

**FINANCIAL SERVICES TRIBUNAL**

**IN THE MATTER OF** the *Pension Benefits Act*, R.S.O. 1990, c.P.8,  
as amended by the *Financial Services Commission of Ontario Act, 1997*,  
c.28 (the “*Act*”);

**AND IN THE MATTER OF** a Proposal of the Superintendent of  
Financial Services to Refuse to Consent to an Application under sections  
78(1) and 79(3) of the *PBA* relating to the Montreal Trust Pension Plan  
(2001), Registration Number 0279034 (Canada Revenue Agency) and  
6428 (Régie des rentes du Québec) as it relates to Ontario members or  
former members of the Plan;

**AND IN THE MATTER OF** a Hearing in accordance with subsection  
89(8) of the Act;

**B E T W E E N:**

**MONTREAL TRUST COMPANY OF CANADA  
and MONTREAL TRUST MEMBER SURPLUS COMMITTEE**

**Applicants**

**- and -**

**SUPERINTENDENT OF FINANCIAL SERVICES**

**Respondent**

**BEFORE:**

Ms Lily Harmer  
Chair of the Panel and Member of the Tribunal

Ms Elizabeth Shilton  
Member of the Panel and of the Tribunal

Mr. Ralph Scane  
Member of the Panel and of the Tribunal

**APPEARANCES:**

For the Applicant, Montreal Trust Company of Canada  
Mr. Alex Cobb, Mr. Craig Lockwood

For the Applicant, Montreal Trust Member Surplus Committee  
Mr. Mark Zigler, Ms Susan Philpot

For the Superintendent of Financial Services  
Ms Deborah McPhail

**HEARD:**  
October 17, 2008

## **REASONS FOR DECISION**

### **Overview**

No money may be paid out of a surplus in a pension fund to the employer without the prior written consent of the Superintendent, pursuant to section 78(1) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended (the “*PBA*”). Section 79(3)(b) of the *PBA* provides that:

“the Superintendent shall not consent to an application by an employer in respect of surplus in a pension plan that is being wound up in whole or in part unless ... (b) the pension plan provides for payment of surplus to the employer on the wind up of the pension plan.”

The issue before us is whether the Montreal Trust Pension Plan (the “Plan”) provides for the payment of surplus to the employer on wind up, in fulfillment of the requirement in section 79(3)(b) of the *PBA*.

For the reasons which follow, we have concluded that the Plan, as validly amended pursuant to court order, does provide for the payment of surplus on wind up to the employer, Montreal Trust, as required by section 79(3)(b).

### **The Facts**

Montreal Trust Company of Canada (“Montreal Trust”) sponsors the Montreal Trust Pension Plan (2001) (the Plan) for its employees and former employees, as well as for employees and former employees of certain of its affiliates. The Plan was initially created by Montreal Trust as a defined contribution plan in 1946, and converted thereafter to a defined benefit plan effective December 31, 1954. It is currently a defined benefit pension plan with some previously-acrued defined contribution benefits.

The Plan is registered in Quebec, with members residing across the country.

Three partial windups have been triggered in the Plan’s history as a result of various corporate transactions – one affecting approximately 2,000 members across Canada who terminated employment from December 2, 1993 to December 31, 1998; another affecting approximately 135 people across Canada in 1997; and a third triggered in June 30, 2007 which impacted approximately 300 Plan members in Quebec and Alberta. Although the Plan was in a surplus position at the date of each of these partial wind-ups, there has been

no distribution of surplus to date, and the Plan has accumulated considerable surplus, estimated at approximately \$29 million as of November 30, 2006.

Starting in 2001 certain Plan members<sup>1</sup> began raising the issue of Plan wind up and surplus distribution in discussions with Montreal Trust. The Montreal Trust Member Surplus Committee (the “Committee”) was formed by Plan members to seek this outcome. Discussions were first held between Montreal Trust’s legal counsel and the Committee’s legal counsel regarding the possibility of surplus sharing on April 17, 2002. After intense negotiations, Montreal Trust entered into a Surplus Sharing Agreement (the “Agreement”) with the Committee. That Agreement, effective February 1, 2006, provides for the wind up of the Plan, and divides the surplus equally between Montreal Trust and Plan members, after providing for certain adjustments for pre-retirement indexation for active and disabled members, payment of related expenses, and a special payment to disabled members. Throughout these negotiations both parties had the benefit of extensive legal and actuarial advice. In particular, the Plan members were fully advised by competent and experienced counsel with respect to the legal issues relevant to surplus distribution, including the fact that there was a dispute between the members and the Montreal Trust over legal ownership of the surplus.

