to any part of the Fund except and to the extent expressly provided in this Plan.

ARTICLE XIV

AMENDMENT OR TERMINATION OF THE PLAN

14.1 The Company retains the right to amend or modify or terminate the Plan in whole or in part, at any time and from time to time, and in such manner and to such extent as it may deem advisable, subject to the following provisions:

(a) no amendment, modification or termination shall have the effect of reducing any Participant's, former Participant's, joint annuitant's, Beneficiary's or estate's then existing interest in the Fund.

(b) no amendment, modification or termination shall have the effect of diverting any part of the Fund to purposes other than for the exclusive benefit of the Participants, former Participants, joint annuitants, Beneficiaries or estates.

The scheme of distribution upon termination was . . . contained in Article 14.2 . . .:

14.2 Should the Plan be terminated, whether by the Company or as a result of wind-up or bankruptcy of the Company, the assets of the Fund shall be used, to the extent adequate, and subject to the provisions of the Pension Benefits Act, for the following purposes:

. . .

14.3 Any balance remaining in the Fund after distributions have been made in accordance with the foregoing Section 14.2 after satisfying all other liabilities of the Plan may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions, be returned to the Company or may be used for the benefit of Participants, former Participants, designated Beneficiaries, or estates, in such equitable manner as the Company may at its discretion determine.

E. THE 1982 STEARNS PLAN CONSOLIDATION . . .

The 1982 Stearns Plan Consolidation is virtually identical to the 1977 Stearns Plan with one important exception. Article 14.3 of the 1982 Sterns Plan Consolidation provides that:

> 14.3 Any balance remaining in the Fund after distributions have been made in accordance with the foregoing Section 14.2 after satisfying all other liabilities of the Plan may, subject to the approval of the Minister of National Revenue and the Superintendent of Pensions, be returned to the former Participants, designated Beneficiaries, or estates, in such equitable manner as the Company may at its discretion determine, so long as the surplus is distributed in such manner as to observe the maximum benefit allowed by the Department of National Revenue.

This consolidation was not registered with the Employment Pension Plans Branch and there is no Directors' Resolution authorizing it.

III. THE STEARNS CATALYTIC PENSION PLANS

[I]n 1983 with the amalgamation of Stearns and Catalytic, the Company instituted the two Stearns Catalytic Pension Plans. . . .

These plans contained, . . . the following terms:

> SECTION 1 -- ESTABLISHMENT OF THE PLAN
>
> The benefits provided by this Plan, in respect of service prior to October 1, 1983, are in lieu of all and any benefits to which any person, active or retired, may have been entitled under either of these Prior

Plans, and in no event shall be less than the benefits to which they were entitled under these Prior Plans.

Effective October 1, 1983, the respective pension funds of the Catalytic Enterprises Plan and the Stearns-Roger Plan shall be merged and held as one fund to the benefit of members of this Pension Plan for Employees (Senior Members of Management) of Stearns Catalytic Ltd. - Construction Division.

SECTION 2 -- DEFINITIONS

2.19 "Pension Fund" means the fund established pursuant to the Trust Agreement to which contributions are made by the Members and the Company and from which retirement and other benefits under the Plan are to be provided.

2.24 "Trustee" means the trustees, trust company or insurance company that the Company may appoint from time to time, to hold and invest the Pension Fund.

2.25 "Trust Agreement" means the agreement entered into between the Company and the Trustee establishing and maintaining the Pension Fund.

. . .

SECTION 4 -- CONTRIBUTIONS

4.03 The Company shall contribute from time to time, but not less frequently than annually, such amounts as are not less than those certified by the Actuary as necessary to provide the retirement benefits accruing to Members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued, in accordance with the requirements of the Pension Benefits Act, after taking into account the assets of the Pension Fund and all other relevant factors.

. . .

6.05 Statutory Maximum Retirement Benefit

In no event shall the annual retirement benefit payable under the Plan in respect of the retirement or termination of service of a Member or termination of the Plan exceed the lesser of:

a) $1,715 for each year of the Member's Credited Service to a maximum of 35 years; and

b) 2% of the Member's average best three (3) consecutive years' Earnings multiplied by his years of Credited Service, to a maximum of 35 years.

. . .

SECTION 18 -- AMENDMENT TO OR TERMINATION OF THE PLAN

18.01 Continuation of Plan

The Company expects and intends to maintain this Plan in force indefinitely but necessarily reserves the right to amend or discontinue the Plan either in whole or in part, if, in the opinion of the Company, future conditions warrant such action, subject always to the requirements of the Department of National Revenue and the provisions of the Pension Benefits Act.

18.02 Amendment of Plan

No amendment to the Plan shall operate to reduce the pension benefits which have accrued to Members thereunder prior to the date of such amendment.

18.03 Discontinuance of Plan

Should the Plan be wholly terminated, the Company shall not be obligated to make any further contributions to the Plan and the assets held under the Pension Fund shall be allocated for the provisions of the accrued benefits to which the Members, their Beneficiaries and their joint annuitants are entitled in such equitable manner as may be determined by the Company in consultation with the Actuary until all liabilities under the Plan have been met. Such benefits may be provided through the purchase of annuity contracts from insurance companies licensed to transact annuities business in Canada, in the form elected by the Members, or through the continuation of the Trust Agreement for this purpose. If the assets of the Pension Fund are not sufficient to provide the aforementioned accrued benefits, the Pension Fund shall be allocated in a manner approved under the Pension Benefits Act.

