IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:	*Lieberman v. Business Development Bank of Canada,* 2009 BCSC 1312

Date: 20090929
Registry: Vancouver
Docket: L041024

Between:

Lucien Lieberman and Marjory Morris

Plaintiffs

And

Business Development Bank of Canada

Defendant

Before: The Honourable Mr. Justice Pitfield

(Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50)

Reasons for Judgment

Counsel for the Plaintiffs:	M. Mazzuca D. Klein, N. Brown S. Tucker
Counsel for the Defendant:	I.G. Nathanson, Q.C. G.B. Gomery
Place and Date of Trial:	Vancouver, B.C. June 8-12 and June 15-16, 2009
Written Submissions Received:	August 28, September 2, and September 9. 2009
Place and Date of Judgment:	Vancouver, B.C. September 29, 2009

Introduction

[1] The plaintiffs in this Class Action are retired employees of the Business Development Bank of Canada (the "Bank") and recipients of defined benefit pensions provided by the Bank's Pension Plan (the "Plan"). The Class claims that its members should have received benefits equivalent to the value of a "contribution holiday" granted to active employees of the Bank who were members of the Plan in the period from 1997 through 2005; that the Bank improperly amended the Plan to provide for the payment to the Bank, rather than to the active or retired members of the Plan, of any actuarial surplus that existed in the Fund from time to time and any surplus that actually existed upon termination of the Plan; and that the Pension Plan Fund (the "Fund") has been improperly charged with administrative fees that should have been paid by the Bank.

[2] On February 16, 2006, the action was certified as a class proceeding. Two questions were certified as common issues:

> (a) Did the Bank breach its fiduciary duties to the Class members as alleged in paragraphs 36 and 37 of the statement of claim; and
>
> (b) If the Bank did breach its fiduciary duties to the Class members, what relief should be granted to the Class members?

[3] Paragraphs 36 and 37 of the statement of claim provide as follows:

> 36. The [Bank] has breached the statutory and private duties owed to the Plaintiffs and plaintiff class by amending the Pension Plan in its own corporate interest, acting in conflict with the interests of Plan Members and beneficiaries, and unjustly enriching itself to the detriment of the Plaintiff Members and beneficiaries. More specifically, but without limitation:
>
> (a) The 1987 Amendments constitute an attempt to divert funds from the Pension Plan to the benefit of the [Bank] and to the detriment of the Plaintiffs and the plaintiff class. The Pension Plan was impressed with an irrevocable trust for the benefit of the Plan Members and their surviving spouses and beneficiaries, and as such the 1987 Plan Amendments are an unauthorized revocation of the Pension Plan trust fund.
>
> (b) The Contribution Holidays for the [Bank] were of significant financial benefit to the [Bank]. The [Bank] breached the irrevocable trust by relieving itself of its obligation to make several million dollars in employer contributions to the financial detriment of Plan Members and

survivors.

(c) the diversion of money from the Fund, to pay the Plan Expenses is a partial revocation of trust. It unjustly enriched the [Bank] at the expense of the Plaintiffs and class members and constitutes a breach of fiduciary duty.

37. In breach of its duty of even-handedness, the [Bank] has amended the Plan in a disproportionate fashion, favouring active and future members as at April 9, 1997, to the detriment of retired and deferred vested members, and their beneficiaries as of that date. More specifically, but without limitation:

(a) The contribution holidays created by the 1997 and 1998 Plan Amendments and other benefits to active members were of significant financial benefit to active members and future members as of the date of those amendments, but provided no benefit to the Plaintiffs and the other class members.

(b) The [Bank] did not provide a corresponding benefit to the Plaintiffs and plaintiff class. The $2 million cash contribution was not equivalent to the value of the substantial benefits created by the contribution holiday for active members and future members.

[4] The Class claims relief in respect of the alleged breaches:

(a) An order granting the Class payments from the Fund proportional to the benefits received by active Plan members for the years 1997 to 2005 during which the active Plan members were not required to contribute to the Fund;

(b) An order declaring that any Plan provisions, including trust agreements, that purport to grant the Bank the right to surplus on Plan termination, or while the Plan is ongoing, are void and of no effect; and

(c) An order requiring the Bank to reimburse the Fund for all administrative expenses charged to the Fund, including the sum of $1,462,624.20 which the Bank has already paid by way of reimbursement.

[5] The Bank denies that it has done anything in relation to the formulation, amendment, or administration of the Plan or the Fund that is unlawful or improper in relation to contribution requirements or termination surplus. It acknowledges that some expenses which should have been borne by the Bank were paid out of the Fund but says that those amounts, together with interest, have been repaid. As a result, the Bank says that the class action should be dismissed.

Overview of Plan History and Operation

[6] The Federal Business Development Bank, created by statute in 1976, was continued as the Bank in 1995 pursuant to the *Business Development Bank of Canada Act*, S.C. 1995, c. 28, (the "*Act*"). Section 13(5) of the *Act* provided for the operation of a pension fund:

> Pension fund
>
> (5) The Board may make by-laws respecting
>
> (a) the establishment, management and administration of a pension fund for the officers and employees of the Bank and their dependents;
>
> (b) the contributions to be made to the fund by the Bank;
>
> (c) the provision of benefits under the fund;
>
> (d) the payment of pensions; and
>
> (e) the investment of the money of the fund.

[7] As part of the continuation, the Bank assumed the rights and obligations associated with the Federal Business Development Bank Pension Plan. Because of the continuation and the Bank's assumption of the rights and obligations under the plan, there does not appear to be any reason to differentiate between the effect of amendments to the plan made before the continuation in 1995, and those made later. The Bank and its employees are bound by the prior amendments. I will therefore address all relevant amendments and board actions in relation to the Plan in respect of which this action arises as if they had been made or taken, respectively, by the Bank, and proceed on the basis that the Plan and the Fund have always been subject to the requirements of the *Pension Benefits Standards Act*, R.S.C. 1970, c. P-8, (the "*PBSA*"), and its successor, the *Pension Benefits Standards Act 1985*, R.S.C. 1985, c. 32 (2nd Supp.) (the "*PBSA 1985*").

[8] The Plan is a defined benefit pension plan. Upon retirement, and in certain other circumstances, a contributor is entitled to receive a benefit equal to 2% of his or her highest average annual salary for any consecutive five year period for each year of service to a maximum of 35 years of service. It follows that the maximum pension is 70% of the highest average annual salary for any successive five years of employment. The pension benefit payable to any participant is indexed by reference to the consumer price index for Canada.

[9] From 1995 through 2007, employees were obliged to make an annual contribution to the Fund. From 2007 forward, the Plan was contributory or non-contributory at an employee's option. At the outset, the Plan was silent regarding the Bank's obligation to

contribute. The employer's contribution obligation was first included in the Plan by an amendment made in 1983.

[10] At all times the Plan has conformed to the requirements of the *PBSA*, the *PBSA 1985*, and the *Income Tax* Act, R.S.C. 1985, c. 1 (5th Supp.), in relation to contributions and benefits.