Pursuant to the terms of the Agreement, the appropriate date to determine eligibility for participation in surplus sharing was identified as December 2, 1993. Surplus would be shared amongst all Plan members who were included in the first partial termination and wind-up at that date as well as all other members of the Plan whose employment terminated on or after that date (the “Sharing Group”). We are satisfied that the Sharing Groups thus consists of all persons who might have any interest in the surplus in the Plan fund, other than Montreal Trust, which is also bound by the Agreement.

Plan members were kept apprised of developments throughout the negotiation of the Agreement, as well as during subsequent class action court proceedings. Following extensive efforts to locate all members eligible to be in the group sharing in the surplus, as of September 12, 2006, 2,977 of the 3,615 Sharing Group members voted in favour of the Agreement. Thirteen Sharing Group members voted against the proposal to wind up the Plan and distribute the surplus in accordance with the terms of the Agreement. Of the 3,615 total members, 1,219 are subject to the jurisdiction of the Ontario pension regulator. As of June 20, 2008, 83% of those members had retained counsel to the Committee to represent them in connection with the Agreement, and voted in favour of that Agreement.

On March 8, 2006, Montreal Trust commenced a court application for a declaration *inter alia* that it was “entitled to receive, out of the pension fund of the Plan, the actuarial surplus remaining in the Plan after the payment of all accrued benefits (the “Surplus”), in the manner and on the terms set out in the Surplus Sharing Agreement”. The parties

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<sup>1</sup> Where the term “Plan members” or “members” is used in these reasons, it refers to all members of the class subsequently defined in the class proceeding, also known as the “Sharing Group”, except where the context demands otherwise.

moved jointly before Hoy J. of the Ontario Superior Court of Justice on May 11, 2006 for an order certifying a class proceeding in respect of the following common issue:

Under the terms of the Plan, is Montreal Trust entitled to the actuarial surplus remaining in the Plan after the payment of all accrued benefits and permissible expenses (the “Surplus”), and does the Plan permit payment of such Surplus to Montreal Trust?

By Order dated June 27, 2006, Hoy J. certified the class proceeding in respect of that issue (the “Certification Order”). The class consisted of all members of the Sharing Group.<sup>2</sup> Only one member of the Sharing Group (who is subject to the jurisdiction of Quebec) opted out of the class and released all claims to any surplus under the Plan. No party suggests that the class certified does not represent all of the interests at issue with respect to entitlement to plan benefits.

On September 20, 2006, the parties brought a motion for approval of a settlement of the class proceeding on the terms of the Agreement. By Order dated October 3, 2006, the Court approved the terms of the proposed settlement, as well as the various undertakings necessary for its implementation (the “Settlement Order”). In particular, the Court ordered, *inter alia*, that:

- The settlement...is hereby approved pursuant to section 29(3) of the *Class Proceedings Act, 1992* and that [Montreal Trust] is accordingly entitled to receive a payment of surplus from [the Plan] in accordance with [the Agreement].
- The [Agreement] is valid and binding on the parties... and the Sharing Group [but for the Opt Out].
- Upon receipt of applicable regulatory approval of the proposed distribution of assets and compliance with applicable legislation, ... the [Custodian] shall transfer assets from the Plan pursuant to the Surplus

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<sup>2</sup> The class certified consisted of the following individuals:

- (a) all persons who are entitled to benefits or other payments from the Plan on the date the Plan is terminated by Montreal Trust (the “Wind-Up Date”);
- (b) the estates of all persons who are entitled to benefits or other payments under the Plan on April 17, 2002 (the deemed cut-off date), if such a person has subsequently died and there are no benefits or other payments owing from the Plan to any other person on the Wind-Up Date as a result of the death of such person;
- (c) all individuals who were alive on April 17, 2002 who terminated employment with Montreal Trust on or after December 2, 1993 and were entitled to benefits under the Plan at the time of such termination, or who were deferred vested members on or after that date, whose benefits have been settled and who therefore will not be entitled to benefits or any other payments under the Plan on the date the Plan is terminated by Montreal Trust, or the estate of such individual if the individual died after April 17, 2002; and
- (d) the estates of all persons who were included in a past partial wind-up of the Plan and who died prior to April 17, 2002.

