

Court File No. CV-25-00738613-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
1242939 B.C. UNLIMITED LIABILITY COMPANY, 1241423 B.C. LTD., 1330096 B.C. LTD.,
1330094 B.C. LTD., 1330092 B.C. UNLIMITED LIABILITY COMPANY, 1329608 B.C.
UNLIMITED LIABILITY COMPANY, 2745263 ONTARIO INC., 2745270 ONTARIO INC.,
SNOSPMIS LIMITED, 2472596 ONTARIO INC., AND 2472598 ONTARIO INC.**

Applicants

**MOTION RECORD
(Returnable June 26, 2026)**

June 18, 2026

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**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
1242939 B.C. UNLIMITED LIABILITY COMPANY, 1241423 B.C. LTD., 1330096 B.C. LTD.,
1330094 B.C. LTD., 1330092 B.C. UNLIMITED LIABILITY COMPANY, 1329608 B.C.
UNLIMITED LIABILITY COMPANY, 2745263 ONTARIO INC., 2745270 ONTARIO INC.,
SNOSPMIS LIMITED, 2472596 ONTARIO INC., AND 2472598 ONTARIO INC.**

Applicants

INDEX

TAB	DESCRIPTION
1	Notice of Motion dated June 18, 2026
2	Affidavit of Thomas Obersteiner sworn June 18, 2026
A	Exhibit "A" – ERC Appointment Order
B	Exhibit "B" – Wind-Up Order
C	Exhibit "C" – Dumai Decision
D	Exhibit "D" –Supreme Court of Canada decision dated October 7, 2010 regarding the Pension Plan
E	Exhibit "E" – Dumai Uncertified Class Action Application
F	Exhibit "F" – Ursel Phillips' Proposed Representative Counsel's Prior Experience
G	Exhibit "G" – Koskie Minsky's Proposed Representative Counsel's Prior Experience
3	Affidavit of Thomas Obersteiner sworn June 18, 2026
4	Pension Plan Representative Counsel Order
5	Appointment of a Mediator Order
6	Stay Extension and Second KERP Order

TAB 1

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
1242939 B.C. UNLIMITED LIABILITY COMPANY, 1241423 B.C. LTD., 1330096 B.C. LTD.,
1330094 B.C. LTD., 1330092 B.C. UNLIMITED LIABILITY COMPANY, 1329608 B.C.
UNLIMITED LIABILITY COMPANY, 2745263 ONTARIO INC., 2745270 ONTARIO INC.,
SNOSPMIS LIMITED, 2472596 ONTARIO INC., AND 2472598 ONTARIO INC.**

Applicants

**NOTICE OF MOTION
(Re: Appointment of Pension Plan Representative Counsel and Mediator,
Approval of Second KERP and Stay Extension)
(Returnable June 26, 2026)**

1242939 B.C. Unlimited Liability Company (f/k/a Hudson's Bay Company ULC Compagnie De La Baie D'Hudson SRI) (the "**Company**"), 1241423 B.C. Ltd., 1330096 B.C. Ltd., 1330094 B.C. Ltd., 1330092 B.C. Unlimited Liability Company, 1329608 B.C. Unlimited Liability Company, 2475263 Ontario Inc., 2745270 Ontario Inc., Snospmis Limited, 2472596 Ontario Inc., and 2472598 Ontario Inc. (collectively, the "**Applicants**") will make a Motion before the Honourable Madam Justice Kimmel of the Ontario Superior Court of Justice (Commercial List) on June 26, 2026, at 10:00 AM, or as soon after that time as the Motion can be heard.

PROPOSED METHOD OF HEARING: The motion is to be heard:

- In writing under subrule 37.12.1(1);
- In writing as an opposed motion under subrule 37.12.1(4);
- In person;
- By telephone conference;
- By video conference.

at the following location: 330 University Avenue, Toronto Ontario and via zoom

THE MOTION IS FOR:¹

1. An order substantially in the form attached to Tab 4 of the Motion Record (the “**Pension Plan Representative Counsel Order**”):

a) appointing representative counsel to represent the interests of each person included in the Hudson’s Bay Company Pension Plan (the “**Pension Plan**”) wind-up effective September 1, 2025, pursuant to the wind-up order issued by FSRA on October 20, 2025, and the reasons set out in the Notice of Intended Decision issued by FSRA on September 8, 2025, including (a) Pension Plan members whose employment was terminated between March 7, 2025 and August 31, 2025; (b) any person claiming (or who may hereafter claim or purport to claim) an interest under or on behalf of such person; and (c) any individual who had been a member of the Pension Plan or predecessor plans, claiming an entitlement to the Pension Surplus (collectively, the “**Represented Pension Plan Members**”).

b) The Pension Plan Representative Counsel Order, among other things:

- i. appoints Koskie Minsky LLP (“**Koskie Minsky**”) on behalf of Persons with defined benefit entitlements under the Pension Plan which arose from accruals under the defined benefit provisions of the Dumai Plan prior to January 1, 2002, solely with respect to such entitlements (in their capacity as such, the “**Dumai Group**”)²;
- ii. appoints Ursel Phillips Fellows Hopkinson LLP (“**Ursel Phillips**”) on behalf of persons with entitlements under either or both of the defined benefit provision and defined contribution provision under the Pension Plan (other than the Dumai Group)

(Ursel Phillips together with Koskie Minsky, “**Pension Plan Representative Counsel**”);

2. An Order substantially in the form attached to Tab 5 of the Motion Record (the “**Mediation Order**”), appointing the Honourable Chief Justice Geoffrey B. Morawetz of Morawetz Chambers

¹ Capitalized terms used herein and not otherwise defined have the meanings ascribed to such terms in the Affidavits of Thomas Obersteiner both sworn on June 18, 2026.

² The definition of “Dumai Group” remains subject to further review and consideration by the parties.

Inc. as mediator in respect of the Pension Surplus (as herein defined) matters to facilitate a consensual resolution of competing interests on a cost-efficient and expedient basis;

3. An Order substantially in the form attached to Tab 6 of the Motion Record (the “**Stay Extension and Second KERP Order**”), among other things:

- a) extending the Stay Period from June 30, 2026, until and including October 31, 2026;
- b) approving the second key employee retention plan (the “**Second KERP**”) and granting a Court-ordered priority charge against the property in the maximum amount of \$527,500 as security for payment under the Second KERP (the “**Second KERP Charge**”); and
- c) sealing the unredacted Second KERP pending further order of this Court.

