CITATION: Kerry (Canada) Inc. v. DCA Employees Pension Committee, 2007 ONCA 416
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COURT OF APPEAL FOR ONTARIO

LASKIN, GILLESE and ROULEAU JJ.A.

B E T W E E N :	
KERRY (CANADA) INC.	**Ronald J. Walker and Christine P. Tabbert for the appellant/respondent by way of cross-appeal**
Appellant/ Respondent by way of cross-appeal	
- and -	
ELAINE NOLAN, GEORGE PHILLIPS, ELISABETH RUCCIA, KENNETH R. FULLER, PAUL CARTER, R. A. VARNEY and BILL FITZ, being members of the DCA EMPLOYEES PENSION COMMITTEE representing certain of the members and former members of the Pension Plan for the Employees of Kerry (Canada) Inc.	**Ari N. Kaplan and Clio Godkewitsch for the respondents/appellants by way of cross-appeal**
Respondents/ Appellants by way of cross-appeal	
- and -	
SUPERINTENDENT OF FINANCIAL SERVICES	**Deborah McPhail and Mark Bailey for the respondent/respondent by way of cross-appeal**
Respondent/ Respondent by way of cross-appeal	
	HEARD: January 10 and 11, 2007

On appeal from the judgment dated March 15, 2006, with reasons reported at (2006), 209 O.A.C. 21, and order dated May 31, 2006, with reasons reported at (2006), 213 O.A.C. 271, of the Divisional Court (Justice John G.J. O'Driscoll, Justice Peter G. Jarvis and Justice Anne M. Molloy).

TABLE OF CONTENTS

GILLESE J.A.:

[1] The Supreme Court of Canada has heard a number of major pension cases in the past decade. In its decisions, the Supreme Court has provided much needed guidance in this new and emerging area of law. As this case shows, however, a number of significant questions remain to be decided.

[2] This appeal addresses a number of those difficult questions, including the following. When is it acceptable for pension plan expenses to be paid from the pension fund? After a plan conversion, is it permissible to use surplus assets in the defined benefit part of the pension plan to pay current service costs in respect of the defined contribution part of the plan? What constitutes proper notice of an adverse amendment? When and how are the courts entitled to interfere with a costs order of the Financial Services Tribunal? Does that Tribunal have the power to order costs payable from a pension fund?

1. OVERVIEW

[3] In 1954, the Canadian Doughnut Company Limited[1] established a defined benefit pension plan for its employees (the "Plan"). The terms of the Plan were contained in a pension plan text dated December 31, 1954 (the "original Plan text"). Funding for the pension was through company and employee contributions to a pension fund constituted as a trust (the "Fund").

[4] A separate trust agreement, dated December 31, 1954, was entered into in relation to the Fund. The parties to the trust agreement were the Canadian Doughnut Company Ltd. and the National Trust Company Limited (the "original Trust agreement"). Subsequent trust agreements were entered into from time to time, beginning in 1958.

[5] The Canadian Doughnut Company Ltd. later became DCA Canada Inc. Kerry (Canada) Inc., the appellant, is the successor to DCA. The words "company", "employer" and "Kerry" are used interchangeably hereafter to refer to Kerry and its predecessors.

[6] From inception, the role of trustee has been separate and distinct from that of the administration of the Plan. The trustee's role, and its rights and obligations, are contained in the various trust agreements executed by the trustee and the company. Administration of the Plan, however, has been by means of a Retirement Committee established by s. 4 of the original Plan text.

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[1] The company is identified as DCA Food Industries Ltd. in the plan text, but as the Canadian Doughnut Company Ltd. in the trust agreement creating the fund.

[7] There are approximately eighty members of the Plan. The respondents are former employees of Kerry (or its predecessor companies) and members of the Plan (the "Committee"). Certain of the Committee members are former executives of the company who took the decisions with respect to expenses and contribution holidays about which they now complain.

[8] The Plan is governed by the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended (the "Act").

[9] The Fund has been in a surplus position for a great many years — that is, there are more assets in the Fund than are needed to cover fully all of the Plan obligations. The Plan members have always received their full pension benefits and continue to do so.

[10] The Plan text has been amended and restated, from time to time. Of significance on this appeal are the amendments made in 1975, 1987 and 2000 which purported, among other things, to give the employer the power to pay Plan expenses from the Fund.

[11] In 2000, the Plan text was amended in order to introduce a defined contribution component. Existing Plan members were given the option of remaining in the defined benefit component of the Plan or converting to the defined contribution component. All new employees were required to participate in the defined contribution component of the Plan.

[12] Starting in 1985, the employer took contribution holidays in respect of its funding obligations. By 2001, it had taken contribution holidays of approximately $1.5 million.

[13] From the Plan's inception through to the end of 1984, the employer paid all Plan expenses. Beginning in 1985, however, third party Plan expenses were paid from the Fund. These expenses were primarily the cost of actuarial, investment management and audit services provided to the Plan. It is agreed that money from the Fund was used to pay for approximately $850,000 of Plan expenses from 1985 to 2002.

[14] After the 2000 Plan amendments were introduced, the Committee asked the Superintendent of Financial Services to investigate alleged irregularities in the administration of the Plan, including the payment of Plan expenses from the Fund and the employer's contribution holidays.

[15] After investigation, the Superintendent[2] issued a Notice of Proposal to make an order requiring Kerry to reimburse the Fund for expenses paid from the Fund after January 1, 1985, that were not incurred for the exclusive benefit of Plan members. The Superintendent also issued a second Notice of Proposal in which he proposed to refuse to

[2] The Deputy Superintendent, acting as the Superintendent's delegate, issued both Notices of Proposal.

order Kerry to pay the amounts to the Fund that had been taken by way of contribution holidays.

[16] Kerry sought a hearing before the Financial Services Tribunal (the "Tribunal") on the Superintendent's proposed order in respect of Plan expenses (the "first Tribunal hearing"). The Committee sought a hearing on the Superintendent's proposed order in respect of contribution holidays (the "second Tribunal hearing"). The Superintendent was a party to both hearings.

[17] Kerry was largely successful at both Tribunal hearings. In a decision rendered after the first Tribunal hearing, the Tribunal held that all but a very few Plan expenses could be paid from the Fund. In a second decision, the Tribunal held that Kerry was entitled to take contribution holidays.

[18] The Committee appealed both decisions to the Divisional Court. The Divisional Court heard the appeals together and issued a judgment which largely overturned the Tribunal decisions. It made a costs award requiring Kerry to pay the Committee's costs, on a partial indemnity basis, of the second Tribunal hearing and the appeals to the Divisional Court. That award also required Kerry, as administrator of the Plan, to cause the Fund to pay the balance of the Committee's costs of the appeals to the Divisional Court.

[19] Kerry appeals the judgment of the Divisional Court. The Committee cross-appeals.

[20] For the reasons that follow, I would allow the appeal and dismiss the cross-appeal.

2. THE ISSUES

[21] The appeal raises the following four issues.

(1) Were Plan expenses properly paid from the Fund or must Kerry reimburse the Fund for them?

(2) Could surplus pension funds be used to satisfy Kerry's contribution obligations in respect of the defined contribution component of the Plan?

(3) Did Kerry give proper notice to Plan members of the conversion option? If the notice was not sufficient, must Kerry issue a new notice and must the Superintendent refuse to register the 2000 Plan? and

(4) Did the Divisional Court err in its costs award?

[22] The cross-appeal raises two additional issues.

(5) Must Kerry remit contributions in respect of the defined benefit component of the Plan? and

(6) Does the Tribunal have the power to order costs payable from a pension fund?

[23] Before turning to these issues, however, the matter of the standard of review to be applied to the Tribunal decisions must be addressed.

3. STANDARD OF REVIEW OF TRIBUNAL DECISIONS – GENERAL CONSIDERATIONS

[24] Following the Supreme Court of Canada's decision in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, there can be no question that when hearing appeals from Tribunal decisions that involve pure questions of law, the court is to apply a standard of review of correctness.

[25] In *Monsanto*, the issue to be decided was the interpretation of s. 70(6) of the Act – a matter of pure law. Unlike *Monsanto*, however, most of the questions raised by this appeal and cross-appeal are not matters of pure statutory interpretation – they are polycentric questions of mixed fact and law, many of which are highly technical and others which involve the exercise of discretion.

[26] In the recent case of *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, the Supreme Court of Canada made it clear that multiple standards of review can apply to different matters decided by a tribunal in the course of a single proceeding.[3] This is so because the reviewing court must apply the pragmatic and functional approach to determine the appropriate standard of review for each issue under appeal.

[27] Under the pragmatic and functional approach, in order to determine the standard of review, the reviewing court must consider (1) the presence or absence of a privative clause, (2) the expertise of the decision maker relative to that of the court, (3) the purpose of any relevant legislative provisions, and (4) the nature of the question under review: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paras. 29-38.

[28] In this appeal, the first factor remains unchanged regardless of the issue under consideration – there is a full statutory right of appeal to the Divisional Court pursuant to s. 91 of the Act and there is no privative clause. However, the other three factors – "relative expertise", "legislative provisions" and "nature of the question" – are not static.

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[3] Although *Lévis* involved an application for judicial review of a labour arbitrator's decision, the breadth of the language in the reasons indicates that the principles articulated apply also to the review of tribunal decisions.