Sharing Agreement and the Custodian shall transfer and/or distribute the assets as so instructed in accordance with the terms of the [Agreement].

In addition, the Court ordered that:

...an amendment to the Plan in the form attached hereto as Schedule “B”, which provides for the payment of surplus to the parties pursuant to the Surplus Sharing Agreement, subject to applicable regulatory filings shall be considered valid and binding except in respect of the Opt Out, and the Applicant is hereby authorized to make such an amendment as contemplated by the Surplus Sharing Agreement.

Under the *Class Proceedings Act*, 1992, S.O. 1992, c.6 the Settlement Order had the effect of binding all of the class defined in the Certification Order to the terms of the Agreement, with the exception of the single opt-out, who had released all claims to any surplus in the Plan fund.

Pursuant to the terms of the Settlement Order Montreal Trust amended the Plan, effective November 15, 2006, by adding the following provision:

13.04 Distribution of assets upon termination

Notwithstanding any other provision of the Plan, and subject to the Company obtaining all necessary regulatory approvals, surplus assets remaining after the payment of all benefits owed to Members hereunder shall be distributed in accordance with the Surplus Sharing Agreement dated February 1, 2006 (as amended) between the Company, the Represented Participants and the Non-Represented Participants (as defined therein), and, The Montreal Trust Member Surplus Committee, with a portion of the surplus being payable to the Company as set out in the Surplus Sharing Agreement.

The Plan amendment was registered with the *Regie des rentes du Quebec* (“Regie”) in Quebec on September 5, 2007.

In accordance with the Settlement Agreement, the Plan was terminated effective November 30, 2006. On July 12, 2007, Montreal Trust made an application to the relevant provincial pension regulators for consent to effect the distribution of surplus in accordance with the Agreement and the Settlement Order. All of the provincial pension regulators provided their consent, with the exception of the Ontario Superintendent of Financial Services (“the Superintendent”). On March 10, 2008 the Superintendent issued a Notice of Proposal (“NOP”) to refuse to consent to the application under sections 78(1) and 79(3) of the *PBA* for withdrawal and distribution of the surplus as it relates to Ontario members or former members of the Plan. In the NOP, the Superintendent took the position that the Plan did not provide for payment of surplus to the employer, and that the Settlement Order did not have the effect of validly varying the trust. Based on the NOP, the issue of whether the employer was entitled to payment of plan surplus on wind up was the only obstacle to the Superintendent’s consent to the withdrawal application.

## The Parties' Positions

As is often the case, the history of this Plan is complex, involving numerous trust agreements, annexations, plan amendments and restatements. We have not been asked to conduct our own review of the historical plan documents in order to determine surplus entitlement; that issue was not argued before us. Instead, we have been asked to determine whether the issue of surplus entitlement was resolved, for purposes of the *PBA*, by the plan amendment made pursuant to the Settlement Order. If that amendment is valid and binding, an historical analysis is not necessary. If the amendment is not binding, the matter will presumably return to Hoy J. for determination in accordance with the application filed in court in March of 2006. We understand from all parties that considerable and lengthy litigation will likely ensue if the settlement fails and the parties are forced to litigate the issues between them.

All parties agree that the jurisprudence requires an analysis of relevant trust law principles in order to determine the validity of the Plan amendment, and thus the issue of whether or not Montreal Trust is entitled to a share of the surplus as contemplated by the Settlement Order and the Agreement. Where the parties disagree is the starting point for this analysis.

The Superintendent takes the position that the Settlement Order, properly construed, does not vary the trusts under the Plan, and therefore does not determine the issue of surplus entitlement under clause 79(3)(b) of the *PBA*. The Superintendent argues that Plan members cannot legally consent to vary the trust. Since the court-ordered entitlement of the employer to surplus was based on the Agreement, and not on an analysis of the historical Plan documents, it cannot validly override the statutory requirement to establish ownership. It is the Superintendent's view that a full historical analysis of the trust and plan documents is required in this case to determine surplus entitlement, and that an analysis of the historical Plan documents compels the conclusion that the employer is not entitled to payment of the surplus.