[11] The Plan was initially silent regarding entitlement to any actuarial surplus that might exist in the Fund from time to time while the Plan was in existence, or to any actual surplus that existed upon the termination or winding up of the Plan. The Plan was amended effective January 1, 1987, to provide for the payment of any surplus to the Bank during the ongoing operation of the Plan, and in the event it was wound up.

[12] An actuarial valuation at December 31, 1993 determined that there was a surplus in the Fund. On June 15, 1994, the Bank's board of directors resolved to discontinue employer contributions to the Fund for the six month period July 1 through December 31, 1994. The surplus continued to accumulate subsequent to 1994. As a consequence, the Bank did not make any contributions to the Fund until 2005, by which time the Fund was in a deficit position from an actuarial perspective, resulting in the need for a contribution from the Bank.

[13] The Bank considered whether the existence of the actuarial surplus should justify a reduction in employee contributions to the Plan. On April 9, 1997, the Bank's board resolved to suspend employee contributions with effect from July 1, 1997; to review continuation of the contribution holiday on an annual basis; and to provide that in exchange for the contribution holiday, employees would be required to make a nominal $10 annual contribution to the Fund as a symbolic reminder that the requirement to contribute could be reinstated at a future date.

[14] On May 6, 1998, the Bank's board resolved to make the Plan non-contributory from the employees' perspective, but stipulated that employee contributions would be re-introduced if the actuarial surplus in the Fund decreased to less than 10% of liabilities, or if the board decided to renew the obligation to contribute.

[15] The Bank offered no concession to pensioners when it granted a contribution holiday to active employees. The pensioners complained about the perceived inequity. The Bank ultimately responded to the complaints by making amendments to the benefits provided by the Fund, and by making a one-time, $2 million payment to pensioners. The Bank's board considered, but denied, further requests for what the pensioners regarded as fair and equal

treatment in respect of the contribution holidays that had been granted to active employees.

[16] At the outset, the Plan was silent regarding the payment of administrative expenses from the Fund. On February 22, 1983, the trustees of the Fund adopted a resolution that permitted the payment of such expenses for the 1983 calendar year and in the future. The Bank amended the Plan effective January 1, 1987, to provide for the payment of administration expenses out of Fund assets. The provision remained unaltered thereafter.

[17] Following the commencement of this action, the Bank reviewed the expenses that had been charged to the Fund from and after 1991. The Bank determined that expenses totalling $834,212.32 paid in that period were in the nature of corporate human resource expenditures, rather than Plan or Fund administrative expenses. On April 3, 2009, the Bank reimbursed the Fund to the extent of $1,462,694.20 representing the total of the expenses it had identified and interest.

Class Claims

[18] In summary form, the Class claims that the Bank breached a fiduciary duty owed to the Class by:

1. Amending the Plan to provide for the payment of any actuarial or actual surplus in the Fund to the Bank to the exclusion of members;
2. Providing a contribution holiday to active employees without granting a comparable benefit to members of the Class; and
3. Paying administrative expenses from the Fund.

[19] The Bank responds by saying that:

1. The Bank was lawfully entitled to amend the Plan to provide for the payment of the Fund surplus to it in the event of a winding up;
2. Nothing required the Bank to provide a proportionate benefit out of Fund surplus to the Class comprised of retired members of the Plan when it made a decision to suspend the requirement that active employees make a contribution to the Fund; and
3. In the absence of any prohibition against the payment of expenses incurred in the administration of a trust from trust funds, the trustees were lawfully entitled to charge such expenses, reasonable in amount, to the Fund, and in any event, the Class does not dispute the validity of the amendment permitting administrative expenses to be paid from the Fund from and after 1987.

The Statutory Scheme

[20] The statutory scheme governing defined benefit pension plans in the federal context is relevant in the assessment of the claims and the defences.

[21] An employee pension plan is a complex instrument. Nothing compels an employer to implement a pension plan. The decision to do so ordinarily results from a corporate decision to implement a pension plan as a term or condition of employment, or from negotiations between an employer and a union representing employees. The employer may select from either of two alternatives: a defined contribution plan or a defined benefit plan.

[22] The *PBSA 1985* defines a defined contribution plan as "a pension plan that consists of defined contribution provisions and does not contain defined benefit provisions", with limited exceptions that are not material for present purposes. A defined contribution provision is defined in s. 2 of the *PBSA 1985*:

> "defined contribution provision" means a provision of a pension plan under which pension benefits for a member are determined solely as a function of the amount of pension benefit that can be provided by
>
> (a) contributions made by and on behalf of that member, and
>
> (b) interest earnings and other gains and losses allocated to that member;

[23] The definition of a defined contribution plan in the *PBSA 1985* makes it clear that the contributions made by an employee and any contributions made by an employer on behalf of a particular employee accumulate in an account that pertains to that employee alone. Upon attaining the age at which a pension becomes payable, the pension is determined by reference to the value of the employee's contribution account. The employee is at risk; the employer is not.

[24] A defined benefit plan is defined as one that is not a defined contribution plan. A defined benefit plan will provide for payment of a benefit in any manner that does not have the character of a defined contribution benefit. A defined benefit plan may or may not require contributions to be made by an employee. Regardless, the employer assumes the burden of ensuring that the accumulated contributions, and the interest, dividends and gains thereon, are sufficient to discharge the obligation to pay the defined benefits plan participants.

[25] The pension plan, whether defined benefit or defined contribution in nature, will be comprised of two parts: the plan, and the fund. At a minimum the plan will specify those who may become members, the amounts of the contributions required from them, and the benefits to be paid in the event of retirement, early retirement, or death.

[26] The *PBSA 1985* describes a “pension fund” in relation to any pension plan to be a fund maintained to provide benefits under or related to the pension plan. Section 8(1) of the *PBSA1985* imposes a trust in respect of the contributions required by the Plan:

> *Amounts to be held in trust*
>
> 8.(1) An employer shall ensure, with respect to its pension plan, that
>
> > (a) the moneys in the pension fund,
> >
> > (b) an amount equal to the aggregate of the prescribed payments that have accrued to date, and
> >
> > > (i) the normal actuarial cost, and
> > >
> > > (ii) any prescribed special payments,
> >
> > that have accrued to date, and
> >
> > (c) all
> >
> > > (i) amounts deducted by the employer from members' remuneration, and
> > >
> > > (ii) other amounts due to the pension fund from the employer
> >
> > that have not been remitted to the pension fund
>
> are kept separate and apart from the employer's own moneys, and shall be deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan.

[27] In addition to assuming obligations as a trustee in respect of the contributions made to a fund pursuant to the provisions of a plan by virtue of s. 8(1), the employer assumes obligations in respect of administration. Section 7(1)(c) of the *PBSA 1985* stipulates that the employer shall be the administrator of any plan that is not a multi-employer pension plan. Section 7(8) sets forth the duties of the administrator:

> 7(8) The administrator of a pension plan is responsible for administering the pension plan, including the pension fund, in accordance with this Act and the regulations, and for filing the required documents in accordance with this Act and the regulations.

[28] Sections 8(3) and (4) impose administrative responsibilities on the employer:

> *Administration of pension plan and fund*
>
> (3) The administrator shall administer the pension plan and pension fund as a trustee for the employer, the members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan.
>
> *Standard of care*
>
> (4) In the administration of the pension plan and pension fund, the administrator

> shall exercise the degree of care that a person of ordinary prudence would exercise in dealing with the property of another person.