. . .

18.05 Distribution of Benefits

> If, after full provision has been made for the accrued benefits payable to the Members, their Beneficiaries and their joint annuitants, there should remain any excess assets in the Pension Fund, such excess shall be used as the Company or liquidator or trustee in bankruptcy, if appropriate, may direct.
>
> Any distribution of the Pension Fund resulting from termination of the Plan shall be in accordance with the applicable provisions of the Pension Benefits Act and the Income Tax Act, and with the rules and regulations of the Department of National Revenue with respect to registered pension plans.
>
> The distribution of the assets of the fund must not result in a Member's retirement benefits exceeding the maximum indicated in Section 6.05 hereof. If any surplus remains in the Fund after all allocations have been made, such surplus shall be refunded to the Company.

The contributions made to the Stearns Catalytic Pension Plans [were] provided to Confederation Life Insurance Company under the terms of an Investment Contract dated October 29, 1984. . . .

> [This contract] provided . . . that:
>
> PROVISION 6 -- WITHDRAWALS
>
> 6.1 Confederation Life shall make withdrawals from the Accounts in order to make payments as designated in writing by the Contractholder provided that any such withdrawal shall be for the sole purpose of making payments in accordance with one of the following conditions:
>
> (c) Payments to the Contractholder of any certified actuarial surplus as may be approved by any provincial or federal government body having jurisdiction in the matter.

The following are the reasons delivered by

SOPINKA J. (dissenting in part on the appeal (File No. 23047)) -- I have read the reasons of Justices Cory and McLachlin. Like McLachlin J. I agree with most of Cory J.'s conclusions but disagree with him on the question of entitlement to the surplus in the Catalytic plan. In my view, the surplus in the Catalytic plan reverts to the employer. However, I have arrived at this conclusion by a somewhat different route from McLachlin J.

While I agree with Cory J. that all monies in the Catalytic pension fund, including the surplus, were impressed with a trust, this does not foreclose amendment of that trust. In the case of a pension plan, the nature of the rights of amendment will continue to depend upon the terms of the plan and the trust agreement, if any. In my view, nothing in the Catalytic plan precluded the company from exercising the express power of amendment in the plan so as to provide that any surplus funds would revert to it upon termination of the plan.

I should state at the outset that I agree with Cory J.'s conclusion that the parties intended Article V of the Trust Agreement to apply to all monies in the pension fund after 1966, including the surplus funds. Article V purports to restrict the company's right to make amendments which divert parts of the "FUND" and reads as follows:

ARTICLE V

MODIFICATION AND TERMINATION

> 1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this

> Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as amended from time to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof. [Emphasis added.]

Under the 1959 Catalytic Plan, the Trust Agreement was made part of the plan. It was clear that the terms upon which the monies contributed to that plan were to be held and administered were contained in both the plan and the Trust Agreement. The 1966 Catalytic Plan amended the 1959 Plan but retained a provision stating that all contributions to the plan were to be administered in accordance with the terms of the Trust Agreement. Thus it is clear that when the Catalytic Plan became a defined benefit plan in 1966, the parties intended the provisions of the Trust Agreement to continue to apply to monies contributed to the plan. Furthermore, at all relevant times the Trust Agreement provided that the "FUND" referred to in that Agreement included all the monies paid to the Trustee by the Company for the purpose of the plan, as well as the earnings, profit and increments therefrom. The Catalytic surplus is derived from monies contributed to the plan after 1966 and thus is obviously part of the Fund. Therefore, it follows that Article V applies to amendments concerning the use of the surplus.

This, however, does not end the matter. By its terms Article V is subject to the terms of the plan. Both the 1959 and the 1966 versions of the plan reserved broader powers of amendment to the company than those contained in

Article V of the Trust Agreement. The relevant provisions of the 1959 Catalytic Plan are as follows:

> SECTION XXII FUTURE OF THE PLAN
>
> 1. The Company hopes and expects to continue the Plan and the payment of contributions hereunder indefinitely but such continuance is not assumed as a contractual obligation. The Company expressly reserves the right, by action of its Board, to amend or terminate the Plan in whole or in part, if in the opinion of the Company future conditions warrant such action.
>
> 2. No amendment to the Plan shall operate to reduce the benefits which have occrued [*sic*] to the Members of the Plan prior to the date of amendment.
>
> 3. In the event of termination of the Plan, the Company cannot recover any sums paid to the date thereof and each Member of the Plan shall receive the proceeds of his Member's Account and his Company Account as of the date of such termination. No other employees will become eligible to become Members and no further contributions will be made by the Company.

These provisions were carried over into the 1966 version of the Catalytic plan, renumbered as Section XXI. By virtue of those provisions, the only limitation upon the company's power to amend the plan was that no amendment could reduce accrued benefits. The right to receive surplus monies in the pension fund was not a benefit which had accrued to the members of the plan at the time that the company amended the plan to permit the surplus to be distributed to itself. Under the terms of the 1959 and 1966 plan the employees may have obtained a right to the surplus upon termination of the plan, but no such right had accrued to them prior to termination. Even if such a right could be said to have accrued at the time of amendment, it is not a benefit contemplated by that provision. The benefits contemplated by the plan are those to which the members were entitled pursuant

to other Articles of the plan. The right to the surplus is not one of those benefits. Indeed, when Article XXII.2 was drafted, it could not have referred to a surplus because no surplus was possible under a defined contribution plan. For both these reasons I conclude that from the outset the company reserved the power to amend the Catalytic plan so as to permit any surplus to be distributed to itself.