4. Such further relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

A. Background

1. The Company and its subsidiaries collectively operated as a premier North American department store retailer with a portfolio of real estate assets in Canada. On March 7, 2025, the Applicants sought and were granted protection under the CCAA by the Court pursuant to an order which, among other things, appointed Alvarez & Marsal Canada Inc. as Monitor of the Applicants in these proceedings (the “**CCAA Proceedings**”).

2. Immediately prior to the commencement of the CCAA Proceedings, the Applicants employed approximately 9,364 people across Canada. A sale and investment solicitation process was conducted in respect of the Company’s business and assets; however, no going-concern opportunity was identified. As a result, the Company made the difficult decision to significantly reduce employee headcount to facilitate the liquidation of the Company’s inventory and the rolling closure of store locations.

3. To assist current and former employees with the potential impacts of the CCAA Proceedings, the Company sought and obtained an order dated May 5, 2025 (the “**ERC Appointment Order**”), pursuant to which the Court appointed Ursel Phillips as employee representative counsel. In this capacity, Ursel Phillips represents the interests of current and

former employees, or any person claiming an interest under or on behalf of a current or former employee of the Applicants, including beneficiaries and surviving spouses but excluding directors and officers of the Applicants. The Employee Representative Counsel's mandate specifically excluded matters relating to Pension Plan entitlements.

4. Since the appointment of Employee Representative Counsel, matters relating to the Pension Plan have arisen, specifically potential claims to the Pension Surplus, including the commencement by Koskie Minsky of a class action application in respect of surplus funds derived from the Dumai Plan, a predecessor of the Pension Plan. In light of these developments, both the Company and the Monitor consider it prudent to coordinate the manner in which these issues are addressed, including the appointment of representative counsel specifically tasked with addressing the Pension Surplus matters.

5. The Company established and sponsored a registered pension plan, the Hudson's Bay Company Pension Plan, that includes both defined benefit ("**DB**") and defined contribution ("**DC**") components. The Pension Plan is registered with the Financial Services Regulatory Authority of Ontario ("**FSRA**") pursuant to the *Pension Benefits Act* (Ontario).

6. On April 3, 2025, FSRA advised the Company that pursuant to its authority under the *Pension Benefits Act* (section 8(1.1) and the General Regulations (section 65.2)), the Chief Executive Officer of FSRA appointed Telus Health (Canada) Ltd. to act as the independent third party Pension Administrator in respect of the Pension Plan, effective April 3, 2025 (the "**Independent Pension Administrator**").

7. The Pension Plan's liabilities include benefits accrued under several predecessor pension plans, including the Dumai Pension Plan (known as the Simpsons, Limited Supplementary Pension Plan prior to January 1, 1994; the "**Dumai Plan**"), which transferred certain assets and liabilities to the Pension Plan and later merged with the Pension Plan effective January 1, 2002.

8. As of September 1, 2025, the Pension Plan had approximately 3,000 active and inactive members with DB entitlements and 13,000 active and inactive members with DC entitlements. In many cases, benefits have been accrued under both the DC and DB components and/or a predecessor plan.

9. On September 8, 2025, FSRA, in its capacity as Independent Pension Administrator, advised the Company, the Monitor and others that FSRA intended to make an order to wind up

the Pension Plan effective September 1, 2025. FSRA issued an order on October 20, 2025, confirming the wind-up date.

10. Following the Pension Plan's wind-up, it is expected that the Pension Plan will have surplus funds after all Pension Plan wind-up liabilities (including related expenses) have been paid or settled (the "**Pension Surplus**"). The wind-up report prepared by the Independent Pension Administrator dated September 1, 2026, confirms the existence of a significant solvency surplus.

11. On July 7, 2025, the Company advised the Independent Pension Administrator of its intention to seek a claim over the Pension Surplus. The Pension Surplus will form a significant source of recovery in respect of the outstanding secured debt owed to the Company's secured creditors.

B. Appointment of Pension Plan Representative Counsel

12. Given the overlap between the current and former employees already represented by Employee Representative Counsel and the Represented Pension Plan Members, Employee Representative Counsel has expressed a willingness to expand its existing mandate to include issues relating to the Pension Surplus. Both the Company and the Monitor support this extension.

13. Employee Representative Counsel has already been identified by the Court as having the requisite independence, experience, ability to communicate with current and former employees, cost-effectiveness, and demonstrated interest in working with the Monitor. Having been involved from the outset of these CCAA Proceedings, Employee Representative Counsel will be able to draw on its existing knowledge to fulfill its expanded mandate. Ursel Phillips has been appointed by the Court as pension representative counsel in other CCAA proceedings, including in respect of pension surplus matters.

14. Koskie Minsky had a historical and an existing retainer with the members of the Dumai Plan in the initial Class Action, as well as a proposed Uncertified Class Action Application commenced in June 2025 (the "**Dumai Members**"). Furthermore, the Dumai Members are in a unique position as compared to the other Represented Pension Plan Members as the Dumai Decision rendered by the Ontario Court of Appeal on September 22, 2011, is relevant to their potential entitlement to the Pension Surplus. Accordingly, the Company believes it is appropriate that separate representative counsel be appointed for their interests. The Company proposes that Koskie Minsky be appointed as representative counsel ("**Dumai Representative Counsel**").

15. The proposed scope of the Pension Plan Representative Counsel role will include:

- a) representing their respective Represented Pension Plan Members in the Pension Surplus Proceedings regarding claims or matters relating to the Pension Surplus;
- b) communicating with the Applicants, the Monitor, the Independent Pension Administrator, FSRA, other Pension Plan Representative Counsel or other stakeholders in respect of future motions and orders to be sought in the Pension Surplus Proceedings;
- c) identifying any sub-group(s) of the Represented Plan Members that Pension Plan Representative Counsel may deem appropriate or necessary having regard to the interests of any such sub-group;
- d) participating on behalf of their respective Represented Pension Plan Member, including any subgroup of the Represented Pension Plan Members, with the negotiation, mediation, settlement or compromise of any of their rights, entitlements or claims to the Pension Surplus and taking any necessary related steps in connection therewith;
- e) entering into a settlement agreement on behalf of the Represented Pension Plan Members including any sub-group of the Represented Pension Plan Members regarding the settlement or compromise of any of their rights, entitlements or claims to Pension Surplus, and taking any other steps required to give effect to such settlement agreement; and
- f) advising Represented Pension Plan Members in relation to the Pension Surplus Proceedings and in respect of any rights in relation to the Pension Surplus.