[29] When first enacted, s. 8(10) of the *PBSA 1985* addressed the question of conflict:

> *Employer conflicts of interest*
>
> (10) Where the employer is the administrator pursuant to paragraph 7(1)(c), if there is a material conflict of interest between the employer's role as administrator and the employer's role in any other capacity, the employer
>
> > (a) shall, within thirty days after becoming aware that a material conflict of interest exists, declare that conflict of interest to the pension committee or to the members of the pension plan; and
> >
> > (b) shall act in the best interests of the members of the pension plan.

[30] The employer is permitted to establish a pension committee to aid in the administration of the plan. Where the plan has fifty or more members, and the majority of the members so request, the employer is obliged to establish a pension committee. In either event, a representative of the members of the plan will be accorded membership on the pension committee.

[31] A defined benefit plan such as the Bank's Plan imposes burdens upon the employer to make contributions to the Fund and limits the rights to receive refunds from it. Sections 9(1), (5), and (6) of the *PBSA 1985* make provision in that regard:

> *Funding of pension plan*
>
> 9. (1) A pension plan shall provide for funding, in accordance with the prescribed tests and standards for solvency, that is adequate to provide for payment of all pension benefits and other benefits required to be paid under the terms of the plan.
>
> ...
>
> (5) Where an actuarial report filed pursuant to subsection 12(3) indicates that the assets of a pension plan exceed its liabilities, no part of that excess may be refunded to the employer unless
>
> > (a) the refund is permitted by the regulations made under subsection (6); and
> >
> > (b) the Superintendent consents to the refund.
>
> (6) The Governor in Council may make regulations respecting the terms and conditions under which refunds referred to in subsection (5) may be made and respecting the amounts of those refunds.

[32] Sections 8 and 9 of the *PBSA 1985* describe the manner in which a pension plan shall be funded at the outset and on an ongoing basis. In the case of a defined benefit plan, an

unfunded liability may arise upon the creation of the plan, upon amendment of the plan, upon a change in the methods or bases of valuation of the fund, or upon the realization of a loss on investments. The employer bears the burden of liquidating any unfunded liability that may arise.

[33] The cost of the benefits that accrue in a defined benefit plan in any year must be funded by a contribution equal to that cost plus any special payment required to offset any unfunded liability. Section 9(7.1) of the *PBSA 1985 Regulation* provides for the reduction of contributions in certain circumstances:

> 9(7.1) The amount of a contribution described in paragraph (7)(a) may be reduced by all or a portion of the lesser of
>
> (a) the amount by which the going concern assets of the plan exceed the going concern liabilities of the plan, and
>
> (b) the amount by which the solvency assets of the plan, as referred to in paragraph (a) of the definition "solvency deficiency" in subsection 9(1), exceed the solvency liabilities of the plan.

[34] Solvency and going concern valuations are, respectively, a valuation that assumes that the plan has been wound-up, and a valuation that assumes that the plan will continue as a going concern, thereby accruing additional liabilities in the future.

[35] The final aspect of plan structure, operation and governance relevant in the context of a defined benefit plan is reflected in s. 10 of the *PBSA 1985* pertaining to amendment:

> 10(2) An administrator shall not administer a pension plan unless that plan is filed for registration in accordance with subsection (1).
>
> (3) Subject to subsection (4), an administrator, in administering a pension plan, shall disregard an amendment until the Superintendent informs the administrator in writing that the plan as amended continues to comply with the standards for registration, and the Superintendent, on the filing of an amendment with him, shall forthwith inform the administrator in writing whether or not the plan as amended continues to comply with the standards for registration.
>
> (4) Subsection (3) does not apply in respect of amendments that do not reduce the pension benefit or pension benefit credit of any member or former member.
>
> (5) Unless the Superintendent so permits, a pension plan shall not be amended so as to reduce or have the effect of reducing
>
> (a) pension benefits accrued prior to the date of the amendment, or
>
> (b) pension benefit credits relating to pension benefits accrued prior to the date of the amendment,
>
> and a plan that is so amended without the Superintendent's permission shall be deemed to cease to comply with the standards for registration.

Analysis

[36] I turn now to a consideration of the specific claims asserted by the Class.

(a) Entitlement to Surplus

[37] At inception, the Plan was silent regarding entitlement to any actuarial surplus that existed in the Fund during the currency of the Plan, or the actual surplus that remained after providing for the payment of all benefits upon the winding up or termination of the Plan. The Plan first addressed the question of a surplus in the Fund when it was amended and restated effective January 1, 1987, in order to comply with the *PBSA 1985*, which came into force in June 1986. After prolonged discussion, the Superintendent of Financial Institutions accepted the amendment for filing and registration in 1991. The amendment was contained in Article 13.09, a provision that remained substantially unchanged when the Plan was further amended and restated effective January 1, 1992:

> 13.09 Surplus
>
> Where an actuarial report filed with the Superintendent in accordance with the Act indicates that the assets of the Plan exceed its liabilities, (such excess being hereinafter referred to as the "Surplus") the Bank:
>
> a) shall, subject to any prior approval required under the Act, receive any such Surplus and, upon termination or winding-up of the Plan, receive any such Surplus as may remain after the satisfaction of or provision for all liabilities as set out in Article 16; and
>
> b) may, on an ongoing basis:
>
> (i) reduce the contribution requirements of the Bank with respect to the Plan as described in Article 4.01; or
>
> (ii) receive, upon application by the Bank, any portion of such Surplus that may be permitted to be refunded in accordance with the provisions of the Act.

[38] The Class disputes the legality of the amendment pertaining to any actuarial surplus that may arise during the currency of the Plan, and that pertaining to any actual surplus that arises upon the termination or winding up of the Plan. The Class says that the Bank breached a fiduciary duty owed to members of the Plan by adopting the amendment pertaining to surplus.

[39] The principles that govern the distribution of the surplus in a pension fund were considered by the Supreme Court of Canada in *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611. The Court held that notwithstanding that the *PBSA 1985* permits the

payment of surplus to the employer during the currency of a plan and upon termination, the right to any part of the surplus must arise from the terms of the plan that created the trust fund, or from the application of the principle of resulting trust: *Schmidt*, paras. 42 and 69.

[40] The Bank does not dispute the claim that the amendment purporting to permit recovery of a portion of the actuarial surplus during the ongoing operation of the Plan was unlawful and invalid. While the amendment conforms to the requirements of the *PBSA 1985 Regulation*, the Bank acknowledges that the recovery of surplus was not authorized by the terms of the Plan governing the use and application of the Fund. As stated in *Schmidt*, para. 58:

> … the employer will not be able to claim entitlement to funds subject to a trust unless the terms of the trust make the employer a beneficiary, or unless the employer reserved a power of revocation of the trust at the time the trust was originally created.

[41] Payment of any portion of a surplus to an employer amounts to a partial revocation of the trust. The power to partially revoke the trust must be explicitly stated in the agreement creating the trust: *Schmidt*, para. 69. The power cannot be inferred. Moreover, a power of amendment, however broadly stated, cannot be used to explicitly permit partial revocation of the trust if the power was absent in the first place.