As the issues on this appeal raise questions of a different nature that engage the Tribunal's expertise and the legislation in different ways, it is necessary to determine the standard of review for each such decision by the Tribunal. That will be done at the outset of the analysis on each issue. However, the following general comments on the *Pushpanathan* factors apply to all and I set them out now to minimize repetition.

[29] **Relative expertise** – This factor requires the court to consider the expertise that the Tribunal brings to bear when deciding a particular matter compared to that of the courts. As Deschamps J. stated in *Monsanto*, "relative expertise must be evaluated in context and in relation to the specific questions under review" (para. 9).

[30] In my view, the Tribunal has a greater relative expertise on questions concerning pension plan documents. In that regard, I would echo the comments of Goudge J.A. in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (2002), 62 O.R. (3d) 305 (C.A.) at para. 29:

> The Act gives the Tribunal the central adjudicative role in the specialized administrative structure set up to regulate pensions in Ontario. While the Tribunal deals with other regulated sectors in addition to pensions, the *Financial Services Commission of Ontario Act* requires that, to the extent practicable, members are appointed with experience and expertise in the regulated sectors and that they are assigned to cases which draw on that experience and expertise. Hence the Tribunal must be seen as having a relative expertise in adjudicating questions relating to pensions. This points to a more deferential standard of review.

[31] Although Deschamps J. took a different view of the Tribunal's expertise in *Monsanto*, that view related to the Tribunal's expertise to decide a question of pure law. In my view, the opinion expressed by Goudge J.A., set out above, remains relevant to questions of mixed fact and law involving pensions.[4]

[32] **Legislative provisions** – For several of the issues on appeal, there are no legislative provisions that apply. On these matters, the provisions of the pension plan documentation dictate the result. In such circumstances, greater deference is owed to the Tribunal decision than in situations such as *Monsanto* where a question of pure law was in issue.

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[4] See *Baxter v. Ontario (Superintendent of Financial Services)* (2004), 192 O.A.C. 293 (Div. Ct.) to the same effect and for an excellent consideration of the standard of review of Tribunal decisions following the decision of the Supreme Court of Canada in *Monsanto*.

[33] **Nature of the Question** – Many of the issues to be decided on this appeal involve questions of mixed fact and law, which require the decision maker to apply a legal standard to a set of facts: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 26. A less searching standard of review is appropriate on questions of mixed fact and law than for matters of pure statutory interpretation. Similarly, greater deference is warranted for decisions involving the exercise of discretion: *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3 at paras. 29–30.

[34] Accordingly, as will be seen, most of the Tribunal decisions under consideration in this appeal are subject to review on a reasonableness standard.

4. PAYMENT OF PLAN EXPENSES

Overview

[35] From the Plan's inception through to the end of 1984, the company paid all of the expenses incurred in administering the Plan and Fund. Beginning in 1985, however, all third-party Plan expenses were paid from the Fund. These expenses included fees for trustee, investment, accounting and actuarial services. Trustee fees are not in dispute in this appeal because, in 1994, the company accepted that it was responsible for all such expenses and repaid the Fund approximately $235,000. Hereafter, I will refer to the expenses paid from the Fund, which exclude trustee fees and expenses, as the "Plan Expenses".

[36] The Tribunal held that, with one exception, it was permissible for the Plan Expenses to be paid from the Fund. The exception was for consulting fees of $6,455 paid for advice on the introduction of a defined contribution option to the Plan ("conversion option expenses"). Fees relating to the implementation of the conversion option, however, were held to be valid Plan Expenses.

[37] On appeal, the Divisional Court reviewed the Tribunal's decision on a correctness standard. It reversed the Tribunal. The Divisional Court held that the Plan provisions did not permit the Plan Expenses to be paid from the Fund and that the Plan could not be validly amended to so provide. It stated that payment of the Plan Expenses from the Fund constituted a partial revocation of the trust and that it was irrelevant whether the Plan Expenses were paid to the company or to a third party.

[38] With respect, I am of the opinion that the Divisional Court erred in the standard of review that it applied. A review of the Tribunal's decision on a reasonableness standard leads to the conclusion that there is no basis for interference with that decision. Moreover, I would not disturb the Tribunal's decision on this issue, even if it were subject to review on a correctness standard.

Standard of Review

[39] The Divisional Court held that the Plan expenses issue was a question of law to which the correctness standard applied. I disagree. Based on a consideration of the *Pushpanathan* factors, I conclude that the Tribunal decision on this matter ought to have been reviewed on a reasonableness standard.

[40] **Relative expertise** – Unlike *Monsanto* which decided a question of statutory interpretation without reference to the terms of particular pension plan documentation, in this case the Plan documents are the basis on which this issue must be decided. In construing those documents, the Tribunal members were required to draw on their knowledge and understanding of pensions. Although the Tribunal has no expertise relative to the courts in applying legal principles, it does have relative expertise in interpreting pension documentation.

[41] **Legislative provisions** – There are no provisions in the Act relevant to the payment of pension plan expenses.

[42] **Nature of the question** – To determine whether the company was entitled to pay the Plan Expenses from the Fund, the Tribunal had to interpret the Plan documents applying legal principles. Although the Plan documents are not facts, they are specific to this Plan and these parties. A less searching standard of review is appropriate for this type of question than for matters of pure statutory interpretation.

[43] These three *Pushpanathan* factors[5] support treating the Tribunal decision with deference. Hence my view that the appropriate standard of review of the Tribunal decision on Plan expenses is reasonableness.

Analysis

a. The Tribunal decision is reasonable

[44] The Tribunal began by considering the provisions of the Trust agreements. It viewed the relevant provisions of the original Trust agreement as being no different than those in the 1958 Trust agreement and thereafter referred to the provisions of the latter.

[45] The Tribunal noted that the Trust agreement served two purposes. The first is to establish a trust over funds contributed to the pension plan. The second is to set out the respective rights and obligations of the parties to the Trust agreement which, in the first instance, were the company, as Plan sponsor, and National Trust, as trustee.

[5] The first factor, as explained in the preceding section, does not.

[46] The Tribunal interpreted ss. 5 and 19 of the 1958 Trust agreement as requiring the company to pay the trustee's fees and any expenses that the trustee incurred in performance of the trust. Those sections read as follows:

> 5. *The expenses incurred by the Trustee in the performance of its duties*, including fees for expert assistants employed by the Trustee with the consent of the Company and fees of legal counsel, *and such compensation to the Trustee* as may be agreed upon in writing from time to time between the Company and the Trustee, and all other proper *charges and disbursements of the Trustee shall be paid by the Company*, and until paid shall constitute a charge upon the Fund. …
>
> 19. The Trustee shall be entitled to compensation in accordance with the Schedule of Fees on pension and profit-sharing trusts of National Trust Company, Limited now in effect, which compensation may be adjusted from time to time based upon experience hereunder, as and when agreeable to the Company and the Trustee. Compensation payable to any successor trustee shall be agreed to by the Company and such successor trustee at the time of its designation. Such compensation shall constitute a charge upon the Fund unless it shall be paid by the Company. The Company expressly agrees to pay all expenses incurred by it or by any Trustee in the execution of this Trust and to pay all compensation which may become due to any Trustee under the provisions of this Agreement. [emphasis added]

[47] The Tribunal noted that s. 1 of the 1958 Trust agreement stipulates that "[n]o part of the *corpus* or income of the Fund shall ever revert to the Company or be used for or diverted to purposes other than for the exclusive benefit of" the beneficiaries. The Tribunal also observed that nothing in the later trust agreements purported to modify the intent expressed in s. 1 that the Fund could be used only for the exclusive benefit of Plan beneficiaries.

[48] Section 11, the amendment provision in the 1958 Trust agreement, was subject to the same limitation. The relevant part of s. 11 reads as follows:

> 11. This Agreement may be amended in whole or in part or be terminated any time and from time to time by an instrument in writing executed by the Company and the then

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

[49] The Tribunal then considered the Plan texts. It noted that the original Plan text contained no provision dealing with payment of Plan or Fund expenses. It considered the Plan amendments in 1975, 1987 and 2000, all of which were directed at providing that reasonable Plan expenses would be paid from the Fund, and concluded that the amendments were permissible so long as such expenses were, in accordance with the terms of the Trust agreement, for the "exclusive benefit" of Plan members.

[50] The Tribunal heard expert evidence that the words "exclusive benefit" had no special meaning in the pension field. It also heard expert evidence that the Plan Expenses were for the exclusive benefit of Plan members because they were routine expenses essential to the continued operation of the Plan.

[51] The Tribunal considered the amendments made in respect of expenses in 1975, 1987 and 2000 to be consonant with the Plan and trust documents. It concluded that the amendments did not authorize the use of the Fund other than for the exclusive benefit of Plan members. In so concluding, the Tribunal construed the words "exclusive benefit" as meaning "primary benefit". It explained that on a strict interpretation of those words, even payment of pension benefits to a member could be said to be other than for the exclusive benefit of Plan members as the payment benefited the company by virtue of discharging its obligation. The Tribunal concluded that the Plan Expenses, apart from $6,455 spent to obtain advice on the addition of the defined contribution option, were incurred for the primary benefit of the Plan beneficiaries. It ordered Kerry to repay only the sum of $6,455.