Assuming that a provision disposing of the surplus in favour of the employer is a partial revocation, I see no magic in the use of those specific words. If the powers of amendment are sufficiently explicit to permit a change which is in law a partial revocation, they should be given effect. After all, a trust can be created by the use of apt words without express reference to a trust. Words are apt to create a trust if the intention of the settlor is clear. Conversely, limitations on the nature of the trust must surely be determined on the same basis.

It is the contention of the respondents that the right to the surplus is an accrued benefit and a reduction of accrued benefits is a revocation or partial revocation of the trust. The fact that reduction in accrued benefits was made an express exception from the power of amendment shows that when the trust was created the parties considered that in the absence of this exception the power of amendment would extend to reduce accrued benefits. It follows that the power of amendment included the power to make changes having the effect of revocation or partial revocation. The real issue, therefore, is whether the right to the surplus comes within the exception. For the reason I have given above, it does not.

As Cory J. points out, there is a fundamental disagreement in the authorities as to whether a power of amendment can be sufficiently explicit to

include a power of revocation. This disagreement is said to derive from the conflicting views expressed in Waters, *Law of Trusts in Canada* (2nd ed. 1984) and Scott, *The Law of Trusts* (4th ed. 1989), vol. 4. As I understand my colleague's reasons, he would apply a statement in Waters as requiring nothing short of the use of the actual words "power of revocation" in order to permit the settlor to effect a change which would amount to a revocation or partial revocation. With respect, I am of the opinion that Waters does not go that far. In the passage to which my colleague refers and which was quoted by Zuber J.A. in *Re Reevie and Montreal Trust Co. of Canada* (1986), 53 O.R. (2d) 595, at p. 600, the learned author states: "A settlor cannot revoke his trust unless he has expressly reserved the power to do so." I do not read this to mean that if the settlor uses language that, when interpreted by reference to the usual canons of construction, clearly establishes an intention to include changes having the effect of revocation, the absence of the magic words is fatal. Nor do I believe that Zuber J.A. was of the opinion that no power of amendment could authorize a change having the effect of revocation. It is clear that he was of the opinion that, in applying the statement in Waters, the appropriate inquiry was whether the wording of the relevant documents could be interpreted to authorize a change having the effect of revocation. At page 600, he stated:

> The appellant does not take issue with these general principles [stated in Waters] but asserts that it has reserved a power of amendment which is wide enough to entitle him to recover surplus funds. In my opinion, this proposition is simply untenable. The language of the trust agreement and the pension plan do not support such an argument. The section in the pension plan (prior to the 1981 amendment) dealing with the powers of amendment specifically affirms the irrevocability of the contributions and the fact that the members of the plan are the sole beneficiaries.

The terms of the trust agreement and plan in *Reevie*, *supra*, were not identical to the wording of the agreements in this case.

But even if Waters stands for the proposition advanced by Cory J., the logic of the contrary position, which is stated in Scott, *The Law of Trusts*, *supra*, and adopted by McLennan J. in *Re Campbell-Renton & Cayley,* [1960] O.R. 550 (H.C.), and the British Columbia Court of Appeal in *Hockin v. Bank of British Columbia* (1990), 71 D.L.R. (4th) 11, appeals to me in preference to a formulaic approach that would disregard the clear intention of the parties. Nor am I persuaded that we should adopt a rule of interpretation that ignores the clear intention of the parties in order to maintain the fundamental character of a trust. Trusts can be revocable or irrevocable. Neither is more fundamental than the other. All we are debating is the means by which we distinguish one from the other. Moreover, the true nature of a trust established as part of a pension plan is to provide funds needed to pay the benefits which accrue to employees under the plan. A power of amendment which is qualified by the requirement that it cannot be used to reduce accrued benefits is not inconsistent with the fundamental purpose of a defined benefits pension trust.

Cory J. also reasons that the circumstances which prevailed when the plans in question were created support his interpretation of the breadth of the power of amendment. In my view, however, the most relevant of those circumstances is the fact that neither the company nor the employees appear to have foreseen the existence of a surplus when the plan was created. In fact, there was no reason for the employees to expect to receive anything more than the defined benefits set out in the plan. Therefore, I see nothing inequitable in

allowing the employer to take advantage of the broad amending power to distribute the surplus to itself, so long as it did nothing to reduce the level of benefits provided to the employees.

As far as the tax legislation in force when the plans were created is concerned, I agree with Cory J.'s observation that the tax motivations of the parties to pension plans are of limited relevance in interpreting those plans. I note however that the Catalytic plan expressly stated that the plan was structured so as to ensure that the company's contributions were deductible under the *Income Tax Act*, S.C. 1970-71-72, c. 63, and any amendments thereto. It is not unreasonable to infer that the broad amending power retained in the 1959 Catalytic plan and subsequent versions of the plan was retained in part to deal with changes in income tax legislation. The amendment of the 1983 Air Products Plan to include Section 18.05 was required by Revenue Canada in order to comply with the pension plan registration requirements under the *Income Tax Act*. Therefore, if anything, consideration of the parties' tax motivations supports a broad interpretation of the power of amendment.