[42] It follows that the Bank can be said to have breached a fiduciary duty when it attempted to amend the Plan to provide for the recovery of any actuarial surplus in a manner that was not permitted. The amendment made in 1987 embodied in Rule 10.9 purporting to permit the Bank to recover any portion of a surplus from the Fund during the currency of the Plan was not lawful. The declaration sought by the Class in respect of that amendment will be granted. Rule 10.9(b) is of no force and effect and Rule 10.9(a) must be amended to delete the reference to the refund of any actuarial surplus.

[43] The analysis with respect to the entitlement to surplus upon the termination or winding up of the Plan proceeds on a somewhat different footing. Specific terms in the Plan will prevail in the absence of legislation to the contrary. Absent specific terms, the question of entitlement will be resolved by application of the principle of resulting trust. The principle directs that in the event that funds remain in a trust after all benefits required to be paid have been paid, the remainder will revert to the settlor of the trust.

[44] The Class submits that Rule 3.4, adopted when the Plan was amended in 1983, should be construed as a specific term that entitles members to any surplus that might exist upon termination of the Plan:

3.4 *Maximum Pension*

A pension paid to a Pensioner *shall not exceed* an amount that would be at an annual rate that is the lesser of:

(A) $1,715 times the number of years of pensionable service not exceeding 35, and

(B) the amount that is the product of

I 2% per year of pensionable service not exceeding 35 years, and

II the average of the best three consecutive years of remuneration paid to the Employee by the employer

or, if paid in another form, from exceeding the actuarial equivalent of the amount that would otherwise be determined under the above formula.

The above rule applies to all pension benefits, *including any distribution of surplus* to members, whether payable upon retirement, termination of employment or termination of the plan.

[emphasis added]

[45] The Class says that the reference to “surplus” in Rule 3.4 must lead to the conclusion that pensioners, rather than the Bank, are entitled to surplus upon the winding up or termination of the Plan.

[46] The Class also supports its claim by reference to Rule 10.3:

10.3 *Payments to and out of Fund*

The monies received pursuant to the Plan and from contributions by the Bank together with earnings on investment thereof shall form part of the Fund and the monies payable under the said Plan shall be payable out of the Fund.

The Bank shall contribute from time to time, but not less frequently than quarterly such amounts as are not less than those certified by the Plan Actuary as required to provide retirement benefits accruing to Participants during the current plan year and to make provision for the proper amortization of any initial unfunded liability or experience deficiency as required by the Pension Benefits Standards Act with respect to benefits previously accrued, after taking into account the assets of the Fund and such other factors as may be deemed relevant.

The Class says that the rule should be construed to require the entirety of the fund to be applied for the benefit of members.

[47] With respect, other provisions of the Plan support a different conclusion.

[48] From the outset, the Plan stipulated that the only benefits to be provided for employees were those specifically stated in the Plan. Rule 10.3 in present and prior iterations provides that the moneys in the Fund, and the earnings thereon, are the source from which the benefits provided by the Plan will be paid. Rule 3.4 stipulates that the pension "*shall not exceed*", and the "*maximum*" benefit an employee may derive from the Plan shall be, that which is computed in accordance with the Rule. No other term in the Plan documentation suggests that the employees have any right to the receipt of surplus upon winding up or termination of the Plan.

[49] Rule 10.3 stating that "the moneys payable under the said Plan shall be payable out of the Fund" does nothing more than specify the use to which the funds are to be applied. The Rule makes no reference to the use of any excess that might exist when provision has been made for the maximum benefits that are payable out of the Fund in accordance with the terms of the Plan.

[50] Because the Plan does not confer upon employees any right, title, or interest in or to any part of any surplus that exists upon winding up or termination of the Plan, entitlement must be determined by reference to the legal principle of resulting trust.

[51] In this case it cannot be argued that the resulting trust accrues to the benefit of anyone other than the Bank as settlor, whether or not the members of the Plan from time to time can also be regarded as settlors because of the contributions they have made to the Fund. This result follows from the terms of the Plan which limit the amounts that may be paid to members to the maximum stipulated in Rule 3.4.

[52] One can properly ask why an amendment was thought necessary to provide that the surplus would flow to the Bank upon termination, if the resulting trust principle applied to produce the same outcome. Guidance on that point was provided by the Ontario Court of Appeal in *Burke v. Hudson's Bay Company*, 2008 ONCA 394, where Gillesse JA. upheld an amendment providing that any surplus that existed on termination reverted to the employer. Her conclusion was that the amendment did not alter rights, but merely made explicit that which was previously implicit: para. 47.

[53] In *Burke*, the employer reserved a very broad power of amendment that was included in the plan and trust documentation. The fact that the Bank did not do so in this case is not fatal. The creation of the Plan resulted from the exercise of the specific statutory power to adopt by-laws pertaining to pensions that appeared in the *Federal Business Development Bank Act*. The power was continued in s. 13 of the *Act* from which the Bank emerged as a

continuation of the Federal Business Development Bank. The statutory power to enact by-laws impliedly authorizes the amendment or repeal of a lawfully enacted by-law. The broad nature of the amending power in such circumstances was discussed in *Bower v. Cominco Ltd.* (1999), 70 B.C.L.R. (3d) 154 (S.C.), aff'd at 19 B.C.L.R. (4th) 284, 2003 BCCA 537.

[54] I see nothing offensive about the amendment that makes explicit the Bank's entitlement to surplus upon the winding up of the Plan, provided that all of the benefits that have accrued and are payable in accordance with its terms have been discharged. The amendment clarified rights; it did not alter them. Moreover, the amendment specifically stated that the right to receive any part of the surplus was subject to any requirements or limitations imposed by the *PBSA 1985*.

[55] It follows that the Bank did not breach any fiduciary duty when it amended the Plan to provide for the payment of the terminal surplus to the Bank. The Class claim for a declaration that the amendment pertaining to surplus entitlement upon the termination or winding up of the Plan was unlawful and of no force and effect is dismissed.

(b) The Contribution Holiday and the Claim to an Equivalent Benefit

(i) Background

[56] The by-law that created the Federal Business Development Bank pension plan, from which the Bank's Plan evolved, made no provision for Bank contributions to the Fund. Rule 10.3 was added by amendment effective December 31, 1983:

> The Bank shall contribute from time to time, but not less frequently than quarterly such amounts as are not less than those certified by the Plan Actuary as required to provide retirement benefits accruing to Participants during the current plan year and to make provision for the proper amortization of any initial unfunded liability or experience deficiency as required by the Pension Benefits Standards Act with respect to benefits previously accrued, after taking into account the assets of the Fund and such other factors as may be deemed relevant.

[57] The amendment reflected the statutory obligation to ensure that the employees' annual contributions were augmented by a contribution from the Bank sufficient to provide for the payment of the defined benefits as they became payable.