[52] The Tribunal considered the Trust agreement and Plan text separately, recognizing the differences between those types of documents. It focused on the relevant provisions in both and construed those provisions reasonably. Accordingly, in my view, the Tribunal's decision was reasonable and it ought to be restored.

b. Plan expenses are properly payable from the Fund

[53] Even if the Tribunal were required to be correct on this issue, I would not interfere with the result.

[54] I approach a determination of this issue in the following way.

[55] First, I looked to the Act to determine whether it contains any provisions that govern the payment of pension plan expenses. There are none.

[56] Next, I considered whether there are any principles of law, trust or otherwise, that would require the company to pay the Plan Expenses. I know of none. I understand trusts to operate on the basis that expenses of the trust are paid from the *corpus* of the trust unless the trust agreement provides otherwise. This understanding is reinforced by s. 23.1 of the *Trustee Act*, R.S.O. 1990, c. T.23, as am. by S.O. 2001, c. 9, Sch. B, s. 13(1), which permits a trustee to pay expenses properly incurred in carrying out the trust from the trust property or to seek indemnification from the trust for any such expenses.

[57] The Plan documentation (Trust agreement and Plan text) was then reviewed to determine whether the matter of expenses had been addressed. If, in the documentation, the company undertook to pay the Plan Expenses, it must do so, unless that undertaking was validly amended. Absent such an undertaking, the company was under no legal obligation to pay such expenses.

[58] Pursuant to ss. 5 and 19 of the Trust agreement, set out above, the company undertook to pay the trustee's fees and expenses. Thus, as the company acknowledges, it is obliged to pay the trustee's fees and expenses.

[59] However, a properly administered pension plan requires a number of services in addition to those of a trustee, including actuarial, accounting and investment functions. The Plan text vests responsibility for ensuring that such functions are fulfilled in the Retirement Committee. The relevant parts of s. 4 of the original Plan text read as follows:

> 4. ADMINISTRATION OF THE PLAN
>
> The Plan shall be administered by a Retirement Committee consisting of at least three members appointed by the Company. …
>
> The Committee shall have the right and power, among other rights and powers,

> (a) to authorize payments of the benefits provided by the Plan;
>
> (b) to make and enforce uniform and non-discriminatory rules for the efficient administration of the Plan, to interpret the Plan and to decide finally and conclusively any questions that may arise in connection with the Plan subject to the provisions of the Text of the Plan and of the Trust Agreement;
>
> (c) *to employ or appoint Actuaries, Accountants, Counsel (who may be Counsel for the Company) and such other services as it may require from time to time in the administration of the Plan* … [emphasis added]

[60] The Plan text is silent in respect of payment of the Plan Expenses. Silence does not create a legal obligation on the company to pay.

[61] Neither the Trust agreement nor the Plan text placed an obligation on the company to pay the Plan Expenses. Based on those documents, the company is obliged to pay only the trustee fees and its expenses incurred in the execution of the trust. As it did not undertake to pay the Plan Expenses, it had no legal obligation to pay for them. The fact that the company voluntarily chose to pay the Plan Expenses for a period of time does not create a legal obligation on it to continue to pay such expenses.

[62] It will be apparent from the foregoing that I disagree with the Divisional Court's view that because the 1958 Trust agreement specified that taxes, interest and penalties were to be paid by the Fund but did not specify that the Plan Expenses were to be paid also from the Fund, it was reasonable to infer that the expenses were not payable from the Fund and to place the obligation to pay such expenses on the company. The company is responsible for the obligations that it undertook; the failure of the original Plan documentation to directly address payment of the Plan Expenses does not lead to the conclusion that the company is obliged to pay for them. In accordance with general trust practice and principles, the trust fund would bear such expenses.

[63] I make two responses to the argument that s. 11 of the Trust agreement precluded any amendment permitting payment of the Plan Expenses from the Fund. This argument is based on the limitation in s. 11 that no amendment can be made that would permit the Fund to be used other than for the exclusive benefit of the employees (the "limitation").

[64] First, in my view, the limitation is directed at "true" amendments – that is, amendments which change a party's rights or obligations. As I have explained, the

company was under no obligation to pay the Plan Expenses – they could have been paid from the Fund from the outset. Amending the Plan text to reflect this made no change to the rights or obligations of any person so the limitation was not engaged. As a procedural matter, an amendment was required in order to change the Plan text to make it clear how the Plan Expenses were to be paid but that was an amendment in form, not substance.

[65] Second, s.11 expressly provides that it "is not to be construed to enlarge the obligations of the Company beyond those assumed by it under the Plan". The company was under no obligation to pay for the Plan Expenses. If the limitation in s. 11 is held to preclude an amendment that permits the Fund to be used to pay the Plan Expenses, the company will be forced to pay such expenses in order to ensure that the Plan continues. That means that s. 11 will have been used to enlarge the company's obligations beyond those that it had assumed under the Plan. Such a result is directly prohibited by that part of s. 11 which provides that it is not to be construed so as to enlarge the company's obligations.

[66] In light of this conclusion, it is unnecessary to decide whether the Tribunal was correct in construing "exclusive benefit" to mean "primary benefit".

[67] Finally, I am of the view that the Tribunal was correct in requiring the company to repay the Fund the sum of $6,455. It will be recalled that the money was paid for advice about the addition of the defined contribution option. In my view, the company obtained that advice for its own benefit, in order to determine whether it wished to alter the structure of the Plan. Even if the advice was obtained by the company in its role as the Plan sponsor, that does not mean that it was obtained on behalf of the Plan. It remains information that the Plan sponsor sought in order to determine how it wished to proceed in terms of the Plan structure. As the expense was that of the company, it is obliged to pay for it.

c. No partial revocation of trust

[68] I disagree also with the Divisional Court's view that to permit the company to pay the Plan Expenses from the Fund amounted to a revocation of trust. Revocation is the return of (some or all of) the trust funds to the person who placed the funds in trust. So, for example, revocation occurs when an employer withdraws surplus monies from a pension fund. Payment of expenses to a third party does not fall within that definition as no money was returned to the company.

[69] The Divisional Court relied on this court's recent decision in *Markle v. Toronto (City)* (2003), 63 O.R. (3d) 321 in concluding that payment of the Plan Expenses amounted to a partial revocation. In that case, this court held that the right to amend a pension plan did not entitle the City of Toronto to recover contributions that it had made, even where the recovery was for services that the City had provided to the Plan.

[70] *Markle*, however, is very different factually from the present case. As will be seen, the result and reasoning in *Markle* are consistent with the notion of revocation articulated above and with my conclusion that causing the Fund to pay for third party expenses incurred by the Plan does not amount to revocation.

[71] In *Markle*, the City enacted a by-law to provide pension benefits for its permanent employees. The by-law created a contributory, defined benefit plan. Contributions were held in a trust fund. Administration of the plan was vested in a board of trustees. The board of trustees was responsible for all aspects of administering the plan and fund. Thus, the board was responsible not only for holding the plan funds but also for investing the funds, paying benefits and appointing the plan actuary and accountant.

[72] The by-law stipulated that the City would bear all expenses incurred by the board. It also provided that the City had the right to amend the by-law "provided always that no such amendment shall entitle [the City] to recover any contribution whatever made by it into the [f]und".

[73] The City provided administrative services to the plan. In 2001, it enacted a by-law (the "later by-law") which purported to have the cost of those services paid from the fund. The City then sent the board an invoice for $181,333.40.

[74] The board applied for a determination of the legality of the later by-law. At first instance and on appeal, it was held that the later by-law was invalid, in part because it amounted to a partial revocation of trust.

[75] There are three critical differences between *Markle* and the present case.

> (1) In *Markle*, the by-law specified that no amendment could permit the City to recover "any contribution whatever" that it made to the pension fund. The later by-law purported to allow the City to recover contributions, albeit as compensation for services rendered. That is, the later by-law purported to do that which was directly prohibited in the original by-law.
>
> In the present case, there was no provision making the company responsible for the Plan Expenses, so later amendments permitting such expenses to be paid from the Fund are not in conflict with original plan documents. The only obligation placed on the company, which came from the original Trust agreement, was to pay for trustee fees and expenses incurred in the execution of the trust; the company acknowledges that obligation and continues to meet it.

(2) In *Markle*, if the later by-law had been held valid, the City would have been returned part of its contributions to the trust fund. I recognize that the character of the money changed in that the City made payments to the fund by way of contribution but it would have received money from the fund as compensation for the administrative services it had rendered. Nonetheless, the return of money to the City falls within the definition of revocation, namely, the return of trust funds to a person who has placed funds in the trust. In the present case, Kerry is not asking that money from the trust fund be returned to it. It is asking that the Plan pay for expenses it incurred on behalf of Plan members.

(3) The expenses at issue in the present appeal were not in issue in *Markle*. It is clear from the trial decision in *Markle*[6] that the board was not challenging the provision in the by-law that provided that third party services were to be paid from the pension fund; it questioned payment for services rendered by the Plan sponsor. Here, the company asks for no funds – payments are only for third party services.