Both Montreal Trust and the Committee ("the Applicants") say that no historical analysis is required in this case to determine the question posed by s.79(3)(b) of the *PBA*: whether the Plan "provides for payment of surplus to the employer on the wind up of the pension plan". The Plan text clearly so provides, pursuant to the amendment validated by Hoy J.'s order of June 27, 2006, and made binding by that order. They submit that courts have equitable jurisdiction to vary a trust through approval of a settlement of a "real and serious dispute", and that Hoy J. validly exercised that jurisdiction when she approved the Plan amendment incorporating the surplus distribution scheme contemplated by the Surplus Sharing Agreement. Under the *Class Proceedings Act, 1992*, Hoy J.'s order is binding upon the entire class. The Applicants submit that the reservation in Hoy J.'s order with respect to the Plan amendment making it "subject to applicable regulatory filings" was not intended to permit the re-litigation of the issue which had been settled between them: the issue of surplus ownership. Instead, it simply contemplated that the amendment would be registered with the proper regulatory authority, the Regie, which has already occurred.

## Analysis

We agree with the Applicants that the amendment made pursuant to the Settlement Order validly amends the trust to provide for payment of surplus to Montreal Trust and in so doing satisfies the requirement in s. 79(3)(b) of the *PBA*.

In this case the enquiry starts with the issue of the validity of the November 30, 2006 Plan amendment, and whether it did indeed provide for such payment. It is only if the amendment does not lead to such a conclusion that the enquiry moves to an analysis of historical trust documents as required by *Schmidt v. Air Products of Canada Ltd.*<sup>3</sup> The central issue to be decided in this case, therefore, is whether the Court ordered amendment to the Plan determines the issue of the employer's entitlement to payment of surplus on wind up within the meaning of section 79(3)(b) of the *PBA*.

In support of his position that he is required to do an historical analysis to determine the issue of whether the pension plan provides for payment of surplus to the employer, the Superintendent relied on the Divisional Court's decision in *Kent et al. v. TecSyn International Inc.*<sup>4</sup> In *TecSyn* the Pension Commission of Ontario (the predecessor to the Superintendent in determining these issues) had approved payment of a share of the plan surplus to the employer based on the current text of the plan, without performing a detailed review and analysis of historical plan documents to determine whether the plan permitted payment of surplus. In doing so, the Commission relied on an assessment of a number of factors set out in the Commission's guidelines and policies governing the process for surplus sharing agreements, colloquially referred to as "flex factors". These "flex factors" included: satisfaction that the plan documents in effect on the wind up date provided for the employer to share in surplus distribution; adequate notice to members and former members; a high percentage of consenting members well in excess of the minimum requirements; and involvement of a Member's Committee with legal representation and advice. *TecSyn* had developed a surplus sharing proposal which was subsequently accepted by 72 out of 76 (94.7%) of the eligible members and former members of the plan. In light of this high degree of support for the sharing agreement, the Commission "applied its past practice of applying a lower degree of scrutiny to prior Plan documentation in the presence of high levels of informed consent".<sup>5</sup>

Although only four plan members had objected to the proposed distribution, together the dissenting members represented over 50% of the entitlements under the plan. They had objected to the proposed distribution before the Commission, and when the Commission granted its approval, they appealed. On appeal, the Divisional Court rejected the Commission's approach of applying a lower level of scrutiny to the plan documents where there was high level of member consent to a surplus sharing proposal. Relying on the decision of the Supreme Court of Canada in *Schmidt v. Air Products*, the court engaged in an historical trust analysis of the plan documents, and concluded that because of the fact that *TecSyn* had not initially reserved to itself the power to revoke the terms

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<sup>3</sup> (1994), 115 D.L.R. (4<sup>th</sup>) 631 (S.C.C.)

<sup>4</sup> *Kent et al. v. TecSyn International Inc.*, [2000] O.J. No. 1826 (Div.Ct.) ("*TecSyn*")

<sup>5</sup> *TecSyn*, para. 24

of the trust agreement, the plan amendment permitting payment of surplus to the employer was “invalid, void and of no legal effect”.<sup>6</sup> The employer therefore failed to meet the threshold requirement that would give jurisdiction to the Commission under sections 78 and 79 of the *PBA* to permit payment of surplus to the employer.