16. The Company believes that both Pension Plan Representative Counsel will contribute to overall cost savings and a streamlining of the Pension Surplus Proceedings by serving as the main points of contact between thousands of Represented Pension Plan Members, the Applicants, the Monitor, the Independent Pension Administrator and the Court.

C. Appointment of a Mediator

17. In tandem with the Pension Plan Representative Counsel Order, the Applicants are also seeking a Mediation Order appointing the Honourable Chief Justice Geoffrey B. Morawetz of Morawetz Chambers Inc. as mediator in respect of the Pension Surplus matters. The Mediation Order is intended to ensure that, in the event the parties are not able to reach agreement during an initial pre-mediation period of 60 days (with the potential of extension), the parties will have an expeditious and efficient mechanism to proceed to formal mediation under the guidance of the mediator.

18. Either directly or with the assistance of a mediator, the Company, the Pension Plan Representative Counsel, the secured creditors, and the Independent Pension Administrator, with the assistance of the Monitor, will seek to negotiate an arrangement governing the Pension Surplus consistent with the Pension Benefits Act (Ontario) and other applicable law. If the parties are able to reach a settlement, the Applicants intend to return to this Court to seek approval of such settlement.

D. Second KERP

19. The Applicants are seeking approval of the Second KERP and the related Second KERP Charge.

20. The beneficiaries of the Second KERP are five Key Employees with significant experience and specialized expertise, including institutional knowledge essential to the administration and implementation of the Term Sheet and potential Hardship Program, the SERP-related matters before the Court, and the resolution of the Pension Surplus proceedings. The continued services of these Key Employees are essential to the completion of the remaining wind-down matters.

21. The maximum aggregate amount payable under the Second KERP is \$527,500 and the proposed Second KERP Charge will be a priority charge on the Property, which will replace the First KERP Charge, totaling \$3,000,000.

22. As with the First KERP, the Applicants seek to have the unredacted Second KERP sealed, as it reveals individually identifiable information, including, among other things, compensation information. Disclosure of such sensitive personal and compensation information may cause harm to the Key Employees in the Second KERP and to the Applicants, and the protection of such information is an important commercial and privacy interest that should be protected.

E. Stay Extension

23. As the current Stay Period expires on June 30, 2026, the Applicants are seeking to extend the Stay Period to and including October 31, 2026.

24. The extension to the Stay Period will permit the Applicants to, among other things, assist in the sale of the remaining Art Collection to be sold online as part of the Art Collection Auction and reconciliation and distribution of proceeds, complete implementation of the Term Sheet, if financial conditions are met, seek to commence the application process for the Employee Hardship Program as approved pursuant to the Hardship Programs Order, address the SERP Trustee Motion for directions together with related HBC SERP matters, pursue Pension Surplus matters in consultation with the Monitor, the FILO Agent, Pathlight, the Independent Pension Administrator and Pension Plan Representative Counsel (if appointed), address Mr. Turpin's claims as part of his Proprietary Claims Motion, attend to matters involving the RioCan JV Receivership Proceedings with respect to certain remaining locations including the closing of transactions involving the Calgary Real Property and the Vancouver Real Property, and attend to various CCAA administrative matters including document and data retention matters.

25. The Applicants have acted, and continue to act, in good faith and with due diligence during the course of the CCAA Proceedings.

26. The Ninth Cash Flow Forecast prepared by the Applicants and reviewed by the Monitor demonstrates that the Applicants have sufficient liquidity to operate through the proposed Stay Period.

27. The Applicants' stakeholders will benefit from the extension of the Stay Period.

F. Other Grounds

28. Sections 11, of the CCAA and the inherent and equitable jurisdiction of this Court;

29. Rules 1.04, 2.03, 3.02, 16, 37, and 39 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended;

30. Such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

1. The Affidavit of Thomas Obersteiner sworn June 18, 2026, in respect of the Stay Extension and Second KERP;
2. The Affidavit of Thomas Obersteiner sworn June 18, 2026, in respect of the Appointment of Pension Representative Counsel and a Mediator;
3. The **[Sixteenth]** Report of the Monitor, to be filed; and
4. Such further and other evidence as counsel may advise and this Court may permit.

June 18, 2026

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Counsel for the Applicants

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**NOTICE OF MOTION
(Returnable June 26, 2026)**

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Lawyers for the Applicants

TAB 2

Court File No. CV-25-738613-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 1242939
B.C. UNLIMITED LIABILITY COMPANY, 1241423 B.C. LTD., 1330096 B.C. LTD., 1330094
B.C. LTD., 1330092 B.C. UNLIMITED LIABILITY COMPANY, 1329608 B.C. UNLIMITED
LIABILITY COMPANY, 2745263 ONTARIO INC., 2745270 ONTARIO INC., SNOSPMIS
LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC.**

Applicants

**AFFIDAVIT OF THOMAS OBERSTEINER
(In Respect of the Appointment of Pension Representative Counsel and Mediator)
(Sworn June 18, 2026)**

I, Thomas Obersteiner, of the City of New York, in the State of New York, MAKE
OATH AND SAY:

1. I am an independent consultant performing services similar to those of a general counsel of 1242939 B.C. Unlimited Liability Company (f/k/a Hudson's Bay Company ULC Compagnie De La Baie D'Hudson SRI) (the "**Company**"), and certain other Applicants.¹
2. I, together with other members of management, have been responsible for overseeing the Applicants' restructuring efforts, specifically in respect of pension related matters. As such, I have knowledge of the matters to which I hereinafter depose, except where otherwise stated. I have also reviewed the records, press releases, and public filings of the Company and have spoken with certain of the directors, officers and/or employees of the Company, as necessary, together with the Monitor and Reflect LLC. Where I have relied upon such information, I believe such information to be true. The Applicants do not, and do not intend to, waive privilege by any statement herein.

¹ The Applicants include the following entities: the Company, 1242939 B.C. Unlimited Liability Company, 1241423 B.C. Ltd., 1330096 B.C. Ltd., 1330094 B.C. Ltd., 1330092 B.C. Unlimited Liability Company, 1329608 B.C. Unlimited Liability Company, 2745263 Ontario Inc., 2745270 Ontario Inc., Snospmis Limited, 2472596 Ontario Inc., and 2472598 Ontario Inc. (collectively, the "**Applicants**"). The Court-authorized name changes of the Applicants are attached as Exhibit "A" to the affidavit of Franco Perugini sworn August 12, 2025, which became effective as of August 12, 2025.

3. All capitalized terms used in this affidavit and not otherwise defined have the meanings given to them in the affidavits of Michael Culhane sworn on May 26, 2025, and the affidavits of Jennifer Bewley sworn on March 7, 2025, and April 17, 2025 (the “**Fourth Bewley Affidavit**”).