Moreover, the approach which Cory J. adopts may make it difficult for the numerous pension plans that had an existence prior to 1981, which do not have an express power of revocation, to conform with the new registration requirements. Both Information Circulars Nos. 72-13R7 (1981) and No. 72-13R8 (1988) provide that the plan must contain a provision permitting an actuarial surplus to be refunded to the employer on termination of the plan. This requirement has apparently been incorporated in ss. 8502(*c*) and 8503(4)(*c*) of the *Income Tax*

Regulations. The Minister has indicated that these regulations may be amended; for the time being, however, they have the force of law.

For the above reasons I conclude that Section 17.05 of the 1978 plan was a valid amendment to the Catalytic plan, as was Section 18.05 of the 1983 Air Products plan. Pursuant to those provisions the surplus in the Catalytic plan should revert to the company. In light of the result which I have reached by interpreting the terms of the plan it is not necessary for me to consider whether the funds could revert to the employer by the operation of a resulting trust.

In the result I would dispose of the appeals as proposed by Cory J., except with regards to the distribution of the surplus in the Catalytic plan. In this respect, I would allow the appeals with costs.

The following are the reasons delivered by

MCLACHLIN J. (dissenting in part on the appeal (File No. 23047)) -- I have read the reasons of Justice Cory. I agree with his conclusions except on the question of the right to surplus on the Catalytic plan. In my view, the surplus on the Catalytic Plan reverts to the employer, either on the terms of the plan or on the basis of the doctrine of resulting trust.

Background: Situating the Problem

Modern private pension plans date to the late 19th century. Fundamental and pervasive societal changes -- large scale industrialization coupled with the breakdown of family, village and church assistance networks -- produced a need to devise methods of caring for those past working age. Employer-sponsored private pension plans, supplemented later by government plans, were the response. Today, together with personal savings, private and public pension plans provide the primary source of income for retired Canadians.

There are two main types of pension plans. In the first type, the "defined contribution" plan, the amount paid in by the contributors to the fund is set. The eventual size of the employee's annuity is determined by the rate of return on the invested contributions. It follows that a low rate of return on investment will result in a smaller pension than if the rate of return is high. While the employer contributes to the plan, the employer does not guarantee the amount of the annuity. The employee is not assured of any particular benefit. The 1959 Catalytic plan was this sort of plan.

In the other type of pension plan, the "defined benefit" or "money purchase" plan, the employee, who may or may not contribute to the fund, is assured of a certain monetary benefit upon retirement. An actuary is employed to determine the amount of contribution which the employer must make in order to ensure that the plan can meet its present and future obligations. The market risk, assumed by the employee in a defined contribution plan, falls on the employer in a defined benefit plan. If, at any time, the plan is unable to meet its obligations, the employer is liable to make up any shortfall. For these two reasons -- the guarantee of a certain benefit and the assumption by the employer of the market

risk -- a defined benefit plan is regarded as more advantageous to employees than a defined contribution plan.

The defined benefit plan possesses a feature which the defined contribution plan does not -- a feature which is at the heart of this appeal, the actuarial surplus. A defined contribution plan can never have a surplus; everything, after deduction of taxes and expenses, must be paid out to the pensioners. However a surplus may accumulate in a defined benefit plan when the amount in the fund exceeds the amount required to meet the defined benefits as calculated by the actuary.

In valuing the assets of a pension plan, the actuary must take into account a number of factors and make assumptions about each of them. These factors include the rate of investment return, the rate of price inflation, salary increases, rates of mortality for active and retired members, rates of employee turnover, incidence of disability and utilization of early retirement options. As might be expected, actuaries advising employers tend to err on the side of caution to produce what is called an "experience gain" rather than an "experience deficiency", since the latter would deprive pensioners of the benefits guaranteed to them.

In the early 1980s this actuarial conservatism combined with a particular set of economic factors to produce massive surpluses in many pension funds. These factors included the level of interest rates -- as high as 20 percent at one point -- which gave returns on investments in fixed value securities far in excess of those predicted. The stock market boom from 1982 to 1987 also resulted

in much higher capital gains than were anticipated. Furthermore, the recession of 1981-82 caused widespread layoffs of employees who had no vested right to pension benefits. Money contributed on their account remained in the plan and either reduced unfunded liability for other employees or fell into surplus. At the same time, employers, uncertain as to whether they could use surplus for ongoing funding, often continued to contribute to over-funded plans in years when investment returns were at their highest, increasing existing surpluses: Gary Nachshen, "Access to Pension Fund Surpluses: The Great Debate", in *New Developments in Employment Law* (Meredith Memorial Lectures, 1988), 1989. The result of these events was to increase pension surpluses in Canada which, by 1982, had already been estimated to be between $4 billion and $8 billion: D. Don Ezra, *The Struggle for Pension Fund Wealth* (1983).

So long as a pension plan remains operational, hefty surpluses pose no problem except perhaps to employers wondering whether they can use the surplus for current funding needs, taking a "contribution holiday". When a plan terminates, however, the question arises of who is entitled to the surplus. That is the problem that faces us on this appeal. It is not, we are told, an isolated one. Many plans such as this were set up in the 1960s and the decades that followed. Few contained express provisions as to distribution of surplus.

The Catalytic plan in this appeal was set up in 1959 as a defined contribution plan. As one would expect in that type of plan, all funds would ultimately be paid out to the pensioners or beneficiaries. There could be no surplus.