[58] The text was modified when the Plan was amended and restated effective January 1, 1987, to delete the reference to the *PBSA* and to substitute a reference to the *PBSA 1985*

which came into force in June 1986. The text was modified again effective January 1, 1992, in order to comply with additional amendments to the *Income Tax Act*. The Bank's contribution obligation was then set forth in Article 4.01 of the Plan as amended, and has remained unchanged:

> 4.01 Bank Contributions
>
> a) Subject to b) and c) below, the Bank shall make such contributions to the Fund as are required, based on the advice of the Actuary to provide:
>
> i) the normal cost of the benefits currently accruing to Participants under the Plan;
>
> and
>
> ii) for the proper amortization of any unfunded liability or solvency deficiency;
>
> both in accordance with the Act after taking into account the assets of the fund, contributions of Participants and all other relevant factors.
>
> b) No contributions should be made by the Bank to the Fund, in accordance with a) above, unless it is an eligible contribution as defined by the Income Tax Act and is permitted by the Income Tax Act.
>
> c) If at any time while the Plan continues in existence, the Actuary certifies that the assets of the Fund exceed the actuarial liabilities of the Plan in respect of benefits defined in the Plan, such surplus assets, or any portion of such assets, may be used to reduce its contribution obligations under a) above, subject to any limitations of the Act.
>
> d) the Bank's contributions in respect of normal cost and any amortization payment to be made during the Plan Year shall be remitted to the Fund not less frequently than quarterly and not later than 30 days after the end of the period in respect of which the instalment is paid.
>
> e) Subject to the prior approval of the Superintendent of Financial Institutions, any overpayment by the Bank in the Plan Year in excess of the amount required to be contributed under a) above or payments made by the Bank that should have been paid out of the Fund may be returned to the Bank out of the Fund.

[59] By December 31, 1993, the Fund had accumulated an actuarial surplus of approximately $17 million attributable to several factors including the contributions of employees and employer, and investment gains. On June 14, 1994, a joint meeting of the pension fund committee and the Bank's compensation committee resolved to recommend to the Bank's board that the Bank make no contribution to the Fund for the last six months of 1994. The resolution was recorded in the following terms:

> MERCER PRESENTATION OF ACTUARIAL VALUATION

> A presentation of the results of the Actuarial Valuation as at December 31, 1993 was made including a discussion on proposed changes in assumptions. This valuation resulted in a surplus of $17,051,000.
>
> The Bank's contribution rate was then discussed.
>
> T-94-5.5 Upon motion duly made and seconded, the Trustees unanimously resolved to recommend to the Board of Directors of the Bank, that the Bank's contributions to the Fund be discontinued for the period of July 1, 1994 to December 31, 1994.

[60] On the same date, the Bank's board resolved to accept the joint recommendation.

[61] The board adopted a similar resolution for the 1995 calendar year. By December 31, 1995, the actuarial surplus had increased to $34.2 million, an amount which exceeded the maximum surplus permitted by the Canada Revenue Agency (the "CRA"). As a result the Bank was prohibited from making any contribution to the Fund in 1996.

[62] At a meeting held April 30, 1996, the Bank's pension committee decided to review issues associated with a surplus in the Fund in the context of overall compensation and, among other things, to investigate the possibility of improving benefits to pensioners and suspending employee contributions.

[63] From the inception of the Plan, each employee had been obliged to contribute annually a specified percentage of income up to the level of maximum insurable earnings for Canada Pension Plan purposes, and a greater percentage of income in excess of that maximum. On April 9, 1997, the Bank's board resolved to retain the benefit structure provided by the Plan; to temporarily suspend the employee contribution requirement effective July 1, 1997; to review the contribution holiday annually; and in the event the suspension was continued, to require a nominal annual contribution of $10 from each employee to serve as a reminder that the larger contribution requirement might be reinstated.

[64] The issue of the surplus was discussed again at a pension committee meeting on May 6, 1997:

> Committee members indicated that all efforts should be made to seek means to improve benefits for retirees as well as active employees. In addition, the Bank was requested to investigate and report back to the June 1997 meeting, on the possibility of providing retirees with an ad hoc lump sum pension adjustment.

[65] On June 11, 1997, the Bank's board resolved to amend the Plan in order to increase the spousal survivor pension benefits from 60% to the maximum of 66 ⅔% permitted by the

CRA, and to expand the definition of surviving dependents as the definition pertained to disabled children. The changes were expected to reduce Fund surplus by an estimated $4.8 million.

[66] Mr. Lieberman, a representative plaintiff in this action, attended a pension committee meeting on July 14, 1997 as a representative of the Bank's pensioners when the Fund surplus was again discussed. The actuary in attendance was asked whether benefits could be increased, or the index for inflation set above the level of the consumer price index. Either action would have further reduced the actuarial surplus. The actuary advised that the benefits and inflation index factor provided by the Plan were at the maximum permitted by the CRA for a registered pension plan. It followed that changes of the kind suggested could not be made.

[67] On May 6, 1998, the Bank's board resolved to make the Plan non-contributory unless and until the surplus in the Fund fell below 10% of the Fund's liabilities, or the board decided to reintroduce contributions. At the same meeting, the board adopted a resolution authorizing a special payment of $2 million to pensioners, acceleration of the date on which monthly benefits would be paid, and modifications to benefits. The changes were expected to reduce Fund surplus by a further $2.89 million.

[68] On July 15, 1998, the Bank notified employees and pensioners of the changes to the Plan. The notice stated that from the Bank's perspective, the changes struck a balance in relation to the board's responsibilities: to honour commitments made to pensioners, to ensure that the Plan could provide for the present and future needs of employees, to maintain the Bank's competitiveness, and to ensure the Bank's future success as an organization.

[69] The notice stated that the $2 million payment to pensioners would be made by the Bank. In fact, the payment was processed as a "special payment" from the Fund. No evidence was adduced in the course of this trial to explain the statutory or regulatory basis for the payment from the Fund, the effect of which must have been to provide pensioners with a pension in excess of the maximum permitted by the CRA, that being 2% of salary for the best five years of earnings. In any event, the payment was not challenged by any regulatory authority.

[70] From 1998 forward, the Pensioners Association of which Mr. Lieberman was a member and representative, urged the Bank to provide additional benefits to retirees in order to afford them what the pensioners regarded as benefits comparable to the benefit that had

been granted to active employees by way of the contribution holiday. The Bank declined to act on the request.

[71] On April 28, 2004, the Bank's board resolved to revise the Plan so that, at the option of an employee, it would be contributory or non-contributory. Renewed contributions would be phased in over a three year period for those who elected the contributory option. Those who elected the non-contributory option would be entitled to reduced benefits equal to 50% of the then current benefit payable to contributory participants. The Bank regarded the conversion of the pension plan to a non-contributory plan as a means of effecting an increase in the compensation levels for active employees. While the defined benefits provided by the Plan continued to accrue in the future on a reduced basis, employees were relieved of the obligation to make contributions out of their current earnings with a corresponding increase in income.

[72] Although the actuarial surplus in the Fund reached a high of approximately $159 million in 1999, by December 2004, the surplus in the Fund had been reduced to the point where there was a solvency deficit of approximately $18 million. The board resolved to make a current service contribution commencing January 1, 2005, and to liquidate the accumulated actuarial deficit over five years as permitted by the *PBSA 1985* and the *PBSA 1985 Regulation.* The actuarial deficit in the Fund has increased since 2005 and was estimated to be approximately $31 million at year end 2007. The deficit obliged the Bank to make additional contributions to the Fund.