I. OVERVIEW

4. The Company and its subsidiaries collectively operated as a premier North American department store retailer with a portfolio of real estate assets in Canada. On March 7, 2025, the Applicants sought and were granted protection under the CCAA by the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) pursuant to an order which, among other things, appointed Alvarez & Marsal Canada Inc. as monitor of the Applicants (in such capacity, the “**Monitor**”) in these proceedings (the “**CCAA Proceedings**”).

5. Immediately prior to the commencement of the CCAA Proceedings, the Applicants employed approximately 9,364 people across Canada. A sale and investment solicitation process was conducted in respect of the Company’s business and assets; however, no going-concern opportunity was identified for the Company. As a result, the Company made the difficult decision to significantly reduce employee headcount to align with the required employee positions to facilitate the liquidation of the Company’s inventory and the rolling closure of store locations and required employee positions.

6. To assist current and former employees with the potential impacts of the CCAA Proceedings, the Company sought the appointment of a representative counsel to advise and represent the interests of all current and former non-unionized employees.

7. By order dated May 5, 2025 (the “**ERC Appointment Order**”), the Court appointed Ursel Phillips Fellows Hopkinson LLP (“**Ursel Phillips**”) as employee representative counsel (“**Employee Representative Counsel**”) to represent the interests of Current and Former Employees (as defined below), or any person claiming an interest under or on behalf of a current or former employee of the Applicants, including beneficiaries and surviving spouses but excluding directors and officers of the Applicants. Attached as **Exhibit “A”** is a copy of the ERC Appointment Order.

8. At the time of the initial appointment of Employee Representative Counsel, matters relating to the Pension Plan (as further described herein) had not yet been formally introduced before the Court. As a result, the Applicants did not at that time seek the appointment of

representative counsel for Pension Plan related matters. However, Pension Plan matters – specifically potential claims to Pension Surplus (as further described herein) – have since arisen, including the commencement of an application in respect of surplus funds derived from the Dumai Plan (as further described herein), which is a predecessor of the Pension Plan. In light of these developments, both the Company and the Monitor consider it prudent to coordinate the manner in which these issues are addressed, including the appointment of representative counsel specifically tasked with addressing the Pension Surplus matters.

9. Additionally, on February 13, 2026, Royal Trust Corporation of Canada in its capacity as trustee of four Retirement Compensation Arrangement trusts (the “**HBC RCAs**”) served a motion for advice and direction regarding the appropriate distribution of funds contained in the HBC RCAs in conjunction with the wind-up of the HBC RCAs. Each HBC RCA was established in relation to payment of benefits under a supplementary executive retirement plan, which provides additional pension benefits to certain current and former executive and other senior employees of HBC, including potentially current and former directors and officers of HBC.

10. Accordingly, for the reasons set out herein, the Company seeks an order (the “**Pension Plan Representative Counsel Order**”) appointing representative counsel to represent the interests of each person included in the Hudson’s Bay Company Pension Plan (the “**Pension Plan**”) wind-up effective September 1, 2025, pursuant to the wind-up order issued by FSRA on October 20, 2025, and the reasons set out in the Notice of Intended Decision issued by FSRA on September 8, 2025, including (a) Pension Plan members whose employment was terminated between March 7, 2025 and August 31, 2025; (b) any person claiming (or who may hereafter claim or purport to claim) an interest under or on behalf of such person; and (c) any individual who had been a member of the Pension Plan or predecessor plans, claiming an entitlement to the Pension Surplus (collectively, the “**Represented Pension Plan Members**”), in: (x) these CCAA Proceedings, solely with respect to potential entitlements of the Represented Pension Plan Members to surplus funds after all Pension Plan wind-up liabilities (including related expenses) have been paid or settled (the “**Pension Surplus**”); (y) the Dumai Uncertified Class Action Application; or (z) any proceeding under the *Bankruptcy and Insolvency Act* or under any other act or in any other proceeding, including with respect to the insolvency of the Applicants, or in any other application or complaint to any regulatory authority which concerns Pension Surplus matters (collectively, the “**Pension Surplus Proceedings**”).

11. The Company seeks to appoint the following as pension representative counsel on behalf of the Represented Pension Plan Members (the “**Pension Plan Representative Counsel**”):

- (a) Koskie Minsky LLP (“**Koskie Minsky**”) on behalf of Persons with defined benefit entitlements under the Pension Plan which arose from accruals under the defined benefit provisions of the Dumai Plan prior to January 1, 2002, solely with respect to such entitlements (in their capacity as such, the “**Dumai Group**”)²; and
- (b) Ursel Phillips on behalf of persons with entitlements under either or both of the defined benefit provision and defined contribution provision under the Pension Plan (other than the Dumai Group).

12. The Company’s goal in respect of the Pension Plan and Pension Surplus is to reach a consensual, negotiated resolution in respect of the competing interests of Represented Pension Plan Members and the Company on a cost efficient and expedient basis. The appointment of representative counsel sought herein will facilitate that resolution.

13. In tandem with the Pension Plan Representative Counsel Order sought herein, the Company is also seeking an order (the “**Mediation Order**”) appointing the Honourable Chief Justice Geoffrey B. Morawetz of Morawetz Chambers Inc. as mediator in respect of the Pension Surplus matters. The Mediation Order is intended to ensure that, in the event the parties are not able to reach agreement during an initial pre-mediation period of 60 days (with the potential of extension), the parties will have an expeditious and efficient mechanism to proceed to formal mediation under the guidance of a mediator.

A. Background

14. As more fully described in the Fourth Bewley Affidavit, on April 24, 2025, the Applicants brought a motion before the Court seeking the appointment of Ursel Phillips as Employee Representative Counsel to represent the interests of current and former employees with continuing entitlements from the Applicants, including retirees of the Applicants, who are not represented by a union, or were not represented by a union at the time of their separation from employment (the “**Current and Former Employees**”), or any person claiming an interest under

² The definition of “Dumai Group” remains subject to further review and consideration by the parties.

or on behalf of a current or former employee of the Applicants including beneficiaries and surviving spouses, but excluding directors and officers of the Applicants (collectively, the “**Represented Employees**”).

15. In response to the Applicants’ motion, several competing proposals were submitted for appointment of employee representative counsel to represent all or a subset of HBC’s employees. This included a cross-motion by Koskie Minsky seeking the appointment of a third party to make a recommendation to the Court determining the appointment of representative counsel or, in the alternative, setting a schedule for a contested motion appointing Koskie Minsky as representative counsel.