In 1966, however, the plan was changed to a defined benefit plan and the possibility of a surplus arose. In 1978, the Plan Agreement was redrafted. This restatement raised for the first time the issue of what should be done with any surplus. It empowered the company to use the surplus as it saw fit after making full provision for the accrued benefits payable to members and beneficiaries. When the plan was terminated in 1988, a large surplus was revealed. The issue was who should have it -- the employees and their beneficiaries or the employer?

Implications Flowing from the Nature of the Defined Benefit Plan

As noted, the employer is legally obliged under a defined benefits plan to ensure that all pension benefits owing are paid when they fall due. The employer thus bears the risk that contributions may be insufficient or that investments may not perform as well as predicted. The converse of this proposition is that the employer should be permitted to take advantage of the excess when investments do better than predicted.

From an economic policy perspective, if employers cannot retrieve surpluses, they may be inclined to request that their actuaries take a more optimistic view of the future of their investments and fund existing pensions less generously. Alternatively, they may refuse to enter into new pension regimes or, in some cases, terminate those which already exist. Inability to retrieve surpluses may also lead employers, unwilling to assume the risk of providing guaranteed benefits without the possibility of recovering surplus funding, to choose defined contribution plans rather than defined benefit plans. Employees, no longer assured

of a specific pension and required to assume the risk of insufficient funding themselves, would be the losers.

On the other side of the coin, permitting employers to recover surplus in a defined benefit plan is not unfair to employees. It is argued that employees should have the surplus because they have paid for it through direct contributions or by accepting lower wages and fewer fringe benefits. This argument overlooks the nature of the employees' legitimate expectations under a defined benefit plan. The employees, having bargained for specific benefits, will receive precisely what they bargained for. The benefits, as defined by the plan, are the *quid pro quo* for their services and contributions. Indeed, the intention of the parties -- and the very purpose of the plan -- is that they receive these benefits. To give the employees the surplus, however, is to give them more than they bargained for. It is a windfall to the employees and a denial of the equitable interest which the employer holds in the surplus.

This practical view of things is supported by the policy of the Minister of National Revenue. Information Circular No. 72-13R7, December 31, 1981, is based on the assumption that surplus is normally returnable to the employer. In order to comply with registration requirements, surplus in excess of the employer's current service funding obligations in the following 24-month period must be either refunded to the employer or applied against the employer's obligations for contributions on account of current or past service in the current and subsequent years. Furthermore, all pension plans are to contain a provision permitting an actuarial surplus to be refunded to contributing employers of the plan. This

requirement, it may be noted, may prevent problems such as the one presented on this appeal from arising in plans set up after the Circular.

The Position in Other Jurisdictions

The problem of surplus in defined benefit pension plans is a recent one. The matter has, however, been considered by courts in England and the United States. It is fair to say that they have generally come down on the side of returning the surplus to the employers.

Courts in Great Britain have relied primarily upon principles of trust law when attempting to resolve the question of pension surplus. In *Davis v. Richards & Wallington Industries Ltd.*, [1991] 2 All E.R. 563 (Ch. D.), for example, Scott J. applied the doctrine of resulting trust and concluded that a surplus in a contributory defined benefits pension fund should be paid to the employer. He held that the result could be otherwise only if the plan contained a provision expressly excluding return of the funds to the employer. He rejected the argument that a resulting trust operated in favour of the employees in view of their contributions mainly on the ground that what the employees had paid for was the specific benefit received from the fund. See also, *In re Courage Group's Pension Schemes*, [1987] 1 W.L.R. 495 (Ch.D.).

In the United States, the courts look to the terms of the plan documents and the intent of the parties. They also tend to the view that the surplus would represent an unintended windfall profit if it were retained by the employees: *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555

F.Supp. 257 (D.C. 1983). Provisions to the effect that amendments to the plan or trust documents may not enable an employer to divert or recover any portion of the trust funds are treated as prohibiting diversion prior to satisfaction of the plan's liabilities, but not thereafter. Once the pensioners are assured of their benefits, the surplus is recoverable by the employer: *In re C. D. Moyer Co. Trust Fund*, 441 F.Supp. 1128 (E.D. Pa. 1977); *Pollock v. Castrovinci*, 476 F.Supp. 606 (S.D.N.Y. 1979); *Washington-Baltimore Newspaper Guild*; *Wilson v. Bluefield Supply Co.*, 819 F.2d 457 (4th Cir. 1987). Where courts in the United States have found that a surplus could not be recovered by the employer, they have done so on the basis that the wording of the plan documents unequivocally precluded such recovery: *Bryant v. International Fruit Products Co.*, 793 F.2d 118 (6th Cir. 1986); *Audio Fidelity Corp. v. Pension Benefit Guaranty Corp.*, 624 F.2d 513 (4th Cir. 1980).

Consistency with the Right to Use Surplus for a "Contribution Holiday"

It has repeatedly been held that employers are entitled to use the surplus in defined benefit plans for purposes of funding their actuarially determined contributions: *Maurer v. McMaster University* (1991), 4 O.R. (3d) 139; *Askin v. Ontario Hospital Association* (1991), 2 O.R. (3d) 641; *Re Reevie and Montreal Trust Co. of Canada* (1986), 53 O.R. (2d) 595. Cory J. arrives at the same conclusion in this case.

The obvious question immediately presents itself. If the employer is entitled to use the surplus to fund future contributions, why should the employer be denied the ability to recoup the surplus from previous funding? If, on the other hand, the fund in equity belongs to the employees in some notional sense, how can

the employer usurp that interest by using the surplus to discharge its ongoing funding responsibility? Consistency suggests that both past and present funding and entitlement should be treated in the same way.