(ii) The Class Claim

[73] The Class claim that retirees are entitled to a benefit equivalent to that derived by active employees by way of reduced contribution is developed in this way. The Bank, in its capacity as administrator and trustee of the Plan and Fund, owed a statutory and private law fiduciary duty to all beneficiaries under the Plan. The temporary suspension of the active employees' contribution obligation in 1997, and the more permanent reduction confirmed in 1998, involved the utilization of Fund assets and resulted in a disproportionate benefit for active employees. The concurrent amendments to the amount of death and spousal benefits that accrued to the benefit of all beneficiaries, and the $2 million special payment, did not eliminate the disparity in benefits.

[74] With respect, the argument does not adequately reflect the nature of the Plan, its relationship to the Fund, the relationship of each to employees and pensioners, and the rights and obligations of the Bank in its capacity as an employer. The argument advanced

by the Class equates changes in contribution requirements to benefits provided from the Fund in accordance with the defined benefit provisions contained in the Plan. They are not the same.

(ii) The Nature and Extent of the Bank's Fiduciary Obligation

[75] As the Supreme Court of Canada observed in *Schmidt*, a pension plan is a complex arrangement. Most often, the plan is an integral part of the employer's overall compensation package: see also *Buschau v. Rogers Communications Inc.*, [2006] 1 S.C.R. 973, 2006 SCC 28, 54 B.C.L.R. (4th) 1 (SCC), para. 12.

[76] At the outset, an employer must decide whether to provide any kind of plan for employees. It owes no duty, except the duty to deal with employees in good faith, when making that decision. The decision to implement a plan, and to continue or terminate the plan, will be factors to be taken into account in the negotiations that lead to, or modify, any employment contract.

[77] Once an employer elects to implement a plan, legislation becomes relevant. The overall integrity of the plan will be governed by either provincial or federal pension legislation, depending upon whether the employer is subject to federal or provincial legislative jurisdiction. The Bank is subject to federal regulation and is therefore governed by the *PBSA 1985*, pursuant to which the Plan must be registered with the Office of the Superintendent of Financial Institutions. Of equal importance to any plan is the *Income Tax Act*, with which a plan must comply in order to ensure the deductibility of employer and employee contributions alike, the exemption of earnings from taxation, and the taxation of benefits upon receipt.

[78] The Class rightly points out that the *PBSA 1985* constituted the Bank the administrator of the Plan and the trustee of the Fund. Section 8(3) of the *PBSA 1985* imposes the responsibilities of a trustee upon the Bank in both capacities. The Bank owes a fiduciary duty to members of the Plan, whether active or retired, in some, but not all, matters that affect the Plan.

[79] In its role as an administrator, the Bank is obliged to ensure that the rules of the Plan are applied in a balanced manner as regards all participants in the Plan. As trustee of the Fund, it is obliged to ensure that the Fund is managed in a manner that is consistent with the fiduciary obligation to make investment decisions with reasonable care, and to ensure that no portion of the Fund is paid or applied for a purpose that is inconsistent with the terms of

the Plan.

[80] However, the fact that an employer is both the administrator of the Plan and trustee of the Fund does not prevent the employer from altering the compensation arrangements it has concluded with its employees. The employer may amend or terminate the plan. When doing so, the employer is acting neither as administrator nor trustee, but as employer and as a party to a broader contract of employment. Enhancements will not ordinarily require employee approval for obvious reasons. An amendment that has the effect of reducing benefits without any offsetting increase in other forms of compensation will result in a breach of contract unless accepted by those affected.

[81] In this case, the Bank's Plan did not specifically address the issues of termination or amendment. However, the power to terminate or amend the Plan was implicit because of s. 38 of its governing legislation which empowered the Bank to adopt a by-law creating a pension plan in the first place. The statutory power to enact a by-law necessarily carries with it the right to amend or nullify the same by-law: cf. *Bower v. Cominco Ltd.* (2004) 19 B.C.L.R. (4th) 284, 2003 BCCA 537.

(iii) The Changes to the Contribution Requirements

[82] In this case, the rights that accrued to pensioners arose out of the terms of their former employment by the Bank. One such term was that in consideration of contributions of a defined amount, each would receive a benefit in a variety of circumstances including retirement at a normal age, early retirement, or death. The Bank assumed both the contractual and statutory obligation to ensure that the employee contributions were held in a trust fund, and the obligation to ensure that it made the contributions required to ensure that sufficient funds were available in the Fund to permit all benefits to be paid as they became payable. There is no dispute in this case that the Bank did what it was obliged to do in that regard.

[83] At a point in time, the Bank determined that the assets in the Fund were sufficient to permit it, on the advice of an actuary, to refrain from making a contribution to the Fund. As explained in *Schmidt*, the decision was authorized because the extent of the Bank's contribution was dependent on the advice of the actuary. The elimination of the contribution requirement in any year did not constitute a use of the Fund for the Bank's benefit. The character of a contribution holiday taken by an employer was specifically addressed by the Supreme Court of Canada in *Schmidt* at para. 86:

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

[84] There is no reason why any different reasoning should be applied in the context of employee contribution holidays or reductions. In fact, the decisions to reduce the level of employee contributions, to reinstate the obligation to contribute, and to offer a non-contributory alternative in exchange for a reduced benefit, were changes made by the Bank as employer and not as administrator of the Plan or trustee of the Fund. They were properly made changes to the contract of employment.

[85] The reduction in the obligation to contribute increased the value of the active employees' compensation package and increased their take home pay. That fact was admitted by the Class in an Agreed Statement of Facts entered as an exhibit at trial. The benefit was derived from their employment and not from the Fund. Their benefits were not altered in any manner that was different from the benefits provided to members of the Class. They paid less to obtain their benefits. Their contract of employment was amended to the employees' benefit.

[86] With respect, retired employees cannot expect that their pension benefits should be enhanced in order to maintain equivalency with changes in the amount of compensation paid to active employees.

(iv) No Breach of Fiduciary Duty

[87] In sum, the Bank did not confer or pay benefits out of the Fund to active employees when it revised their contribution requirements. The reduction in the contribution requirement did not constitute the use or impairment of assets in the Fund. It did not alter any benefits that had accrued to members of the Plan, whether those members were active or retired. The Bank did not breach any fiduciary duty owed to either active employees or retirees when it varied the contribution obligations of the active employees. Had the amendments involved the inappropriate exercise of a fiduciary duty, the appropriate course would have been to commence an action seeking a declaration that board resolutions authorizing changes in the contribution levels were a nullity. The Class does not question the validity of any of those

resolutions.

[88] The circumstances in this case differ from those considered by the court in *Neville v. Wynne*, 2005 BCSC 483, where an administrator or trustee interfered with some of the benefits under a plan in a manner that did not afford fairness to all plan members in relation to benefits.

[89] *Edge v. Pensions Ombudsman,* [1999] 4 All E.R. 546, cited by the Class, does not assist in the disposition of this case. *Edge* touched upon questions that might arise when an increase in benefits was being considered because of a surplus. In that situation, the trustee or administrator would be subject to a fiduciary duty to act fairly and even-handedly as between all classes of beneficiaries. I cannot conclude that the comments of the court in *Edge* have any application to this case which is concerned with contribution holidays which are not benefits.