16. At the conclusion of the hearing, the Court appointed the Honourable Justice Wilton-Siegel as an independent third party to evaluate the various proposals and to make a recommendation to the Court.

17. On May 5, 2025, after considering the proposals filed and responses received from the interviews conducted by the Honourable Justice Wilton-Siegel, and factors including independence, the requisite experience, communications with the employees, cost and a demonstrated interest in working with the Monitor, the Honourable Justice Wilton-Siegel recommended the appointment of Ursel Phillips as Employee Representative Counsel for the Current and Former Employees. The Court accepted the recommendation and appointed Ursel Phillips as Employee Representative Counsel on May 5, 2025.

18. Pursuant to the ERC Appointment Order, the scope of the Employee Representative Counsel’s role was to:

- (a) represent the Represented Employees in the Insolvency Proceedings (as defined in the ERC Appointment Order);
- (b) communicate with the Applicants, the Monitor and other stakeholders on behalf of the Represented Employees generally, and in respect of future motions and orders to be sought in the Insolvency Proceedings;
- (c) advise the Represented Employees in respect of employment or other workplace matters arising within the Insolvency Proceedings;

- (d) file claims in any claims process that may be approved within the Insolvency Proceedings;
- (e) advise the Represented Employees in respect of matters involving their other post employment benefits entitlements;
- (f) participate on behalf of the Represented Employees with the settlement or compromise of any rights, entitlements or claims of the Represented Employees; and
- (g) participate in and assist with, on behalf of the Represented Employees, claims filed under the *Wage Earner Protection Program Act*, if applicable; (collectively, the “**Purpose**”).

19. Employee Representative Counsel’s mandate and the ERC Appointment Order specifically noted: “which Purpose for greater certainty shall not include assisting with any entitlements of current and former Employees under the Pension Plans”.

B. Overview of Employees and Retirees

20. Immediately prior to the Filing Date, as of February 28, 2025, the Applicants employed approximately 9,364 people in operations in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec and Nova Scotia. The Applicants’ employees generally fell into three categories: (a) corporate employees; (b) employees at the Company’s retail stores; and (c) employees at the four Distribution Centres.

21. Approximately 647 of the Applicants’ employees were subject to collective bargaining agreements, applicable to employees working in five of the Company’s retail stores, three of the Company’s Distribution Centres, and for certain other employees working in Ontario.

22. All stores and Distribution Centres closed on or before June 15, 2025, following the completion of the liquidation sales, and the majority of employees were terminated.

C. The Pension Plan

23. The Company established and sponsored a registered pension plan, the Hudson’s Bay Company Pension Plan, which includes both defined benefit (“**DB**”) and defined contribution

("DC") components. The Pension Plan is registered with the Financial Services Regulatory Authority of Ontario ("FSRA"), pursuant to the *Pension Benefits Act* (Ontario).

24. Most of the active members of the Pension Plan were, as at the Filing Date (prior to their terminations during the CCAA Proceedings), accruing benefits under the DC component.

25. The Pension Plan's liabilities include benefits accrued under the Pension Plan as well as several predecessor pension plans, whether through prior mergers and/or the transfer of assets and liabilities to or from such predecessor plans, including:

- (a) the Hudson's Bay Company Executive Pension Plan (the "**Executive Plan**"), which merged with the Pension Plan on January 1, 2002;
- (b) the Dumai Pension Plan (known as the Simpsons, Limited Supplementary Pension Plan prior to January 1, 1994; the "**Dumai Plan**"), which (i) transferred certain assets/liabilities relating to service prior to January 31, 1979, to the Pension Plan and (ii) later merged with the Pension Plan on January 1, 2002;
- (c) the Zellers Inc. Pension Plan (formerly the Zeller's Limited Pension Plan; the "**Zellers Plan**"), which (i) transferred certain assets/liabilities to the Dumai Plan on December 31, 1999, and (ii) later merged with the Pension Plan on January 1, 2002;
- (d) the Pension Plan for Employees of Zellers Inc. at Fields Stores, which merged with the Zellers Plan on January 1, 1984;
- (e) the Zellers Inc. Senior Executive Pension Plan, which (i) transferred certain assets/liabilities to the Executive Plan on January 1, 1999, and (ii) merged with the Zellers Plan on January 1, 1991;
- (f) certain pension plans of Oshawa Group Limited (collectively, the "**Towers Plan**"), which transferred certain assets/liabilities to the Zellers Plan on November 4, 1990;
- (g) the Woodward's Limited and Designated Companies Management Pension Plan (the "**Woodward's Plan**"), which transferred all remaining assets/liabilities to the Pension Plan effective December 31, 2007;

- (h) the Morgan Pension Plan, which transferred certain assets/liabilities to the Pension Plan in 1963 (it is unlikely that anyone subject to this transfer is still a member of the Pension Plan);
 - (i) the Pension Plan for Employees of Markborough Properties Limited, which transferred certain assets/liabilities to the Pension Plan (the Pension Plan text indicates there is no longer any member subject to this transfer that is still a member of the Pension Plan); and
 - (j) the Retirement Plan for Employees of Kmart Canada Co. - Kmart Canada Cie (the "**Kmart Plan**"), which merged with the Dumai Plan on January 1, 2000;
- (collectively, the "**Predecessor Plans**").

26. A brief timeline and description of the Pension Plan and Predecessor Plans is as follows:

- (a) the Pension Plan was established by the Company effective July 1, 1961, to provide DB pensions to the regular full-time and part-time employees of the Company, its subsidiaries and certain of its affiliates. It is a contributory plan with both DB and DC components.
- (b) effective January 1, 1988, the Pension Plan was amended to include a DC component. All newly eligible employees of the Company thereafter participated in the DC component, while members of the DB component generally continued to accrue benefits in accordance with the DB terms of the Pension Plan until April 30, 2025 (unless they elected to transfer the commuted value of accrued DB pension benefits to the DC component on January 1, 1992).
- (c) the Company made a number of acquisitions which impacted the Pension Plan, whether through recognition of prior service, transfers of assets and liabilities and/or mergers (as further described in paragraph 25 where relevant), including the acquisition of Henry Morgan and Co. Limited, A.J. Freiman Limited, Simpsons, Limited, Markborough Properties Limited, Woodward's Limited and Zellers Inc. (including Fields Stores Limited and Towers Department Stores Inc.).
- (d) effective January 1, 2002, the Pension Plan was amended to provide for the merger of the Dumai Plan (which previously had merged with the Kmart Plan,

effective January 1, 2000), the Executive Plan and the Zellers Plan into the Pension Plan. The provisions of each of the aforementioned Predecessor Plans have been maintained in the Pension Plan.