5. APPEAL AND CROSS-APPEAL IN RESPECT OF CONTRIBUTION HOLIDAYS

Overview

[76] It will be recalled that the company established a defined benefit pension plan for its employees in 1954 and that the Plan was funded through employer and employee contributions which were held in a trust fund. The initial beneficiaries of the Fund were employees and retired employees, their beneficiaries or estates, and their contingent annuitants (s. 22 of the original Plan text).

[77] In 2000, the Plan was amended to add a defined contribution component. The effect of the 2000 amendments was to create two categories of Plan members – those in the defined benefit component and those in the defined contribution component.

[78] In 1999, existing Plan members who would be active members of the Plan on January 1, 2000, were given a one-time option to convert their defined benefit entitlement to a defined contribution entitlement. Those who did not elect to convert remained as

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[6] (2002), 213 D.L.R. (4th) 362 at 369 – 70 and 372 – 73 *sub nom. Metropolitan Toronto Pension Plan (Trustees of) v. Toronto (City).*

members of the defined benefit component of the Plan ("Part 1 members"). After January 1, 2000, all new employees were required to participate in the defined contribution component of the Plan. The pre-2000 Plan members who exercised the conversion option together with the new Plan members who were in the defined contribution component of the Plan are termed "Part 2 members".

[79] Funds contributed to the defined contribution component of the Plan were held by the Standard Life Assurance Company pursuant to an insurance contract. When a Part 2 member retires, the accumulated contributions held by Standard Life to that member's benefit are used to purchase a life annuity for the member. The payments from the life annuity are the member's pension.

[80] The employer began taking contribution holidays in 1985. It continued to do so after the Plan was amended in 2000 for both Part 1 and Part 2 members. The contribution holidays were taken through use of the actuarial surplus in the Fund which had accrued when the Plan was a defined benefit plan only.

[81] The Committee asked the Superintendent to refuse to register the 2000 Plan on the basis that, among other things, the provisions in the 2000 Plan text that permitted the company to take contribution holidays in respect of Part 2 members were contrary to the Trust agreement ("cross-subsidization"). It also challenged the right of the company to take contribution holidays in respect of the defined benefit component of the Plan.

[82] The Tribunal held that the provisions in the 2000 Plan permitting cross-subsidization were inconsistent with the terms of the Trust agreement. It concluded, however, that the conflict could be resolved by amending the 2000 Plan to designate Part 2 members as Fund beneficiaries. It would have permitted registration of the 2000 Plan so long as it had been amended to make the Part 2 members beneficiaries of the Fund.

[83] The Tribunal also held that the company was entitled to take contribution holidays in respect of the Part 1 members.

[84] The Divisional Court set aside the Tribunal's decision in respect of the cross-subsidization. It viewed the 2000 amendments as having created two pension plans and funds and held that cross-subsidization was impermissible – that is, Kerry could not use surplus money in the Fund to satisfy its contribution obligations in respect of the Part 2 members. Consequently, the Divisional Court ordered the Superintendent to refuse registration of the 2000 Plan.

[85] Like the Tribunal, however, the Divisional Court held that the contribution holidays taken in respect of the defined benefit component of the Plan were acceptable.

[86] Kerry appeals and asks that the cross-subsidization decision of the Tribunal be restored.

[87] The Committee cross-appeals; it seeks an order requiring Kerry to remit the amounts that it has taken by way of contribution holidays in respect of the defined benefit component of the Plan.

[88] The appeal and cross-appeal are dealt with in separate sections, below.

[89] Before turning to that analysis, I will consider the standard of review on the issue of contribution holidays; this reasoning applies to both the appeal and cross-appeal. As will be seen, unlike the Divisional Court which applied a standard of correctness to the Tribunal's decisions on contribution holidays, in my view, those decisions are subject to review on a reasonableness standard. As the Tribunal's decisions are reasonable, they should be permitted to stand. Moreover, as I explain, even if those decisions must be correct, I would not interfere with them.

Standard of Review

[90] Again, the *Pushpanathan* factors must be considered to determine the standard of review applicable to the question of whether the employer was permitted to take contribution holidays.

[91] For the same reasons as those given in respect of the standard of review on the issue of Plan expenses, in my view, the standard of review on the question of the permissibility of the contribution holidays is reasonableness. This issue, like that of Plan expenses, required the Tribunal to interpret the Plan documents, a matter on which they have relative expertise. This issue, like that of Plan expenses, is specific to this Plan and these parties and warrants a higher degree of deference than do matters of pure law; it is not a matter of pure statutory interpretation, a matter on which the Tribunal is required to be correct. And, again like the situation in respect of Plan expenses, there are no statutory provisions governing this issue.

[92] Accordingly, the Tribunal's decisions on contribution holidays are to be reviewed on a reasonableness standard.

6. CONTRIBUTION HOLIDAYS IN RESPECT OF THE DEFINED CONTRIBUTION COMPONENT OF THE PLAN (APPEAL)

[93] The Tribunal accepted the Committee's argument that permitting cross-subsidization was inconsistent with the provisions of the Trust agreement. It explained this conclusion as follows. The trust provisions permitted the Fund to be used or diverted only for the "exclusive benefit of" Fund beneficiaries. The 2000 Plan confined the Fund

beneficiaries to Part 1 members. That is, it did not make Part 2 members beneficiaries of the Fund. Thus, use of the Fund by means of a contribution holiday in respect of Part 2 members was inconsistent with the Trust agreement requirement that the Fund be used only for the exclusive benefit of Fund beneficiaries.

[94] However, the Trust agreement also provided that beneficiaries of the Fund were those persons designated under the Plan (s. 1). Under the terms of the Plan, it was possible to designate Part 2 members as beneficiaries of the Fund. Thus, the Tribunal held that the contribution holidays in respect of Part 2 members were permissible so long as the Plan was amended to designate Part 2 members as beneficiaries of the Fund, with effect from January 1, 2000.

[95] The Tribunal rejected the argument that *Aegon Canada Inc. v. ING Canada Inc.* (2003), 179 O.A.C. 196 (C.A.) precluded this result. In *Aegon*, two separate pre-existing plans – one in a surplus position and the other in deficit – were merged as a result of the amalgamation of NN Life Insurance Company of Canada and Halifax Life Insurance Company of Canada. The plans were merged subject to the condition, imposed by the Pension Commission of Ontario, that the assets and liabilities of each plan were to be accounted for separately in the merged plan. The pension plan that was in surplus was subject to a trust in favour of the plan members. This court held that no part of the assets of the fund in surplus could be applied to meet the liabilities associated with the other fund without breaching the trust in favour of the beneficiaries of the fund in surplus.

[96] The Tribunal distinguished *Aegon* on the basis that in the present case, there was a single plan formed with the intention of benefiting all of the company's employees, present and future.

[97] In my view, the Tribunal's decision is reasonable and ought to stand. In reaching this conclusion, it is important to note the caution with which the Tribunal approached this matter. The Tribunal was clearly alive to the potential for misuse of surplus funds and its reasons make it clear why it was satisfied that no misuse was occasioned in the present case.

[98] However, even if the Tribunal must be correct on this matter, I see no basis on which to interfere with its decision.

[99] This conclusion flows from the following five points.

[100] First, nothing in the original Plan and Trust documents prohibited the taking of contribution holidays. Consequently, as I explain more fully in the following section, *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 provides that the company has the right to use the actuarial surplus to fund its contributions while the Plan is ongoing. It is significant to note that *Schmidt* establishes that right even where, as here,

the trust agreement provides that the fund is to be used exclusively for the benefit of plan members.

[101] Consequently, to the extent that the Divisional Court's decision is premised on the notion that the Plan members were entitled to surplus while the Plan was ongoing, I respectfully disagree. *Schmidt* makes it clear that members of a pension plan have no entitlement to the actuarial surplus in an ongoing pension plan. Justice Cory explained in *Schmidt* that members in plans with exclusive benefit language or the equivalent are entitled to "two distinct types" of benefits: the benefits promised under the pension plan and the right to share in surplus remaining on plan termination (654-5).

[102] Second, s. 9 of the *Pension Benefits Regulations*, R.R.O. 1990, Reg. 909, provides that after a plan conversion, surplus can be used to fund employer contributions. Section 9 reads as follows:

> 9. If an amendment to a pension plan with defined benefits converts the defined benefits to defined contribution benefits, the employer may offset the employer's contributions for normal costs against the amount of surplus, if any, in the pension fund after conversion.

[103] Although the Plan has introduced a defined contribution component, rather than been fully converted, this provision confirms that an employer is entitled to use the actuarial surplus to fund contributions where a defined benefit arrangement is not maintained.

[104] Third, the company was at liberty to introduce a new category of Plan member: there is nothing in law or the Plan documentation to prevent such an action. The Plan text expressly permits the company to unilaterally amend the plan (s. 22). Thus, the company could amend the Plan to introduce a new category of member. So, for example, if there were part-time employees for whom the company wished to provide a pension, it could create a new category of members and permit the part-time employees to become Plan members in that category.

[105] Fourth, if the company introduced a new category of Plan member, it would be entitled to take contribution holidays in respect of that new category (*Schmidt)*. The fact that overall Plan membership was expanded through inclusion of a new category of member would not alter the company's right to take contribution holidays.

[106] Fifth, cross-subsidization is not prohibited by the Trust agreement. What is prohibited is the use of the Fund for other than the exclusive benefit of Fund

beneficiaries. Once the Part 2 members are designated Fund beneficiaries,[7] use of the Fund's surplus by way of contribution holidays in respect of them meets the requirement that the Fund be used exclusively for the benefit of Fund beneficiaries.