[90] In the result, the Class claim that retirees should be afforded a benefit from the Fund equivalent to the increase in compensation to active employees resulting from a reduction in the contribution obligation must be dismissed.

(c) Administrative expenses

[91] The Class claim pertaining to the payment of administrative expenses has been affected by the judgment of the Supreme Court of Canada in *Nolan v. Kerry (Canada) Inc*., 2009 SCC 39, pronounced after the trial of this action. I invited and received written submissions from counsel with respect to the effect of the *Nolan* decision on the outcome of this action.

[92] The reference point when considering whether administrative expenses may be paid out of the Fund is the documentation that created the Plan and the Fund in the first place. One must ask whether the documentation expressly or impliedly imposed an obligation on the employer to pay such expenses: "Each case will turn on its own facts and the terms of the plan and trust at issue": *Nolan*, paras. 43 and 64.

[93] In the event a plan does not oblige the employer to pay such expenses, then an employer that has paid such expenses out of its owns funds should be regarded as having done so without obligation, and "subsequent amendments allowing the expenses to be paid out of the [fund] do not infringe the exclusive benefit language" in the plan: *Nolan*, para. 52. The Court stated the reason for its conclusion at para. 55:

> Here the existence of the Plan is a benefit to the employees. The payment of Plan expenses is necessary to ensure the Plan's continued integrity and existence. It is therefore to the exclusive benefit of the employees, within the meaning of s. 11, that expenses for the continued existence of the Plan are paid out of the Fund.

[94] The payment of expenses out of the Fund does not constitute a partial revocation of the trust:

> Paying plan expenses out of the trust fund is not a matter of the settlor (the Company in this case) exercising a power of control on a part of the property it has transferred to the trust. So long as nothing in the plan texts requires the paying of expenses by the employer, funds in the pension trust can be used to pay reasonable and *bona fide* expenses. In the absence of an obligation on the employer to pay the plan expenses, to the extent that the funds are paying legitimate expenses necessary to the integrity and existence of the plan, the employer is not purporting to control the use of funds in the trust. [Nolan, para. 59]

[95] In sum, *Nolan* stands for the proposition that if payment is not prohibited by the terms of the Plan, and the plan does not impose the burden to pay on the employer, administrative expenses may be paid from the Fund, and an amendment to explicitly address the point is lawful.

[96] As I have remarked, the Bank's Plan evolved from the plan created by by-law for the Federal Business Development Bank on December 12, 1975. At inception, the only provisions in the by-law that related to the use of the contributions to the Fund were Rule 8 entitled "Payment of Benefits" and Rules 10.1 and 10.3 comprising parts of Rule 10 entitled "Administration":

> RULE EIGHT – PAYMENT OF BENEFITS
>
> <u>Rule 8.1 Pension in Monthly Instalments</u>. All pensions shall be paid in monthly instalments at the end of each calendar month. A pension shall commence on the day following the event which is the reason for the pension and shall continue to the end of the month in which the event occurs which is the reason for the termination of the pension.
>
> <u>Rule 8.2 Lump Sum Payment in Lieu of Nominal Pension</u>. Where a person becomes entitled to a pension the monthly instalment of which are less than $10 there may be paid to such person, at his written request to the Secretary of the [Bank], an amount equal to the actuarial value of his pension as determined by the Board which shall be in lieu of any other benefit under these Rules.
>
> <u>Rule 8.3 Payment Where Pensioner Unable to Manager His Affairs</u>. Where, for any reason, a Pensioner is unable to manage his own affairs and there is no person entitled by law to act on his behalf, the Board may pay to any person it may designate to receive payment on behalf of the Pensioner any amount that is payable to the Pensioner under these Rules and any payment made by the [Bank] pursuant to this

> Rule is deemed to be a payment to the Pensioner in respect of whom such payment is made.
>
> Rule 8.4 General. No payments shall be made under this by-law except those which are specifically provided for in these Rules.
>
> ...
>
> RULE TEN - ADMINISTRATION
>
> Rule 10.1 Fund Vested in Trustees. The Fund shall be vested in the Trustees. They shall direct and the [Bank] shall administer the investment of the Fund. All other matters relating to the business and operation of the Fund shall be administered by the [Bank] in accordance with the rules and regulations governing the Fund and the [Bank] shall act through such of its officers and employees as it shall designate and empower so to act.
>
> ...
>
> Rule 10.3 Payments to and out of Fund. The moneys received under the rules of the Fund and from contributions by the [Bank] together with earnings on investment thereof shall form part of the Fund and the moneys payable under the said rules shall be payable out of the Fund.

[97] Rule 10.3 was amended by by-law on January 1, 1987 to add a second paragraph to the Rule:

> The Trustees may, by resolution, appoint any two persons to authorize payments as provided in this Plan for pensions, for purchasing life annuities, for transfers to locked-in registered retirement savings plans, for refunds of contributions with Interest, for transfers made under a reciprocal transfer agreement made with another employer in accordance with Rule 10.5, and for expenses incurred in the administration of the Fund.

[98] The same text appeared in Article 13 of the Plan when it was further amended and restated by by-law effective January 1, 1992. The text has remained substantially unchanged since that date.

[99] The Class claims that the Plan documentation did not authorize such payments, at least until 1987, and an agreement concluded between the Bank and trustees of the Fund in 1991 fettered the discretion of the trustees of the Fund so that the payment of administrative expenses thereafter was improper.

[100] The Bank claims that the principle established by the Court in *Nolan* is that administrative expenses can be paid from the Fund unless the Plan documentation prohibits such payments. The Bank says that the Plan documentation cannot be construed to contain such a prohibition.

[101] The Bank's interpretation conforms to the principle to be derived from *Nolan*. The Plan need not specifically authorize the payment of administrative expenses from the Fund. Rather, such expenses can be paid from the Fund provided the Plan documentation does not expressly or impliedly prohibit such payments.

[102] The only provision in the original by-law creating the Plan from which the Bank's Plan evolved that might be construed as a prohibition is Rule 8.4. However as the Court said in *Nolan*, the "obligations of the employer will be determined by the text and context of the Plan documents": para. 40.

[103] Rule 8.4 is part of Rule 8 that is directed to the payment of benefits. Each of Rules 8.1 through 8.3 addresses a specific topic pertaining to benefits. In context, Rule 8.4 must be construed as a direction that no benefit other than benefits specifically provided by the by-law shall be paid to members out of the Fund. The payment of administrative expenses is not such a benefit.

[104] Moreover, when the benefits to Plan participants cannot exceed the maximum provided by the Plan, and the employer is obliged to ensure that the assets of the Fund are sufficient to pay all defined benefits, there is no reason to construe Rule 8.4 to prevent the payment of administrative expenses from the Fund. If the cost of administration reduces the Fund's assets to the point where a deficiency arises, the Bank is obliged to fund that deficiency.