- (e) effective October 1, 2009, the Pension Plan was amended and restated to reflect the assumption of liabilities of the Woodward's Plan and reflect the settlement of a class action between the Company and certain members of the Dumai Plan.

27. As of September 1, 2025, the Pension Plan had approximately 3,000 active and inactive members with DB entitlements and 13,000 active and inactive members with DC entitlements.

28. For illustrative purposes only, demographic data, according to whether benefits had been accrued under the DC component or DB component of the Pension Plan and/or under any Predecessor Plans as of September 1, 2025, is generally as follows:

Plan	Retirees	Actives	Suspended	Deferred	Total
Pension Plan (DB)	1,843			56	1,899
Dumai Plan (DB)	379			19	398
Zellers Plan (DB)	679			24	703
Towers Plan (DB)	46		2	84	132
Executive Plan (DB)	14				14
Woodward's Plan (DB)				16	16
DC		60		12,996	13,057
TOTAL	2,961	60	2	13,195	16,219

29. In many cases, benefits have been accrued under both the DC and DB components of the Pension Plan and/or a Predecessor Plan, and in some cases, benefits have been accrued under more than one DB component. As such, there is some overlap in the demographic data.

I. Pension Plan Administrator and Wind-Up

30. Historically the Company has been the administrator (“**Pension Administrator**”), within the meaning of subsection 1(1) of the *Pension Benefits Act*, for the Pension Plan.

31. On April 3, 2025, FSRA advised the Company that pursuant to its authority under the *Pension Benefits Act* (section 8(1.1) and the General Regulations (section 65.2)), the Chief Executive Officer of FSRA appointed Telus Health (Canada) Ltd. to act as the independent third party Pension Administrator in respect of the Pension Plan, effective April 3, 2025 (the “**Independent Pension Administrator**”).

32. The Pension Plan was administered in the ordinary course up to and including August 31, 2025. It was a continuing Pension Plan, and current employees continued to contribute into the Pension Plan and accrue pension benefits up to August 31, 2025.

33. On September 8, 2025, FSRA advised the Company, the Monitor and others that FSRA intended to make an order to wind up the Pension Plan effective September 1, 2025 (the “**NOID**”), pursuant to its authority under section 69 of the *Pension Benefits Act*, which provides FSRA with the authority to wind up a pension plan if all or substantially all of the members of the pension plan cease to be employed by the employer. Following the lapse of the 30-day review period, FSRA issued an order on October 20, 2025, confirming the wind-up date of the Pension Plan effective September 1, 2025 (the “**Wind-Up Order**”). A copy of the NOID dated September 8, 2025, and the Wind-Up Order is attached as **Exhibit “B”**.

34. Pursuant to paragraph 9 of the NOID, as affirmed by the Wind-Up Order:

“The Administrator has recommended that all HBC members who terminated employment between March 7, 2025, and August 31, 2025, shall be included in the wind-up.”

35. The proposed group of Represented Pension Plan Members includes this group of post-filing terminated employees.

II. Pension Plan Surplus

36. Based on the most recent actuarial valuation report of the Pension Plan, effective January 1, 2024, as revised by an actuarial interim cost certificate as at April 30, 2025, the value of the

Pension Plan's assets is substantially greater than what is currently required to pay all accrued pension benefits (liabilities) on both a going concern and wind-up basis. Following the Pension Plan's wind-up, it is expected that the Pension Plan will have surplus funds after all Pension Plan wind-up liabilities (including related expenses) have been paid or settled (the "**Pension Surplus**"). The wind-up report prepared by the Independent Pension Administrator dated September 1, 2026, confirms the existence of a significant solvency surplus.

37. I am advised by my counsel that there are two legal proceedings concerning entitlements to the surplus under the Dumai Plan and Pension Plan:

- (a) the September 22, 2011, decision of the Court of Appeal for Ontario concerning the Dumai Plan (the "**Dumai Decision**"). A copy of the Dumai Decision is attached hereto as **Exhibit "C"**; and
- (b) the October 7, 2010, Supreme Court of Canada decision concerning the Pension Plan. A copy of the Supreme Court of Canada's decision is attached hereto as **Exhibit "D"**.

38. On July 7, 2025, the Company advised the Independent Pension Administrator of its intention to seek a claim over the Pension Surplus. The Pension Surplus will form a significant source of recovery in respect of the outstanding secured debt owed to the Company's secured creditors.

III. The Dumai Application

39. As noted above, one of the Predecessor Plans was the Dumai Plan, registration number 0358572. On June 6, 2025, Koskie Minsky commenced an application for a class action proceeding (the "**Dumai Uncertified Class Action Application**") on behalf of John Scott and James Common, as proposed representative plaintiffs. The Dumai Uncertified Class Action Application was brought both in their own right and on behalf of an asserted class consisting of all Dumai Members under the Dumai Plan, which has since been integrated into the Pension Plan. Attached hereto as **Exhibit "E"** is the Dumai Uncertified Class Action Application.

40. The Dumai Uncertified Class Action Application presently seeks various orders in respect of the Pension Surplus and asserts an interest on behalf of the Dumai Members in the Pension Surplus. The application identifies Telus Health (Canada) Ltd. and RBC Investor Services Trust as the only respondents. Neither the Company nor the Monitor received notice of the

commencement of the Dumai Uncertified Class Action Application, nor were any of the Applicants named as respondents in the proceeding.

41. Upon learning of the Dumai Uncertified Class Action Application, on July 4, 2025, the Applicants, with the support of the Monitor, sent a letter to Koskie Minsky regarding the Dumai Uncertified Class Action Application, clarifying that the Company has a contingent future interest in the Pension Surplus, and as such, the class action proceedings are stayed under the terms of the stay of proceedings outlined in the ARIO. The proposed Pension Plan Representative Counsel Order seeks to address the Pension Surplus matters in their entirety, and no further steps will be taken in the Uncertified Class Action Application at this time.

II. RELIEF SOUGHT

A. Pension Plan Representative Counsel

42. The Company, through counsel, has engaged in discussions with the Monitor, Employee Representative Counsel, the Independent Pension Administrator and secured creditors regarding how best to resolve entitlement issues related to the Pension Surplus.

43. In light of the existing mandate of Employee Representative Counsel, Employee Representative Counsel was approached and has expressed a willingness to expand its existing mandate to include issues relating to the Pension Surplus. Both the Company and the Monitor support the extension of Employee Representative Counsel's mandate to include all persons with entitlements under either or both of the DB and DC provision under the Pension Plan (other than the Dumai Group, for whom separate representation is proposed).