[107] Once the 2000 Plan is amended to designate the Part 2 members as beneficiaries of the Fund, the entitlement of members would be as follows:

- Part 1 members – pension benefits are paid from the Fund.
- Part 2 members – pension benefits are paid from the funds in the member's account, at the time of retirement, with Standard Life (through the purchase of an annuity).
- On Plan termination – both Part 1 and Part 2 members are entitled to lay claim to the Fund's surplus.

[108] In short, Part 2 members would receive their pension benefits from their accounts with Standard Life but would have the same right as Part 1 members to make a claim to any surplus in the Fund, on Plan termination.

[109] I recognize that the present case was not simply the introduction of a new category of Plan member – it also created a new funding arrangement for the payment of pension benefits for the Part 2 members. Thus, it must be asked, does that change the foregoing analysis? The answer to that question is "no", so long as the Part 2 members are made Fund beneficiaries.

[110] Why is that? Why can the Fund be used for the benefit of Part 2 members when the surplus in the Fund accrued prior to some of them becoming Plan members?[8] The answer lies in the Plan documentation. Read as a whole, it is apparent that: (1) the Plan and Fund were created to benefit all full-time employees; and (2) it was intended that all full-time employees would become members of the Plan and beneficiaries of the Fund. The Plan documents created an "open" pension plan in the sense that it was designed for employees, an ever-changing class with some employees leaving before retirement and new employees joining. Because employment is not static so neither is membership in the Plan. It does not matter whether new members arrive one at a time or as a group, the Plan was designed to permit them to become Plan members and Fund beneficiaries.

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[7] The Trust agreement provides that the Fund beneficiaries are those persons designated by the Plan and the Plan permits the company to designate Plan members. Thus, there is no impediment to the company so designating the Part 2 members.

[8] It will be recalled that all Part 2 members except those joining the company after January 1, 2000, had been members of the Plan and Fund and had elected to transfer their entitlement from the defined benefit component to the defined contribution component of the Plan.

[111] Finally, I do not see the introduction of the defined contribution component to the Plan as creating a second plan. In this regard, I disagree with the Divisional Court. In my view, a single plan remained after the introduction of the defined contribution component. The fact that the Plan consisted of two components does not mean that a new plan was created for Part 2 members. Control, management and administration of the Plan remained with the Retirement Committee and the company, as Plan administrator. The fact that pension benefits were payable from the Fund in the case of Part 1 members and from annuities in the case of Part 2 members does not lead to the conclusion that there were two different plans, particularly as both Part 1 and Part 2 members have a claim to any Fund surplus remaining on Plan termination.

[112] On this view, I do not see *Aegon* as relevant to the instant case. *Aegon* was about the merger of two existing independent pension plans. This is not a plan merger case: the same Plan continued to exist although it had two components and two categories of members. Put another way, it was the unexpected liabilities presented by merger with a second plan that led to the need for segregation in *Aegon*. Absent segregation, the Halifax Plan members' rights would have been diminished by the addition of a new category of beneficiaries whose membership was not contemplated at the time the Halifax Plan was created. In the instant case, however, the new category of member was contemplated from the outset as the Plan was designed for all full-time employees.

[113] Accordingly, while my reasoning differs from that of the Tribunal, I arrive at the same result. Consequently, even if the Tribunal had to be correct on this matter, its decision should be reinstated.

7. CONTRIBUTION HOLIDAYS IN RESPECT OF THE DEFINED BENEFIT COMPONENT OF THE PLAN (CROSS-APPEAL)

[114] On cross-appeal, the Committee argues that the Divisional Court erred in concluding that Kerry was entitled to take contribution holidays in respect of the defined benefit component of the Plan. The Committee submits that the terms of the original Trust agreement prohibit contribution holidays and that amendments made in 1965 explicitly permitting contribution holidays are invalid because they constitute a partial revocation of the Fund.

[115] Kerry submits that the Divisional Court and the Tribunal correctly concluded that the Supreme Court of Canada's decision in *Schmidt, supra*, establishes that it was entitled to take contribution holidays. I agree.

[116] In my view, there is no question but that Kerry's contribution holidays in respect of the defined benefit component of the Plan were permissible. *Schmidt* establishes that an employer may take contribution holidays when a defined benefit pension plan enjoys

an actuarial surplus, unless the plan documentation explicitly provides otherwise. A specific formula for calculating the employer's annual contribution is an example of such a provision. However, if an employer's contribution is to be determined by an actuarial calculation of the amount necessary to fund promised benefits, a contribution holiday is permissible. Thus, the Plan documentation must be examined to determine whether Kerry was entitled to take contribution holidays.

[117] Kerry's funding obligation, as set out in s. 14(b) of the original Plan text, requires Kerry to contribute the amount necessary to fund current and future benefits. Section 14(b) reads as follows:

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

[118] Section 14(b) does not contain a formula by which Kerry's contributions are determined. Although no explicit reference is made to actuarial calculations, there is no other means by which Kerry's contributions could reasonably be determined. Section 14(b), therefore, implicitly permits Kerry to take contribution holidays by limiting its contribution obligation to the additional amount needed to pay current and future benefits, if any. When no such amount is needed, Kerry is not obligated to contribute.

[119] As a result of this determination, it is unnecessary to decide the second question raised by the Committee, namely, whether the 1965 amendments permitting contribution holidays were invalid. Because the original Plan text permits the employer to take contribution holidays, the 1965 amendment does nothing but make that right explicit.

[120] The Committee makes several additional arguments against Kerry's right to take contribution holidays.

[121] First, it submits that in other cases, language similar to that in s. 14(b) has been held to amount to a formula for determining an employer's contribution, and thus to preclude the taking of contribution holidays. It points to *C.U.P.E., Local 1000 v. Ontario Hydro* (1989), 68 O.R. (2d) 620 (C.A.); *Trent University Faculty Association v. Trent University* (1997), 35 O.R. (3d) 375 (C.A.); *Hockin v. Bank of British Columbia* (1995),

123 D.L.R. (4th) 538 (B.C.C.A.); and *Chateauneuf v. T.S.C.O. of Canada Ltd.* (1995), 124 D.L.R. (4th) 308 (Que. C.A.), as examples.

[122] Those cases, however, are fundamentally different. In those cases, the pension plan documentation contained a formula by which the employer's annual contribution was calculated: the employer was to pay the difference between the employees' contributions and the benefits either accrued or paid out in a given year. As previously mentioned, s. 14(b) is not such a formula. It requires Kerry to contribute the amount needed to ensure that the Fund will be able to pay the current and future benefits owed to Plan members. This requires a determination of the amount needed to ensure that the Fund remains adequately funded rather than the amount needed to pay benefits in the current year. This distinction was recognized by LeBel J.A. (as he then was) in *Chateauneuf* as integral to determining whether a pension plan permits contribution holidays (401-2).

[123] Second, the Committee argues that contribution holidays are prohibited by the terms of the Plan. It asserts that the Divisional Court failed to appreciate that although contributions do not become part of the *corpus* of the Fund until paid, the requirement that Kerry make ongoing contributions is a separate trust obligation imposed by the Plan. As just explained, the Plan does not create such an obligation. Further, this submission is inconsistent with *Schmidt*. Beneficiaries of a defined benefit pension plan are entitled to the benefits promised by the plan, and may be entitled to any surplus actually remaining on plan termination. They do not have a claim to any notional surplus that exists while the plan is ongoing. (See *Schmidt* at 654-5.) It follows that the Plan members cannot compel the employer to make additional contributions to preserve or increase the actuarial surplus. It would be inconsistent with both the result and the reasoning in *Schmidt* to find that Kerry is obliged to make contributions while the Fund enjoys an actuarial surplus, given the language of s. 14(b).

[124] Third, the Committee submits that contribution holidays constitute an impermissible partial revocation of trust. It argues that Kerry has made a binding promise, which it cannot unilaterally amend or revoke, to alienate certain property to the Fund. Again, this argument runs squarely contrary to the terms of the Plan. Section 14(b) does not contain an unconditional promise that Kerry would alienate property to the Fund. The promise is that Kerry would make contributions when necessary. Further, it is only after money is contributed to the pension trust fund that it becomes trust property and, therefore, subject to the possibility of revocation.

[125] Finally, the Committee argues that clauses permitting contribution holidays should be construed narrowly because there is a strong policy interest in requiring companies to make ongoing contributions to protect employees against the employer's potential future financial hardship. *Schmidt* is a full answer to this argument. Kerry is required by s.

14(b) to make only those contributions necessary to ensure the Fund can pay all benefits. It is legally entitled to take contribution holidays so long as that obligation is met. I would add that there is nothing in the record to support such an argument in this case. There is no evidence to suggest that Kerry would be unable to make any future contributions that might be required or that the Fund will be unable to pay benefits owed. In fact, given the continuing surplus position of the Fund, the evidence is to the contrary.

8. NOTICE OF CONVERSION OPTION

Overview

[126] In November 1999, Kerry gave notice to its employees that they had a one-time option to convert the value of their defined benefit entitlement, as of January 1, 2000, to a defined contribution arrangement. The notice advised that the option had to be exercised by December 15, 1999, and that any such exercise would have the effect of eliminating pension entitlement under the existing defined benefit plan.