The Superintendent seeks to analogize the Settlement Order and the Settlement Agreement here to the surplus sharing agreement reached in *TecSyn*. He notes that the Settlement Order was obtained on the basis of an agreement, and not on the basis of adversarial litigation determining the issue of surplus ownership. Accordingly, he argues that the Settlement Order stands on no higher ground than the member consent dealt with in the *TecSyn* case, and does not obviate in any way his independent fiduciary obligation to make his own determination as to whether or not the conditions under the *PBA* for payment of surplus to an employer are satisfied.

The Superintendent acknowledges that in a proper case, superior courts do have authority to order valid amendments to trust documents. He argues, however, that the Plan amendment made pursuant to Hoy J.’s order was not a valid amendment. According to the Superintendent, the amendment would be valid only if it came about as a result of a compromise of rights which were genuinely disputed under the plan documents. He argues that there was no genuine dispute about the issue of surplus ownership in this case; it clearly belonged to the employees. And even if there had been a genuine compromise, he argues, the trust could be validly amended by the court only if the compromise had the unanimous consent of all *sui juris* beneficiaries. In this case, he notes that although there was a high degree of support, it fell short of unanimous.

The Superintendent acknowledges that his position runs the risk of being characterized as a collateral attack on Hoy J.’s order. He denies, however, that this is the case. In support of this position, he argues that the Settlement Order, properly construed, is subject to regulatory approval and therefore permits him to arrive at his own conclusions about the ownership of surplus. He notes that the Settlement Order does not refer expressly to s.79(3)(b) of the *PBA*, and therefore does not purport to determine ownership of surplus for purposes of that section.

In support of his argument that Hoy J.’s order regarding the entitlement of Montreal Trust to payment of surplus is subject to regulatory approval, the Superintendent points to various provisions in the Order referring to the involvement of the regulator.

Paragraph 3 of the Settlement Order provides as follows:

*This Court orders that the settlement of this Application on the terms set forth in the Surplus Sharing Agreement be and is hereby approved pursuant to section 29(3) of the Class Proceedings Act, 1992 and that the Applicant is accordingly entitled to receive a payment of surplus from the Montreal Trust Pension Plan (2001) (the “Plan”) in accordance with Schedule “A”. [Emphasis added]*

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<sup>6</sup> *TecSyn*, para. 28

Paragraph 5 of the Order, which specifically addresses the amendment to the plan, reads as follows:

This Court orders that an amendment to the Plan in the form attached hereto as Schedule “B”, which provides for the payment of surplus to the parties pursuant to the Surplus Sharing Agreement, *subject to applicable regulatory filings* shall be considered valid and binding except in respect of the Opt Out, and *the Applicant is hereby authorized to make such amendment as contemplated by the Surplus Sharing Agreement.*

The Schedules to the Settlement Order refer to regulatory approval and applicable regulatory filings as follows:

1. Schedule “A”, the Surplus Sharing Agreement, provides at paragraph 2 that: “the distribution of surplus pursuant to the Proposal as described in this Agreement is *subject to (i) applicable legislation; (ii) receipt by Montreal Trust of any necessary approvals from regulatory authorities* having jurisdiction over the Plan; ...”
2. Schedule “B”, dealing with the approved Amendment to the Plan, states: “*subject to and conditional upon the Company receiving all required regulatory approvals for the payment to the Company of the Company’s surplus share* in accordance with the Surplus Sharing Agreement, and notwithstanding any other provision of the Plan, the Plan is amended by deleting section 13.04 of the Plan and replacing it with the following:

Notwithstanding any other provision of the Plan, and *subject to the Company obtaining all necessary regulatory approvals*, surplus assets remaining after the payment of all benefits owed to Members hereunder shall be distributed in accordance with the Surplus Sharing Agreement ...with *a portion of the surplus being payable to the Company* as set out in the Surplus Sharing Agreement.

[Emphasis added]

According to the Superintendent, properly interpreted, these provisions make the Court Order subject to the Superintendent’s statutory approval, and are therefore not determinative of the issue of surplus entitlement.