Some commentators, while recognizing the anomaly of allowing the employer to use the surplus for a contribution holiday but not to recoup past over-contributions from the surplus, argue that, from a "practical and symbolic" point of view, the two questions may be different since "all funds paid into the pension stay there, at least notionally": Bernard Adell, "Pension Plan Surpluses and the Law: Finding a Path for Reform", *Task Force on Inflation Protection for Employment Pension Plans, Research Studies*, vol. 2 (1988), at p. 242. Cory J. makes a similar point. So, it is suggested, an employer's entitlement to a contribution holiday may "not automatically entitle him to ownership of the actuarial surplus, as well": Nachshen, *supra*, at p. 77.

Nevertheless, it remains true that as a matter of principle, there appears to be no reason why an employer permitted to use surplus for ongoing contributions should not be allowed to reclaim the result of past over-contributions from the same surplus.

Summary

Consideration of the nature of defined benefit plans leads to the conclusion that the normal and just result is that surplus in such plans (as distinguished from defined contribution plans) should revert to the employer.

Against this background, I turn to the documents which govern this case and the principles of law applicable to them.

Analysis

The Private Regime

Pension plans such as those at issue here are private arrangements bestowed by an employer on employees as a benefit of employment or set up pursuant to agreement between employer and employees. The employees may contribute (contributory plans), or the employer may bear the entire cost (non-contributory plans). The plan may be funded through insurance purchased by the employer for payment of the benefits (an insured plan), or the monies may be placed in a trust (a "trusteed" plan). Whatever form they take, as private contractual or as trust arrangements, the law of contract or trust determines how the funds are distributed. This may be varied by legislation, but in this case that did not occur. We must look to the principles of private law for a solution to the problem of distribution of surpluses. In so far as we are concerned with an agreement, we look to the law of contract; in so far as a trust arises, we look to the law of trusts. We are not concerned with making some new law peculiar to pension surpluses.

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.

The Documents

It is my conclusion, after studying the documents and applying them to the plan as it stood at all relevant times, that apart from the reference in the 1978 restatement which provided that surplus should go to the employer, the documents are silent on the question of surplus. There is a dispute about whether the 1978 stipulation was a valid "amendment" to the original trust documents. As I see it, and for the reasons discussed below, it was a valid amendment and, as such, ought to stand. Alternatively, even if the 1978 stipulation were disregarded, the surplus would devolve on the employer under the doctrine of resulting trust.

The crux of the debate is Article V of the 1959 Trust Agreement:

> ARTICLE V
>
> MODIFICATION AND TERMINATION
>
> 1. Subject as herein and in the PLAN provided, the Company reserves the right at any time and from time to time to amend, in whole or in part, any or all of the provisions of the PLAN (including this Agreement) provided that no such amendment which affects the rights, duties, compensation, or responsibilities of the Trustee shall be made without its consent, and provided further that without the approval of the Minister of National Revenue no such amendment shall authorize or permit any part of the FUND to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the PLAN as

> amended from time to time, and for the payment of taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof. [Emphasis added.]

Moore C.J. upheld in the Court of Appeal, interpreted the underlined portion of Article V as precluding any amendment of the plan which would have the effect of conferring money in the plan to anyone other than the beneficiaries. Reasoning that the surplus here in issue constituted funds under the plan, he concluded that the 1978 amendment was ineffective and that, consequently, the surplus must go to the employees. Cory J., as I understand his reasons, adopts the same approach.

The problematic step in this logical process is the assumption that the surplus arising after conversion to a defined benefit plan in 1966 forms part of the fund to which Article V is addressed. For the reasons outlined earlier, at the time Article V was drafted, there could never be a surplus. It was simply impossible to have a surplus under the defined contribution plan then in place. The surplus was a new entity, created years later as a consequence of converting the plan to a defined benefits plan. The "FUND" referred to in Article V cannot therefore refer to the surplus with which we are concerned. Rather, it refers to the fund in place under the defined contributions scheme. This is apparent from the latter part of Article V, which permits deductions for only those things which would be deductible under a defined contribution policy: "taxes or other assessments as provided in paragraph 2 of Article II hereof, and the expenses and compensation of the Trustee as provided in paragraph 4 of Article IV hereof".

With respect, I think Moore C.J. gave a broader scope to Article V of the 1959 Trust Agreement than it can reasonably be made to bear. In effect, he read "FUND", which at the time of drafting could not by definition have included any surplus, as extending to the surplus which later arises under quite a different arrangement.

The problem is a common one. A contract or trust deed is drafted. Later, a new, unanticipated situation arises. The first question is whether the new situation falls within an existing term of the document. Courts facing this question look at the factual context in which it was drafted. They consider the wording against this background to determine whether the new situation can reasonably be said to fall within this clause. If the answer to this question is negative, the court may go on to ask itself whether a term covering the new situation can be implied, whether as a matter of fact, law or custom: see Treitel, *The Law of Contract* (4th ed. 1975), at p. 128. The limiting principle is that the courts will not make a new contract or trust to which the parties have not agreed: *Murphy v. McSorley*, [1929] S.C.R. 542.