[127] For various reasons, including that Kerry had given allegedly inadequate notice about the conversion option, the Committee asked the Superintendent to refuse to register the 2000 Plan.

[128] The Superintendent refused to take the action requested by the Committee; consequently, the Committee asked for a hearing before the Tribunal in relation to this matter.

[129] At the Tribunal hearing, the Committee renewed its complaint in relation to the notice and asked the Tribunal to direct the Superintendent to refuse registration of the 2000 Plan.

[130] The Tribunal found that there were “shortcomings” in the “disclosure” process that raised questions as to whether the employees had been given adequate information about the conversion option. However, it held that any such shortcomings were insufficient to constitute grounds on which the Superintendent could refuse to register the 2000 Plan. The Tribunal found it unnecessary to decide whether Kerry was obliged to give notice of the conversion option.

[131] The Divisional Court held that Kerry, as administrator of the Plan, had a duty to give notice to all affected parties, including former employees who were beneficiaries under the original Plan, of all of the proposed changes that would take place as a result of the 2000 Plan amendments and that it failed to give proper notice. It relied on ss. 22 and 26(1) of the Act in arriving at this conclusion.

[132] The Divisional Court also reasoned that the failure to give proper notice amounted to a failure to administer the Plan in accordance with the Act. Relying on ss. 18 and 87 of the Act, the Divisional Court held that the Superintendent erred in failing to refuse registration of the 2000 Plan and it so ordered.

[133] Kerry argues that the Divisional Court erred in finding that inadequate notice had been given.

[134] The Superintendent argues that the Divisional Court erred in ordering him to refuse registration of the 2000 Plan.

[135] To resolve the matters raised by the parties in respect of this issue, three questions must be addressed. These are:

i. Was Kerry, as administrator of the Plan, required by the Act to give notice of the amendment that created the conversion option?

ii. If so, was adequate notice given? and

iii. Was the Divisional Court correct in ordering the Superintendent to refuse to register the 2000 Plan?

Standard of Review

[136] In my view, the appropriate standard of review must be determined for each of the three questions. My intent is not to overly complicate this matter. But, as explained above, *Lévis* makes clear that multiple standards of review can apply to different matters decided in a single proceeding. And, considering these questions on the pragmatic and functional approach established by *Pushpanathan*, it is apparent that the three questions are each of a different nature and may engage the Tribunal's expertise and the Act in different ways.

[137] The first question – whether notice was required – depends on interpreting s. 26(1) of the Act to determine whether it applies to the conversion option amendment. Although this is a question of mixed fact and law, its outcome depends on the proper interpretation of s. 26(1). As *Monsanto* makes clear, the court's expertise exceeds that of the Tribunal in matters of statutory interpretation. In addition, if s. 26(1) applies, the Superintendent must require the administrator to give notice unless the limited circumstances set out in s. 26(4) are found to exist, in which case he can choose to not require transmittal of the notice. Thus, while recognizing that s. 26(4) creates a limited discretion in the Superintendent, in my view, s. 26(1) is better understood as mandatory in nature. A weighing of these factors leads me to conclude that the standard of review for the first question is correctness.

[138] Different considerations apply in respect of the second question, however. Whether the notice that was given was adequate is a question of mixed fact and law: it involves the application of the legal standards for notice to the particular facts of this case to determine whether the legal requirements have been met. For reasons similar to those given in respect of the issues of Plan expenses and contribution holidays, this question is subject to review on a standard of reasonableness.

[139] The third question revolves around a discretionary decision of the Tribunal. As has been noted, where the decision involves the exercise of discretion, greater deference is owed: see *Suresh*, *supra*. As the Act expressly permits the Superintendent (and the Tribunal, if a hearing is convened) to decide whether it is appropriate to refuse registration, a more deferential standard of review is called for. Consequently, the decision of the Tribunal in respect of the third question is also, in my view, reviewable on a reasonableness standard.

[140] It is unclear what standard of review the Divisional Court applied when reviewing the Tribunal's decision on these matters. While nothing is said explicitly in this regard, it appears that the Divisional Court considered the questions as a single matter and applied a standard of correctness.[9]

Analysis

a. Was there a statutory duty to give notice?

[141] Section 26 of the Act governs adverse amendments. Section 26(1) stipulates that if an administrator applies for registration of an amendment that would reduce benefits or "adversely affect the rights or obligations of a member or former member", the Superintendent *shall* require the plan administrator to transmit notice to specified persons. Section 26(1) reads as follows:

> 26(1) *If the administrator of a pension plan applies for registration of an amendment to the pension plan that would result in a reduction of pension benefits* accruing subsequent to the effective date of the amendment *or that would otherwise adversely affect the rights or obligations of a member or former member or of any other person* entitled to payment from the pension fund, *the Superintendent shall require the administrator to transmit* to such persons as the Superintendent may specify *a written notice* containing an explanation of the amendment and inviting comments to be

[9] At para. 9 of the reasons, the Divisional Court stated that the standard of review for a decision of the Tribunal that involved the exercise of discretion was that of reasonableness. However, it is unclear which, if any, of the Tribunal's decisions were reviewed on that standard.

> submitted to the administrator and the Superintendent, and the administrator shall provide to the Superintendent a copy of the notice and shall certify to the Superintendent the date on which the last such notice was transmitted. [emphasis added]

[142] In my view, Kerry, as administrator of the pension plan, had a statutory obligation pursuant to s. 26(1) of the Act to give notice of the Plan amendment that created the conversion option.

[143] The Act provides that pension plans must be registered (s. 6). To be registered, among other things, the plan administrator must file copies of all plan documentation with the Superintendent (ss. 9 and 10). The obligation to ensure that pension plan documentation is filed for registration is ongoing; the plan administrator must apply to the Superintendent for registration of all plan amendments (s. 12).

[144] In my view, a conversion from a defined benefit plan to a defined contribution plan is an adverse amendment within the meaning of s. 26(1).[10] Why? Because of the uncertainty and risk for a plan member that such a change brings about. Uncertainty arises because the pension plan changes from one in which a plan member receives a guaranteed, defined pension benefit to one in which the amount that will be received is unknown until retirement. Risk increases because the plan member bears the full risk of loss or diminution if the defined contribution investments do not perform well. Although a conversion to a defined contribution plan does not necessarily result in a reduction in benefits, such a result can occur. Because of that risk and the uncertainty as to the quantum of the pension benefit to be received, it seems to me that an amendment that converts a defined benefit pension plan to a defined contribution plan is within the purview of s. 26(1). The intent of s. 26(1) is to ensure that plan members are apprised of changes to their pension plan that may adversely affect their rights. As the change to a defined contribution plan could have that effect, the Superintendent was obliged to require Kerry, *qua* administrator, to transmit notice.

[145] I recognize that in the present case the Plan was not actually converted. Rather, existing Plan members were given the option to convert. However, in order to meaningfully exercise that option and in light of the potentially adverse consequences that can arise if the option is exercised, the Plan members need proper information. Thus, in my view, notice is required pursuant to s. 26(1).

[146] The Divisional Court linked the obligation to give notice flowing from s. 26(1) of the Act to s. 22 of the Act. With respect, I do not see s. 22 as relevant to the question of

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[10] It is interesting to note that FSCO requires that notice be given because a conversion "alters the fundamental pension agreement between the employer and the plan members". See Financial Services Commission of Ontario Policy C200-101, "Conversion of a Plan from Defined Benefit to Defined Contribution" (effective June 1, 2004).

whether notice of the conversion option was required. Section 22 specifies the standard of care owed by an administrator in the administration and investment of the pension fund.[11]

b. Was adequate notice given?

[147] When determining whether adequate notice has been given, two questions must be asked: (1) was the content of the notice accurate and sufficient? and (2) were all affected parties given notice? The latter question may be subject to modification in the pension context because s. 26(1) of the Act gives the Superintendent the power to specify the persons to whom notice must be given.

[148] The Divisional Court found that the content of the notice was inadequate because it failed to disclose all of the changes that the 2000 amendments would make to the Plan, including the fact that "cross-subsidization" would occur. With respect, that finding does not correspond to the matter in issue. The question was whether Kerry gave adequate notice of the conversion option; the question was not whether Kerry had given adequate notice of all of the 2000 Plan amendments, including its intended use of surplus assets. The question of adequacy of notice of the latter matters does not arise unless it has first been decided that s. 26(1) requires that notice be given of such matters. Whether notice of the other 2000 Plan amendments is required is beyond the scope of this appeal as the Committee request to both the Superintendent and the Tribunal was based on the specific allegation of inadequate notice of the conversion option.

[149] The Tribunal said only this in respect of the adequacy of notice: the Superintendent found the notice to be adequate. As will be apparent from my determination that a reasonableness standard of review is appropriate on the matter of the adequacy of notice, deference is to be afforded a Tribunal decision on such a matter. However, as the Tribunal gave no meaningful reasons for its decision, no deference is owed to it.