We disagree. In our view, the reservations in the Order with respect to the involvement of regulatory requirements were not intended to leave the door open to re-litigation of the matter identified as the “common issue” in the class proceeding before Hoy J.: the issue of whether the plan permitted payment of surplus to the employer. That matter was settled by her Order. The only requirement for regulatory approval explicitly applicable to the amendment was the requirement for regulatory filing, a requirement which was fulfilled by the filing with the Regie in the province in which the Plan was registered. The other requirements for regulatory approval relate not to the question of surplus

ownership, but to the question of whether or not any surplus can be paid out of the Plan, irrespective of the question of employer entitlement. We note that there was no suggestion by the Superintendent in the NOP or before this Tribunal that any issue arising from the regulatory scrutiny required by s. 79(3) of the PBA before surplus can be paid out, other than the issue raised by s.79(3)(b), was being relied upon by him in opposing this application for surplus withdrawal.

Accordingly, we are squarely faced with a court order binding on all plan members which expressly permits the amendment to the plan on which the parties to the settlement rely. We are invited by the Superintendent to disregard the Plan amendment made in accordance with that order, or at least to treat it as occupying no higher ground than any other amendment made by a Plan sponsor, to be tested for validity on *Schmidt* principles against the provisions of the initial trust documents. It is difficult to characterize this invitation as anything other than a collateral attack on the Order.

We would be hesitant to disregard a court-ordered plan or trust amendment even if we have the authority to do so.<sup>7</sup> We need not, however, decide the question of whether the Superintendent and this Tribunal are bound to accept such amendments in all cases. In our view, the Settlement Order in this case was perfectly consonant with existing jurisprudence on the variation of trusts. The order was made binding on all relevant trust beneficiaries by virtue of the *Class Proceedings Act, 1992*. While a different court might have reached a different conclusion based on the relevant case law and the material before the court, Hoy J.'s order was clearly made "within jurisdiction", and we have no basis on which to disregard it.

It is clear law that superior courts have the authority to amend trust instruments; indeed, this point is not contested. It is equally clear that this authority can only be exercised in very limited circumstances; in most cases, the settlor's intent with respect to the disposition of property must prevail. One of these limited exceptions is the court's jurisdiction to approve settlements to disputes which involve the interpretation of a trust. In *Dickson v. Richardson*,<sup>8</sup> the Ontario Court of Appeal confirmed that this exception to the general rule against variation of trusts, originally recognized by the House of Lords in *Chapman v. Chapman*<sup>9</sup>, was part of the law of Ontario. In *Dickson*, the Court noted:

The inherent jurisdiction of the Court to remodel the terms of a trust either as to the powers of the trustee or as to the rights of those beneficially interested, are so well established that it is not necessary to review the authorities. The general rule is that the Court gives effect to the intention of the settler as expressed in the trust instrument and does not arrogate to itself any overriding power to disregard or rewrite the trusts....

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<sup>7</sup> In *Allegheny International Canada Ltd. v. Adams*, [1992] O.J. No. 2148, the Ontario Court of Justice (General Division) described a submission by the Pension Commission that it has the authority to second-guess courts as "a surprising statement [that] is at least open to serious question" (para. 26), although it did not reject it out of hand.

<sup>8</sup> *Dickson v. Richardson* [1981] O.J. No. 2451 at para. 32

<sup>9</sup> *Chapman v. Chapman* [1954] All E.R. 1 798

There are of course exceptions to the general rule. ....The second relevant exception to the general rule is that where the rights of beneficiaries under a trust are the subject of doubt or dispute, the Court has jurisdiction on behalf of all interested parties to sanction a compromise by substituting certainty for doubt.

The courts have made it clear that this exception applies only where there is a real and serious dispute between the parties as to the meaning of the trust instrument.<sup>10</sup> We are satisfied that the evidence before Hoy J. disclosed a real and serious dispute between the parties concerning entitlement to the surplus in this case. Montreal Trust is not prepared to concede that a historical trust analysis would result in the conclusion that Plan members have sole entitlement to the surplus. Affidavit material before Hoy J. showed that the Member Sharing Group had received the following legal advice:

...the answer to ‘who owns the surplus?’ is not straightforward. It is a complex legal question which requires a review and analysis of the plan’s historical treatment and documentation. Koskie Minsky has advised us that while they believe that the Plan members may have a good claim for the entire surplus if the Plan were wound up, the Company does not agree. Since we cannot force a wind-up of the Plan, we cannot test that claim without litigation.