In the case at bar, there is nothing in the evidence that suggests that the parties who signed Article V intended it to apply to a surplus which might arise under a conversion of the plan to a defined benefit plan. There is no suggestion that conversion of the plan was foreseen, much less that a surplus might arise under such a scheme. Article V by its terms clearly applies to the specific defined contribution plan which the parties were putting in place in 1959. It refers to a specific "PLAN", the 1959 plan, and, consistent with a defined contribution plan, it treats all funds as falling into one of two categories -- benefits payable to the

employees and expenses. Finally, to apply Article V to a surplus under the unforeseen defined benefit plan would, for the reasons enunciated earlier, produce a result which, if not anomalous, is out of step with the characteristics of a defined benefits plan and the approach which has been taken to this problem in other jurisdictions. It is not reasonable, in my opinion, to conclude that Article V applies to the surplus that could only develop after conversion of the plan years later to a defined benefit plan.

The same considerations negate the possibility of implying a term that the provisions of Article V apply to the unforeseen surplus. An attempt to imply a term to cover an unforeseen factual situation will generally fail if it is not clear that the parties would have agreed to the term, or where one or both of the parties is shown not to have known of the new situation at the time of contracting: Treitel, *supra*, at pp. 129-130. There is no suggestion that the parties who signed Article V in 1959 knew about the possibility of a surplus; nor can it be said that they would have agreed that it should go to the employees had they foreseen it. Indeed, the inference from the 1978 provision that surplus go to the employer suggests the contrary.

I am thus led to conclude that Article V, drafted in the context of a defined contribution plan, should not be read as applying to the surplus which arose under the later defined benefit plan. It follows that the 1978 provision stipulating that the surplus should go to the employer is valid and determines the issue.

Express Trust

It is argued that the surplus here in question is impressed with an express trust in favour of the employees which prevents the employer from claiming it.

I note initially that this argument must be distinguished from the argument based on the doctrine of resulting trust. The doctrine of resulting trust does not deal with the classic express trust, but is rather an equitable doctrine permitting those who have an interest in funds held in the name of another to recover them. In the first case we are concerned with the interpretation of terms of an express trust document; in the latter about the application of a legal (equitable) doctrine to a given situation.

The 1959 plan created a trust. All contributions were made subject to the trust. This did not mean, however, that all contributions were payable to the employees. Under the 1959 plan, expenses and administrative fees were payable to those who earned them, and the balance was payable to the beneficiaries. Consistent with a defined contribution plan, these were the only two classes of disbursements.

When the plan was changed in 1966 to a defined benefits plan, the nature of the trust necessarily changed. For one thing, the two accounts which the trustee was obliged to hold under the 1959 plan, the Employee's Account and the Company Account, no longer made sense and were necessarily collapsed. For another, the benefits payable to the employees were redefined. The trustee's former obligation to pay out the balance in the member's share of the two accounts after expenses, was replaced with a new and different obligation to pay out the

defined benefits. And finally, as the fund continued to operate in its new form, there appeared a new element; the surplus which accumulated from year to year.

It appears that when the change was first made from a defined contribution to a defined benefit plan, no thought was given to the question of surplus. Certainly the 1966 plan made no reference to surplus. In theory, the actuarial projections should be so perfect that a surplus does not arise. But in reality, as the years passed, it became evident that a surplus was being generated. This new situation needed to be addressed. The response was the 1978 stipulation that any surplus which existed after all defined benefits and expenses had been met, was payable to the employer.

Against this background, we return to the obligations on the trustee. The situation, as I see it, was this. Under the 1966 plan the trustee was obliged to pay defined benefits to each entitled employee. The trustee was further required to pay all administrative expenses of the trust. In addition to these two obligations, however, the trustee, as the years passed, found itself holding a third fund which was attached neither by the obligation to pay out benefits nor the obligation to pay expenses -- the accumulating surplus. The original trust documents did not contemplate this fund and gave no guidance as to what to do with it.

The trustee was left with the following options with respect to the surplus. Prior to the 1978 stipulation, the trustee's only option, had the question of distribution of surplus arisen, would have been to apply to the court for a ruling. Had this occurred, the appropriate ruling would have been that it go to the employer on the principles of resulting trust, for the reasons discussed below. As

it happened, however, a stipulation that the surplus go to the employer was made before the question of surplus distribution arose. For the reasons discussed earlier, that stipulation was valid. It follows that the surplus goes to the employer pursuant to the 1978 amendment.

It is contended that payment of the surplus to the employer constitutes revocation of a trust and that a trust cannot be revoked without express wording so permitting. This argument, however, fails because the surplus was an unanticipated development which was never contemplated by the original trust and was not addressed by any changes to the trust until 1978. The error in the respondents' submissions, as I see it, lies in assuming that the 1959 trust provisions apply to a surplus. In fact, they do not. All contributions fell into the trust, but to stop the analysis there is to beg the critical question: what was the trustee to do with the portion of the fund which became surplus after conversion of the plan to a defined benefit plan? The answer to that question does not amount to revocation of a trust, as the respondents suggest. Rather, it amounts to fulfilling the trust.

I conclude that the terms of the trust did not require that the surplus in question be paid to the employees. In 1966, when the possibility of a surplus first arose, the trust provided no guidance as to where a surplus would go in the event of termination. The 1978 amendment made it clear that it was payable to the employer. Therefore, under the terms of the trust, the employer is entitled to the surplus.

Resulting Trust

I have argued that under the terms of the governing documentation, and in particular the 1978 amendment which I consider valid, surplus contributions are returnable to the employer. If I were wrong in concluding that the documentation requires this result, the same conclusion would nevertheless flow from application of the doctrine of resulting trust.

Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 299, describes the concept of resulting trust as follows:

> . . . a resulting trust arises whenever legal or equitable title to property is in one party's name, but that party, because he is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner, or to the person who *did* give value for it. [Emphasis in original.]

The concept of resulting trust does not depend on there being an express trust in existence. However, one of its applications is in the case where residual monies not designated to a particular person or purposes arise in an express trust. Where this happens in a charitable trust, the courts will order the residual sum *cy-près*, among all the creditors. Where the trust is non-charitable, the sum generally reverts to the settlor: see Waters, *supra*, at p. 322.

If the 1978 amendment as to surplus is invalid, these principles suggest that the doctrine of resulting trust requires that the surplus be available to the employer. The employer was responsible for ensuring a fund sufficient to meet all defined benefits owing to employees. As it turns out, the employer paid more than required for the purpose of the trust, the provision of benefits to all eligible employees. The residual sum should therefore return to the employer.

As noted earlier, the doctrine of resulting trust has been applied to this situation in Great Britain, with the result that surplus funds in defined benefit pension plans have been ordered paid to the employer. It has also been applied in Canada. The case of *Re Canada Trust Co. and Cantol Ltd.* (1979), 103 D.L.R. (3d) 109 (B.C.S.C.), raised similar issues as those before us. The first question was the validity of an amendment directing that surplus should revert to the employer. Gould J. found that the attempted amendment in that case was invalid. However, he went on to hold that the surplus reverted to the employer under the doctrine of resulting trust. He stated, at p. 111:

> The method which the board has employed [directors' resolution to allow reversion] does not accomplish the purpose for which it was intended. If this method is ineffectual, how then must the money remaining in the fund be distributed?
>
> . . .
>
> The purposes of this trust simply did not exhaust the fund and the outcome here, *i.e.*, a surplus balance of $31,163.38, was not foreseen by the respondent Dependable. The situation appears to be one where a resulting trust arises by operation of the law. [Emphasis added.]

My colleague seeks to distinguish this case on two grounds. He questions Gould J.'s conclusion that there could be a resulting trust in favour of the employer because of a clause in the plan providing that no amendment "shall permit any part of the trust fund to revert to or to be recoverable by the Company" (p. 110). But Gould J. was not talking about reversion under an amendment (having found the attempt to amend had failed), but rather about reversion by operation of law. My colleague also points to the fact that unlike the plan at bar, the plan in *Cantol* was non-contributory. But as we have seen, even where

employees contribute to a defined benefit plan, that contribution is taken to be fully satisfied by receipt of the defined benefits: *Davis v. Richards & Wallington Industries Ltd.*, *supra*. Once the defined obligations to the employees have been paid, it is difficult to argue that the employees have an interest in the surplus on the basis of a resulting trust in their favour. It is in the nature of a defined benefit that it represents a fixed amount to which the employee is entitled from the plan. The employee accepts this fixed amount in lieu of the greater or lesser amounts he or she might obtain on a defined contribution plan. Generally, this is thought to be in the employee's interest.

To put it another way, once the stipulated benefit is paid, the employee is no longer a beneficiary -- he or she has exhausted his or her rights under the plan. As Gould J. put it in *Cantol*, at p. 111, "[a]ll of the beneficiaries have been paid off in accordance with [the trust] provisions, and no beneficiaries remain in any of the categories". Moreover, the complications of holding otherwise appear significant. As Scott J. points out in *Davis*, *supra*, at p. 595, different employees contribute different amounts, and often receive benefits disproportionate to their contributions, depending on when they started working, how long they have been working, and other factors. The task of restoring to each employee his or her fair share of any surplus would be impossible. I can do no better than echo the query of Scott J.: "How can a resulting trust work as between the various employees inter se? I do not think it can and I do not see why equity should impute to them an intention that would lead to an unworkable result."

Conclusion

I conclude that the surplus in the Catalytic plan should revert to the employer. It is not touched by Article V of the 1959 agreement, with the result that the 1978 provision for its disposition is determinative. There is nothing in the Trust Agreement which requires its return to the beneficiaries, once their stipulated entitlement under the agreement has been fully met. If, in the alternative, the 1978 provision does not settle the matter, the doctrine of resulting trust would require that the surplus revert to the employer.

I would dispose of the appeals as proposed by Cory J., except on the question of the distribution of surplus in the Catalytic fund, where I would allow the appeal with costs.

The appeal by Air Products Canada Ltd. (File No. 23047) with respect to entitlement to any surplus traceable to the Catalytic fund should be dismissed and its appeal with respect to its entitlement to take a contribution holiday is allowed, SOPINKA *and* MCLACHLIN JJ. *dissenting in part.*

The cross-appeal by Gunter Schmidt in his personal capacity and on behalf of the beneficiaries of the Stearns plans (File No. 23057) should be dismissed with respect to the entitlement of Air Products Canada Ltd. to all surplus remaining in the pension fund derived from the Stearns plan and to its entitlement to take a contribution holiday.

Solicitors for Air Products Canada Ltd., William M. Mercer Limited, Confederation Life Insurance Company and T. J. Westley: Borden & Elliott, Toronto.

Solicitors for the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans: Code, Hunter, Calgary.

Solicitors for Gunter Schmidt in his personal capacity and on behalf of the Beneficiaries of the Stearns Catalytic Ltd. Pension Plans: Blake, Cassels & Graydon, Calgary.