[150] In any event, the Tribunal's decision is not reasonable. The conversion election form specified that if the member elected to transfer to the defined contribution "plan", the member would "have no further rights and entitlements under the defined benefit plan". The quoted phrase encompasses more than simply the value of a member's accrued pension entitlement under the Plan ("pension entitlement"). If it was intended that exercise of the conversion option would extinguish not only a member's pension entitlement but also all other rights in the Plan and Fund, including the right to future Plan enhancements and to claim entitlement to surplus on Plan termination, then the

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[11] Section 22(1) reads as follows:

> The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

conversion option information was not only misleading, it was incorrect. As explained above in the section on contribution holidays, a single Plan remains after the introduction of the defined contribution component and all Plan members remain beneficiaries of the Fund. Thus, conversion to the defined contribution component could not, of itself, wipe out such rights.

[151] Having found that the notice was misleading or incorrect or both, the Tribunal's determination that notice was adequate is unreasonable. None of the parties have addressed what is to follow from a finding by this court that inadequate notice of the conversion option was given - that matter is beyond the scope of this appeal. It may be that it becomes a matter for investigation by the Superintendent.

c. Ought the Superintendent to be required to refuse registration of the 2000 Plan?

[152] The Tribunal declined to order the Superintendent to refuse to register the 2000 Plan text for three reasons:

1. the Superintendent found that adequate notice had been given;

2. the Act does not provide that failure to give the required notice of an adverse amendment results in the amendment being void or otherwise non-registerable; and

3. any deficiencies in the notice would not constitute sufficient grounds for the Superintendent to refuse registration of the 2000 Plan text.

[153] The Divisional Court overturned this decision. However, in my view, the Tribunal's decision meets the reasonableness standard of review, so there was no basis on which to overturn it. A review of the Tribunal's reasons explains my conclusion.

[154] At the time the Tribunal made its decision on this matter, the first reason was factually accurate and the Tribunal was entitled to consider it – the Superintendent did find that adequate notice had been given. Although I have found that adequate notice was not given, in light of the Tribunal's second and third reasons, discussed below, such a finding does not derogate from my view that the Tribunal's decision on this ought not to be disturbed.

[155] What of the second reason given by the Tribunal? Does failure to give adequate notice result in an amendment being non-registerable or void? Nothing in the Act so provides.

[156] Section 26(2) of the Act reads as follows:

> *If the Superintendent has required the administrator to transmit notices* under subsection (1), the Superintendent shall not register an amendment mentioned in that subsection before the expiration of forty-five days after the date certified to the Superintendent under that subsection, but *after the expiration of the forty-five day period the Superintendent may register the amendment* with such changes as are requested in writing by the administrator. [emphasis added]

[157] On a plain reading of s. 26(2), where notice of an adverse amendment has been required, the Superintendent has the discretion to register the amendment after the forty-five day period has elapsed. Nothing in this provision limits the Superintendent's power to register the amendment to situations in which adequate notice has been given.

[158] I would add that s. 18(1) (d) of the Act reinforces this plain reading of s. 26(2), namely, that the Superintendent has the power to register an amendment after the expiration of a forty-five day period even if inadequate notice was given.

[159] Section 18(1) (d) concerns void amendments. It reads as follows:

> 18(1) The Superintendent *may*,
>
> …
>
> (d) refuse to register an amendment to a pension plan if the amendment is void or if the pension plan with the amendment would cease to comply with this Act and the regulations[.] [emphasis added]

[160] The language in this provision is, again, permissive. Although the Superintendent has the discretion to refuse to register a void amendment, he is not required to do so.

[161] Furthermore, in my opinion, there may be good reason for the Superintendent to register an amendment even if he is concerned that it may be invalid. Pension plan members rely on the Superintendent for complete information on the terms of their pension plan. The legality of plan provisions is often a difficult question that requires determination by an appropriate adjudicative body. The Superintendent might choose to register an amendment, even if inadequate notice was given or he has received comments that cause him to doubt its validity, because he wishes pension plan members to have access to as much information as possible about the terms of their plan. Based on that

information, the pension plan members can take whatever steps they feel are necessary to protect their rights.

[162] In relation to the third reason given by the Tribunal, the Tribunal found that any shortcomings in the notice related only to information that might have affected a member's decision on whether to exercise the conversion option. It is apparent that the Tribunal did not view such shortcomings as sufficiently serious that it would cause the amended 2000 Plan text to cease to comply with the Act. Section 18(1) of the Act makes it clear that revocation of registration and refusal to register are based on that criterion.[12] As explained above, I view the inadequacies of the notice as being far more serious than did the Tribunal. However, the notice relates only to the conversion option. The conversion option is a single, discrete aspect of but one of the many amendments made in 2000. Accordingly, I view as reasonable the Tribunal's determination that the inadequacies in the notice did not cause the amended Plan text to cease to comply with the Act.

[163] Accordingly, considering the reasons as a whole given by the Tribunal on this matter, its decision to refuse to order the Superintendent to refuse registration of the amendment or the 2000 Plan is reasonable and ought not to be disturbed.

9. APPEAL AND CROSS-APPEAL IN RESPECT OF COST ORDERS

Overview

[164] After the Tribunal rendered its decisions, the Committee asked the Tribunal for an order for its costs of the two hearings, payable either from the Fund or by Kerry. Kerry asked the Tribunal for an order requiring the Committee to pay its (Kerry's) costs of the hearings.

[165] In a decision dated December 24, 2004, the Tribunal unanimously declined to make any order as to costs. Further, a majority held that the Tribunal has jurisdiction only to order costs payable by a party to the proceeding. As the Fund was not a party to the proceeding, the majority held that the Tribunal did not have jurisdiction to order payment of costs out of the Fund. The minority held that the Tribunal had the power to

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[12] 18(1) The Superintendent may,

(a) refuse to register a pension plan that does not comply with this Act and the regulations;

(b) revoke the registration of a pension plan that does not comply with this Act and the regulations;

(c) revoke the registration of a pension plan that is not being administered in accordance with this Act and the regulations;

(d) refuse to register an amendment to a pension plan if the amendment is void or if the pension plan with the amendment would cease to comply with this Act and the regulations;

(e) revoke the registration of an amendment that does not comply with this Act and the regulations.

order costs from a pension fund but that the circumstances did not warrant making such an order.

[166] By order dated May 31, 2006 (the "Costs Order"), the Divisional Court ordered that: (1) Kerry pay the Committee its costs of the second Tribunal hearing on a partial indemnity basis; (2) Kerry pay the Committee its costs of the appeals to the Divisional Court on a partial indemnity basis; and (3) Kerry, as the administrator of the Plan, pay the balance of the Committee's legal costs of the Divisional Court appeals from the Fund.

[167] On this appeal, Kerry asks that the Costs Order be set aside in its entirety. The second and third parts of the Costs Order are addressed below, in the Disposition section of these reasons. In the following section, I deal with the first issue, namely, costs ordered in favour of the Committee in respect of the second Tribunal hearing, payable by Kerry. Thereafter, I deal with the costs issue raised by the Committee by way of cross-appeal: whether the Tribunal has the power to order costs payable from a pension fund.

10. COSTS OF THE SECOND TRIBUNAL HEARING

[168] It will be recalled that the Tribunal declined to make any costs order in respect of the two hearings. However, the Divisional Court set aside that order and ordered Kerry to pay the Committee's costs, on a partial indemnity basis, of the second Tribunal hearing.

[169] For the following reasons, I would allow the appeal on this issue and restore the Tribunal's order of no costs.

Standard of Review

[170] An appellate court may interfere with a costs award made by a lower court only if the costs award is clearly wrong or the court made an error in principle: *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303 at para. 27. The deference owed to the lower court reflects the fact that the award is an exercise of discretion and that the lower court, having heard the matter, is in the best position to exercise that discretion.

[171] I see no principled reason why the Divisional Court ought to review a costs order of the Tribunal on any other basis. That is, in reviewing the Tribunal's costs order, the Divisional Court ought only to interfere if the Tribunal's order is clearly wrong or the Tribunal acted on an error in principle.

[172] On that basis, I see nothing in the Tribunal's costs decision that warranted interference by the Divisional Court. As discussed below, the Tribunal's decision is in accordance with its published procedures; it reflects no error in principle. And, far from being plainly wrong, the decision is eminently fair and sensible. Indeed, the Divisional

Court's reasons do not allude to any error made by the Tribunal in its decision on costs. As there was no basis to interfere with the Tribunal's cost decision, it was an error in principle for the Divisional Court to set it aside.

[173] There are cases which suggest that the Tribunal's cost order ought to be reviewed on a reasonableness standard.[13] If that standard is applied, as the order was reasonable, there was no basis for interference by the Divisional Court.

[174] Finally, even if the Divisional Court had been entitled to interfere with the Tribunal's cost award, as explained below, the costs award the Divisional Court made must be set aside as it is based on an error in principle.

Analysis

[175] Section 91(1) of the Act gives a party to a proceeding before the Tribunal the right to appeal to the Divisional Court. Section 134(1)(a) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, empowers the Divisional Court to make any order or decision that the Tribunal could have made.

[176] As the Divisional Court gave no reasons for ordering Kerry to pay costs to the Committee for the second Tribunal hearing, I cannot know the basis for the order. I can only suppose that the Divisional Court awarded the Committee its costs of the second Tribunal hearing because the Committee enjoyed substantial success at the Divisional Court on the issues decided in the second Tribunal hearing.