44. Employee Representative Counsel has already been identified by the Court as having the requisite independence, experience, ability to communicate with current and former employees, and demonstrated interest in working with the Monitor to fulfill this mandate. Employee Representative Counsel recently brought a motion to facilitate provision of long-term disability benefits to former employees from certain disputed trust funds. The motion proceeded on consent of all parties. Having been involved from the outset of these CCAA proceedings, Employee Representative Counsel will be able to draw on its existing knowledge to fulfill its mandate.

45. Further, I am advised by my counsel that Ursel Phillips has been appointed by the Court as pension representative counsel in other CCAA proceedings and restructurings, including the DCL Corporation CCAA proceedings wherein Ursel Phillips was charged with negotiation of a

pension surplus sharing arrangement, which arrangement was ultimately approved by the Court and FSRA. Ursel Phillips has extensive experience representing large groups of pension beneficiaries, including in negotiations relating to pension surpluses. Further details of Ursel Phillips' representative experience in pension and employee representative matters are as outlined in the **Exhibit "F"** hereto.

46. As set out above, Koskie Minsky had a historical and an existing retainer with the members of the Dumai Plan in the initial Class Action addressed in the Dumai Decision, as well as the proposed Uncertified Class Action Application (the "**Dumai Members**"). Furthermore, the Dumai Members are in a unique position as compared to the other Represented Pension Plan Members as the Dumai Decision is relevant to their potential entitlement to the Pension Surplus. Accordingly, the Company believes it is appropriate that separate representative counsel be appointed for the Dumai Members. The Company proposes that Koskie Minsky be appointed as representative counsel ("**Dumai Representative Counsel**").

47. For the purposes of the Representative Counsel Order, it is proposed that Koskie Minsky represent the Dumai Group which is defined in the proposed Order as follows: Persons with defined benefit entitlements under the Pension Plan which arose from accruals under the defined benefit provisions of the Dumai Plan prior to January 1, 2002, solely with respect to such entitlements.

48. I am advised by my counsel that Koskie Minsky has been appointed by the Court as pension representative counsel in other CCAA proceedings and restructurings, including Sears Canada, Stelco and Nortel Networks. Koskie Minsky has experience representing large groups of pension beneficiaries and, particularly given its former role as counsel to the Dumai Members in the Dumai Decision, is qualified to represent the Dumai Members in respect of the Pension Surplus. Further details of Koskie Minsky's representative experience in pension related matters are outlined in the **Exhibit "G"** hereto.

49. It is proposed that Ursel Phillips will commence by acting on behalf of all members of the Pension Plan (and, as applicable, their beneficiaries or estates) other than the Dumai Members solely with respect to their entitlements accrued under the Dumai Plan prior to January 1, 2002 (the "**Non-Dumai Members**"), i.e., those with defined benefit and/or defined contribution entitlements. Should a conflict arise amongst Non-Dumai Members, Ursel Phillips will contact the Monitor, and the parties will revisit potential next steps to address the potential conflict.

50. Once Pension Plan Representative Counsel are appointed, the Company intends to engage in discussions with Pension Plan Representative Counsel, in consultation with the Monitor, the Independent Pension Administrator and secured creditors, to try to resolve entitlement to the Pension Surplus consensually. It is proposed that the parties will have 60 days, plus an additional 45-day extension, to attempt to resolve the matters directly (the “**Pre-Mediation Negotiation**”).

51. If a consensual resolution cannot be reached without the assistance of a third party, the Company will seek the appointment of a mediator to pursue a mediation process. The participants to the proposed mediation will be the Company, the Monitor, the Independent Pension Administrator, Pension Plan Representative Counsel, the FILO Agent and Pathlight (the “**Surplus Mediation Parties**”).

52. These parties (including proposed representative counsel) have consulted and agree on seeking the appointment of Chief Justice Morawetz of Morawetz Chambers Inc. as the proposed mediator.

53. The draft mediation order ensures the mediator has an opportunity to commence preparation work while the Surplus Mediation Parties pursue the Pre-Mediation Negotiation. If the parties are not able to resolve the matter in the initial period (or extended period), the Monitor will advise the mediator, and the formal mediation will begin.

54. Either directly, or with the assistance of a mediator, the Company, the Pension Plan Representative Counsel, secured lenders, together with the Independent Pension Administrator, and with the assistance of the Monitor, will seek to negotiate an arrangement governing the Pension Surplus consistent with the *Pension Benefits Act* (Ontario) and other applicable law (the “**Pension Surplus Proceedings**”). If the parties are able to reach a settlement, it is contemplated that the Applicants would return to this Court, as the supervising judge of the CCAA Proceedings, to seek approval of the settlement.

B. Pension Plan Representative Counsel Order – Pension Plan Purpose & Mandate

55. The proposed scope of the Pension Plan Representative Counsel role will include:

- (a) representing their respective Represented Pension Plan Members in the Pension Surplus Proceedings regarding claims or matters relating to the Pension Surplus;

- (b) communicating with the Applicants, the Monitor, the Independent Pension Administrator, FSRA, other Pension Plan Representative Counsel or other stakeholders in respect of future motions and orders to be sought in the Pension Surplus Proceedings;
- (c) identifying any sub-group(s) of the Represented Plan Members that Pension Plan Representative Counsel may deem appropriate or necessary having regard to the interests of any such sub-group;
- (d) participating on behalf of their respective Represented Pension Plan Member, including any subgroup of the Represented Pension Plan Members, with the negotiation, mediation, settlement or compromise of any of their rights, entitlements or claims to the Pension Surplus and taking any necessary related steps in connection therewith;
- (e) entering into a settlement agreement on behalf of the Represented Pension Plan Members including any sub-group of the Represented Pension Plan Members regarding the settlement or compromise of any of their rights, entitlements or claims to Pension Surplus, and taking any other steps required to give effect to such settlement agreement; and
- (f) advising Represented Pension Plan Members in relation to the Pension Surplus Proceedings and in respect of any rights in relation to the Pension Surplus

56. For general information requests relating to Pension Plan matters, the Independent Pension Administrator should be in a position to respond to such inquiries.

57. Similar to the ERC Appointment Order granted on May 5, 2025, the proposed Pension Plan Representative Counsel Order provides:

- (a) for the mechanism by which the Pension Plan Representative Counsel would bind the members of their respective group;
- (b) for the creation of a committee to assist in providing feedback for the Represented Pension Plan Members; and

- (c) the ability for a potential member of a Pension Plan or Predecessor Plan to opt out of representation by the representative counsel.