Plan members accepted that there was significant risk to litigating this issue, as evidenced by their overwhelming consent to the Agreement. The common issue certified in the class action addressed the question of whether the Plan permitted payment to Montreal Trust of surplus remaining in the plan. It is unsurprising, therefore, that Hoy J. saw before her a firm foundation for the court’s jurisdiction to approve the settlement resulting in a variation of the trust. As *Mason v. Farbrother*<sup>11</sup> makes clear, relying on *Chapman*, there need not be open warfare before the court may approve a compromise, provided that there are genuine points of difference requiring determination or settlement.

In the *Dickson* case, the Court of Appeal ultimately refused to approve the settlement varying the trust because it had not received the unanimous consent of all beneficiaries. The Court of Appeal held that since a compromise was a contract to which all parties must consent, and since the court did not have the power to bind known dissentients, the order of the court below amending the trusts could not be supported by the court’s inherent jurisdiction in that case. In the case before us, the Applicants have addressed this concern by obtaining a Court order under the *Class Proceedings Act, 1992* to bind all possible parties (but for the sole opt out). The *Class Proceedings Act, 1992* provides that once the class and the common issue(s) have been defined and certified, the court may make orders on the common issues which are binding on all members of the class who do not opt out (s.27(3)). The Act establishes detailed procedures for ensuring that the interests of all class members are protected. For example, once a class proceeding has been certified, it cannot be settled without the approval of a judge (s.29(3)).

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<sup>10</sup> Eileen E. Gillese, “Pension Plans and the Law of Trusts” (1996), 75 Can. Bar Rev. 222 at 248

<sup>11</sup> *Mason v. Farbrother* [1983] 2 All ER 1078 at 1085

In exercising her jurisdiction under the *Class Proceedings Act, 1992* to approve this settlement, Hoy J. makes it clear that she granted the Order validating the amendment and entitling the employer to surplus only after considering the terms of the settlement. She took into account, *inter alia*, the following terms: that active, disabled, and transferred members would receive enhanced pre-retirement benefits; that disabled members would receive a special payment to compensate for the cessation of benefit accruals after termination of the Plan; that the inclusion of the members entitled to surplus was negotiated; that regulatory approval was required before any surplus would be paid out; that extensive communication with class members had been made resulting in only one opt-out; that the proposed 50/50 split roughly approximated historic contributions; that if the Agreement was not approved a stalemate was the likely result, requiring regulatory or court intervention to resolve; and finally, that the question of entitlement was complex, with a resolution through contested litigation resulting in a lengthy and costly process with risks to both sides. On the basis of those conclusions, she concluded that the Agreement was fair, reasonable and in the best interests of those class members affected by it.

In our view, therefore, Hoy J. made an order she was entitled to make, an order which expressly authorized an amendment to the plan expressly providing for payment of surplus to the employer on wind up of the plan. That amendment was duly registered, and it is now relied upon by the parties to support the application for payment of surplus out of the plan. It is possible that in the absence of the court order, that amendment would not have been valid; we make no finding on that issue. In the face of the court order authorizing the amendment, however, we find that it is valid for all purposes, including s.79(3)(b) of the *PBA*.

## **Conclusion**

The Plan amendment made pursuant to the Settlement Order validly amended the Plan through the exercise of the Court's equitable jurisdiction to approve a settlement which varied the Plan trust, and through the operation of the *Class Proceedings Act, 1992* which bound all relevant parties to the terms of the Agreement and the consequent amendment to the Plan. The Superintendent was required to ensure that the plan permitted payment of surplus to the employer. Here, the Plan as validly amended provided for the payment of surplus to the employer on wind up, and there was no justification for going behind this most recent version of the Plan documents.

We therefore direct the Superintendent to consent to the surplus withdrawal application dated July 12, 2007.

**DATED** at Toronto, Ontario, this 7<sup>th</sup> day of January, 2009

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"Lily Harmer"  
Lily Harmer  
Chair of the Panel and Member of the Tribunal

“Elizabeth Shilton”

Elizabeth Shilton

Member of the Panel and of the Tribunal

“Ralph Scane”

Ralph Scane

Member of the Panel and of the Tribunal