[177] In my view, it was an error in principle to award costs at the Tribunal level solely on that basis. When the Divisional Court makes a costs award in respect of a tribunal hearing, it is standing in the shoes of the tribunal. Accordingly, the Divisional Court is obliged to consider and apply the rules governing costs under which the tribunal operates.

[178] Thus, the Divisional Court was obliged to consider the Tribunal rules on costs as part of its determination on whether costs at the Tribunal level should be ordered and, if so, the quantum of those costs. Accordingly, it was an error in principle for the Divisional Court to fail to consider costs in accordance with the criteria established by the Tribunal to govern costs awards and, instead, to award costs at the Tribunal level to the Committee based simply on the Committee's success on appeal.

[179] The power of the Tribunal to make costs orders is contained in s. 24 of the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 (the "FSCO Act"). It reads as follows:

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[13] See *Creager v. Provincial Dental Board of Nova Scotia* (2005), 230 N.S.R. (2d) 48 (C.A.) and *Brand v. College of Physicians and Surgeons (Saskatchewan)* (1990), 86 Sask. R. 18, 72 D.L.R. (4th) 446 (C.A.).

> 24(1) The Tribunal may order that a party to a proceeding before it pay the costs of another party or the Tribunal's costs of the proceeding.[14]

[180] The Tribunal adopted procedural rules for proceedings before it. Those rules address the matter of costs. Further, the Tribunal issued a practice direction on costs. Both documents make it clear that costs of Tribunal proceedings are awarded primarily on considerations relating to the conduct of the parties, rather than on the degree of success enjoyed by a party. Having said that, I hasten to add that the Rules explicitly make result a relevant consideration.

[181] Rules 44.01 and 45.01 of the *Rules of Practice and Procedure for Proceedings before the Financial Services Tribunal* (August 1, 2004) (the "Rules"), are the relevant rules for the purpose of the present case. Those rules read as follows:

> 44.01 The Tribunal may, after considering submissions from a party that asked for an award of costs and the party or parties that may be subject to such an order, order the costs of a party be paid by another party or parties.
>
> 45.01 In determining whether a party is liable to pay the costs of a party, the Tribunal shall consider:
>
> (a) whether the party engaged in conduct which is clearly unreasonable, frivolous, or vexatious;
>
> (b) whether the party's conduct unreasonably delayed or prolonged the proceeding, including any failure to comply with undertakings or orders;
>
> (c) whether the party's participation assisted the Tribunal in understanding the issues;
>
> (d) failure to cooperate with other parties during preliminary proceedings or at the hearing;

[14] Although s. 17.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as am. by S.O. 2006, c. 19, Sch. B, s. 21(2) (the "SPPA"), generally circumscribes the power of administrative tribunals to order costs, s. 17.1(6) creates an exception for costs orders made in accordance with the tribunal's enabling legislation so long as that legislation was in force on February 14, 2000. The FSCO Act meets that test. Therefore, the Tribunal was not circumscribed by s. 17.1 of the SPPA when making its costs decision.

> (e) failure to attend a hearing or other proceeding, or to send a representative, despite notice being provided to the party;
>
> (f) the party's degree of success in the proceeding; and
>
> (g) any other matter it considers relevant.

[182] The *Financial Services Tribunal Practice Direction on Costs Awards* (August 1, 2004) (the "Costs Practice Direction"), begins by stating that its purpose is to supplement and clarify Rules 44 through 47 of the Rules. Paragraph 2 of the Costs Practice Direction provides:

> 2. The Tribunal need not follow the civil court practice where the usual rule is that the unsuccessful party pays the successful party's costs. A party will not be subject to costs only because it has lost a hearing. The Tribunal is more likely to make a cost award against a party if it has engaged in conduct which is clearly unreasonable, frivolous, or vexatious. The Tribunal is less likely to make a cost award against a party that has been reasonable, cooperative, and helpful to the Tribunal.

[183] The Costs Practice Direction goes on to provide examples of conduct likely to be found to be unreasonable, frivolous or vexatious, and conduct that will be looked on favourably.

[184] Although the Tribunal had the power to award costs under s. 24(1) of the FSCO Act, it chose to make no such award. The Tribunal concluded that a case had not been made for an award of costs. As mentioned previously, I see no basis on which to interfere with this exercise of discretion by the Tribunal. It is clear from the Rules and the Costs Practice Direction that conduct of the parties is a central consideration when deciding whether to award costs. The Tribunal found nothing in the conduct of the parties that would lead to such an award. In light of the considerations governing costs orders of the Tribunal, in my view, the change in result on appeal to the Divisional Court does not warrant interference with the Tribunal's decision on costs and I would restore it.

11. JURISDICTION OF THE TRIBUNAL TO ORDER COSTS FROM A PENSION FUND

[185] By way of cross-appeal, the Committee seeks an order declaring that the Tribunal has jurisdiction to order that costs payable to parties in a proceeding before it be paid out of a pension trust fund.

[186] Rather than arguing this issue in its factum, the Committee relied on the factum it filed in the Divisional Court. The Committee did so because the "Divisional Court summarily and without any analysis dismissed the Committee's appeal on whether the Tribunal has the jurisdiction to award costs from the fund."

[187] Kerry argues that the Committee ought to be regarded as having abandoned its cross-appeal on this issue and that the Committee's act of filing its factum from the Divisional Court effectively circumvents this court's page limit for factums.

[188] It would have been preferable had the Committee addressed the merits of this issue in the usual fashion. However, as this matter was fully argued before the Tribunal and the Divisional Court and is of importance generally, I will deal with it nonetheless.

Standard of Review

[189] It seems readily apparent that this is a question of law and that the standard of review to be applied by the Divisional Court was that of correctness. Although the standard of review was not expressly averted to, it appears that the Divisional Court applied such a standard.

Analysis

[190] In para. 94 of the reasons for decision dated March 15, 2006, the Divisional Court concluded as follows:

> In our view, the majority of the Tribunal was correct in law when it held that it had no jurisdiction to order costs be paid to the Appellants [i.e. the Committee] out of the Trust Fund because the Tribunal, a statutory administrative tribunal, is not clothed with such statutory power by the Legislature.

[191] To say that these reasons are "summary" in nature and provide no analysis is to ignore the preceding paragraphs in this section of the reasons of the Divisional Court. In para. 93, the Divisional Court summarizes the reasoning of the majority of the Tribunal. The wording of para. 94 makes it clear that the Divisional Court adopted that summary. Hence, the reasons are adequate to explain the result: the Tribunal is a creature of statute

and can only exercise the powers conferred on it by legislation. The Tribunal was given the authority to award costs payable by a party. The Fund was not a party to the proceedings; hence, the Tribunal did not have the power to award costs payable from the Fund.

[192] A plain reading of s. 24(1) of the FSCO Act, set out above, supports the Divisional Court's conclusion. Section 24(1) empowers the Tribunal to order one party in a proceeding to pay the costs of another party to the proceeding. In the instant case, the Tribunal could not order that costs be paid from the Fund because the Fund was not a party to the proceeding. The fact that Kerry is the administrator of the Plan does not make the Fund a party in the proceedings.

[193] While it may seem unfair that pension plan members have no statutory right to fund litigation before the Tribunal from the pension fund, employers also have no such right. Policy considerations cannot override the clear terms of the statute. In any event, there are valid policy considerations for not providing access to a pension fund for the purpose of funding legal proceedings. One such consideration is that the causes pursued by litigating plan members may not be in the interests of the membership as a whole. In the present case, one of the reasons of the minority of the Tribunal for refusing to award costs was that there was insufficient evidence of the level of support for the actions of the Committee from the Plan membership. Another consideration is that the solvency of the pension plan could be adversely affected if such funding were permissible.

12. DISPOSITION

[194] Accordingly, I would allow the appeal and:

(1) set aside the judgment of the Divisional Court in respect of Plan expenses and contribution holidays and restore the Tribunal decisions dated March 4, 2004, and September 1, 2004; and,

(2) set aside the Costs Order of the Divisional Court.

[195] I would dismiss the cross-appeal.

[196] Kerry seeks its costs of the appeals to the Divisional Court and of this appeal and cross-appeal. It asks for an order requiring the Committee or, alternatively, the Fund to pay such costs on a substantial indemnity basis. As Kerry has been successful, it is *prima facie* entitled to costs both in this court and before the Divisional Court.

[197] Before deciding the matter of costs, however, and in accordance with the wishes of the parties, the court will accept written submissions on what party or parties are entitled to costs, from what source or sources, and on what scale. In particular, the

submissions should address: whether this court has the power to order costs from a pension fund; if so, whether it ought to order that costs be paid from the Fund for the appeals to the Divisional Court and/or this court; whether, given the novelty of the issues and the role of the Committee which, arguably, sought to ensure the due administration of the Fund, the Committee ought to be awarded costs either at the Divisional Court or here or both; and, on what scale costs ought to be awarded.

[198] Accordingly, if the parties are unable to agree on the disposition of costs of the Divisional Court appeals and this appeal and cross-appeal, they shall make written submissions on the same within twenty-one days of the date of release of these reasons.

RELEASED: June 5, 2007 ("JL")

"E. E. Gillese J.A."
"I agree John Laskin J.A."
"I agree Paul Rouleau J.A."