[105] In its submissions, the Class did not dispute the validity of the 1987 amendment that specifically addressed the topic of administrative expenses. The Class must be taken to agree that there was no prohibition against the payment of administrative expenses from the Fund prior to the amendment being made. Were it otherwise, the Class would undoubtedly have asserted that any amendment that removed the prohibition was unlawful, as was held to be the case in *Markle v. Toronto* (2003), 63 O.R. (3d) 321 (C.A.).

[106] The Class also submitted that clause 3.0 in the 1991 agreement between the Bank and trustees fettered the discretion of the trustees and amounted to an attempt to control the use of the Fund in a manner that is inconsistent with the trust:

> 3.0 Payments at Bank's Direction. The Trustees shall, from time to time, on the written directions of the Bank make payments, or cause payments to be made, out of the Trust Fund to pay benefits, to pay the fees and expenses of the Plan, to purchase annuities or to make any other payments authorized by the terms of the Plan; such payments to be made in such manner and in such amounts as may be directed by the Bank, and upon any such payment being made, the amount thereof shall no longer

> constitute a part of the Trust Fund. The Trustees shall be under no liability for, and shall be fully protected for, any payments made by them pursuant to the written directions of the Bank, and shall not be under a duty to make inquiries with respect to whether any payment directed by the Bank is made in accordance with the provisions of the Plan.

[107] With respect, the clause to which counsel for the Class refers is not a fetter, but a means of providing that the Bank, as Plan administrator, will be empowered to direct the trustees to make payments of various kinds. The provision reflects the complex nature of an employee pension plan. The administrator, rather than the trustees, is charged with the responsibility of ensuring that required contributions are made and that stipulated benefits are paid. The trustees do nothing more than safeguard the assets of the Fund by appropriate management. It is not their responsibility to be involved with matters affecting the administration of the Plan.

[108] The Class submits that support for its claim can be derived from *Markle*. In that instance, a specific term in the City of Toronto's pension plan obliged it to pay administrative expenses of the plan. The City later attempted to amend the plan, retroactively, in order to recoup the expenses it had paid, and prospectively, in order to oblige the trustees to pay such expenses as they were incurred in the future. The Ontario Court of Appeal held that the retroactive amendment constituted a partial revocation of the trust and was therefore unlawful. The Court addressed the prospective amendment at para.44:

> Prospectively, the effect of By-law 186 will require the Trustees to pay trust moneys towards administrative services that the City will provide for the Plan. While it is correct that the Plan will receive a benefit in exchange for the payments to the City, the effect of the amendment if permitted to proceed, is nonetheless to allow the City to exercise control over the trust fund that has been transferred irrevocably to the Trustees and that is subject to their exclusive control. Whether one characterizes this effect as an improper attempt to fetter the discretion of trustees as it relates to trust property, or as a partial revocation of trust, the requirement in the by-law is inconsistent with the fundamental nature of the trust and for that reason is invalid. The City cannot dictate to the Trustees the manner in which they are to use trust funds, absent a specific power to do so being reserved at the time the trust was created.

[109] The discussion arose in the context of a plan which, at inception, made specific provision for the payment of administrative expenses by the employer. Permitting the City to direct the trustees to pay expenses that they were not obliged to pay at the outset would therefore have constituted an impermissible fetter on discretion, or a partial revocation of the trust. The last sentence in the extract from the reasons supports the conclusion that a provision such as clause 3.0 in the 1991 trust agreement is lawful, as it is consistent with the initial terms governing the Plan and the Fund.

[110] In any event, should there be any identifiable defect in the 1991 agreement between the Bank and the trustees, the clause containing the defect would be inoperative. In that case, the Bank and the trustees would revert to the pre-amendment state of affairs, which was that *bona fide* and reasonable administrative expenses could be paid from the Fund in the absence of any prohibition against doing so.

The Class claim is global in nature: no part of the Fund may be used to pay administration expenses. No claim is advanced in the amended statement of claim that challenges the payment of any particular expense on the basis that it was unrelated to the administration of the Plan or the Fund. The Class claim that the Bank should be obliged to reimburse the Fund for administrative expenses paid from it must fail.

Choice of Law Considerations

[111] In the course of submissions, counsel on behalf of the Bank stated that to the extent private law was relevant in resolving the issues raised by this action, the private law of Quebec should apply because the Plan and the Fund were creatures of a corporation whose head office was in Quebec and the administration of the Plan and the Fund was principally carried out in Quebec. Counsel on behalf of the Class contended that the entire action was governed by the private law of British Columbia and the *PBSA 1985*, a federal statute.

[112] I am unable to conclude that any differences that might exist in the law as it applies to fiduciaries governed by the civil law of Quebec and fiduciaries governed by the law of other provinces would affect the outcome of this case and counsel identified none. The single point of difference may arise in the context of entitlement to surplus. In that regard, Quebec enacted specific provisions that restricted claims to surplus in relation to pension plans subject to provincial legislation, as opposed to those subject to federal legislation. The provincial legislation cannot affect a federally regulated plan, and I do not understand the Class to contend that the Bank's Plan was subject to provincial legislation.

[113] As a result, I have concluded that it is not necessary to consider any aspect of Quebec civil law as it pertains to trustees.

Limitation Defence

[114] The Bank submits that the question of whether it has a limitation defence to any of the claims advanced by the Class should be resolved in this proceeding. The Class says that question is a matter to be addressed in the context of each individual in the Class and not as a common issue.

[115] When the application to certify the class action was heard and the common questions were framed, no defence had been filed by the Bank. The fact that the Bank would claim the benefit of a limitation defence was therefore not known to the Class or to the court. That being the case, I cannot agree with the Bank's submission that the question of whether a limitation defence was available is, by inference, one of the common issues stated in the certification order.

[116] If the defence had been raised at the certification hearing, it would have been a factor for the court to take into account when deciding whether the action should be certified as a class proceeding. However, because it affects individual claims, the defence would not have been stated as a common issue. It would have remained an issue to be addressed in the context of the individual claim by each member of the Class: see *Pausche v. British Columbia Hydro & Power Authority* (2002) 98 B.C.L.R. (3d) 132, 2002 BCCA 62, and *Harrington v. Dow Corning Corp.* (1999), 179 D.L.R. (4th) 326, 1999 BCCA 546.

[117] It follows that I decline to consider the Bank's claim that it has a limitation defence in relation to any of the common issues that are to be addressed in this proceeding.

Summary

[118] In summary, the questions certified for determination must be answered as follows:

1. The Bank breached its fiduciary duty to members of the Plan, whether active or retired, by adopting Rule 10.9 to the extent it purports to entitle the Bank to receive payment of any actuarial surplus during the currency of the Plan.
2. The remedy to which the Class is entitled, and therefore granted, is a declaration that the amendment embodied in Rule 10.9 is of no force and effect, as it pertains to actuarial surplus during the currency of the Plan.
3. The Bank breached its fiduciary duty to members of the Plan by directing that expenses of $834,412, which could not reasonably be classified as administrative expenses, should be paid from the Fund.
4. The Class is not entitled to an order requiring repayment of the amount improperly paid because the amount, together with interest, has been fully repaid to the Fund.

Costs

[119] In the absence of agreement, the parties are at liberty to speak to costs.

"Mr. Justice Pitfield"