58. On the issue of opt-out rights, any individual Represented Pension Plan Member who does not wish to be represented in the Pension Surplus Proceedings by their respective Pension Plan Representative Counsel in relation to the Pension Surplus shall, within thirty 30 days of the date of receiving notice of the appointment of Pension Plan Representative Counsel, notify the Monitor, in writing that such Represented Pension Plan Member is opting out of representation by the respective Pension Plan Representative Counsel by delivering to the Monitor an opt-out notice in the form attached as Schedule "A" to the Pension Plan Representative Counsel Order (each an "**Opt-Out Notice**"), and shall thereafter not be bound by the actions of such Pension Plan Representative Counsel and shall represent themselves or be represented by any counsel that such Represented Pension Plan Member may retain exclusively at their own expense in these CCAA Proceedings. The Monitor shall deliver copies of all Opt-Out Notices received to counsel to the Applicants, the applicable Pension Plan Representative Counsel and counsel to the Independent Pension Administrator as soon as reasonably practicable

59. The Company believes that both Pension Plan Representative Counsel will contribute to overall cost savings and a streamlining of the Pension Surplus Proceedings by serving as the main points of contact between thousands of Represented Pension Plan Members, the Applicants, the Monitor and the Court.

I. Access to Pension Surplus Documents

60. It is contemplated that the Company and the Independent Pension Administrator will make documentation available to participants in the pre-mediation and mediation proceedings involving the Pension Surplus. Some participants are already subject to confidentiality arrangements with the Company. In order to facilitate sharing of documentation, the Company is seeking mediation confidentiality provisions in the Pension Plan Representative Counsel Order.

II. Fee Structure

61. Retainer agreements with Ursel Phillips have been finalized, with the approval of the Independent Pension Administrator. The Pension Plan Representative Counsel Order provides that Ursel Phillips shall be paid its reasonable and documented fees and disbursements, including reasonable and documented fees for such actuarial, financial and other advisors as Ursel Phillips

may retain as reasonably necessary in connection with its role as Pension Plan Representative Counsel, in accordance with the terms of its retainer letter. The Independent Pension Administrator is authorized to make interim payments to Ursel Phillips from the Pension Plan fund for the purposes of paying such reasonable and documented fees and disbursements. In the event of any disagreement with respect to such fees and disbursements, the matter may be remitted to this Court for determination.

62. The Pension Plan Representative Counsel Order provides that Koskie Minsky shall be paid its fees and disbursements, including costs for such actuarial, financial and other advisors as Koskie Minsky may retain as necessary in connection with its role as Pension Plan Representative Counsel, from any judgment, order or settlement pursuant to the terms of the retainer agreement between Koskie Minsky LLP and John Scott and James Common dated June 6, 2025 under the Dumai Uncertified Class Action Application. The retainer agreement and the fees requested thereunder shall be brought before the Court by Koskie Minsky for approval in accordance with sections 32 and 33 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6.

63. The Pension Plan Representative Counsel Order also contemplates the ability for Pension Plan Representative Counsel to retain actuarial, financial and other advisors as may be reasonably necessary to fulfill their mandates. Retainer agreements with the proposed Mediator will also be finalized with the approval of the Company and the Independent Pension Administrator. The Monitor will have oversight on all retainer agreements.

64. I understand that our counsel has had an opportunity to discuss the proposed expansion of Employee Representative Counsel's role and appointment of Dumai Representative Counsel, as well as the proposed forms of order with the Monitor, the Independent Pension Administrator and counsel to the secured lenders in advance of filing of these materials.

65. I swear this affidavit in support of the Applicants' motion for the foregoing relief and for no other improper purpose.

SWORN remotely via videoconference, by Thomas Obersteiner stated as being located in the City of New York, in the state of New York, before me at the City of Toronto, in the Province of Ontario, this 18th day of June, 2026, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely.

Signed by:

Brittney Ketwaroo

PA363D063530A42C

Commissioner for Taking Affidavits, etc.
Brittney Ketwaroo | LSO #89781K

Signed by:

Thomas Obersteiner

DBE9F9D9AE7144E

Thomas Obersteiner

EXHIBIT "A"
referred to in the Affidavit of
THOMAS OBERSTEINER
Sworn June 18, 2026

Signed by:

Brittney Ketwaroo

FA383D6B5B5A42C...

Commissioner for Taking Affidavits
Brittney Ketwaroo

Court File No. CV-25-00738613-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE MR.)
JUSTICE OSBORNE)
MONDAY, THE 5TH DAY
OF MAY, 2025

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
HUDSON'S BAY COMPANY ULC COMPAGNIE DE LA BAIE D'HUDSON SRI, HBC
CANADA PARENT HOLDINGS INC., HBC CANADA PARENT HOLDINGS 2 INC., HBC
BAY HOLDINGS I INC., HBC BAY HOLDINGS II ULC, THE BAY HOLDINGS ULC, HBC
CENTERPOINT GP INC., HBC YSS 1 LP INC., HBC YSS 2 LP INC., HBC HOLDINGS GP
INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC.**

EMPLOYEE REPRESENTATIVE COUNSEL ORDER

THIS MOTION, made by Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI ("**Hudson's Bay**"), HBC Canada Parent Holdings Inc., HBC Canada Parent Holdings 2 Inc., HBC Bay Holdings I Inc., HBC Bay Holdings II ULC, The Bay Holdings ULC, HBC Centerpoint GP Inc., HBC YSS 1 LP Inc., HBC YSS 2 LP Inc., HBC Holdings GP Inc., Snospmis Limited, 2472596 Ontario Inc., and 2472598 Ontario Inc. (collectively, the "**Applicants**") was heard on April 24, 2025 at 330 University Avenue, Toronto, Ontario and via videoconference.

ON READING the affidavit of Jennifer Bewley sworn April 17, 2025 (the "**Third Bewley Affidavit**"), the second report of Alvarez & Marsal Canada Inc. ("**A&M**"), dated April 22, 2025, (the "**Second Report**"), in its capacity as monitor of the Applicants (in such capacity, the "**Monitor**"), on hearing the submissions of counsel to the Applicants, counsel to the Monitor, and such other parties as listed on the Counsel Slip, with no one else appearing although duly served as appears from the affidavits of service of Brittney Ketwaroo sworn April 21, 2025 and April 24, 2025, and upon receiving the recommendation of the Independent Third Party dated May 5, 2025.

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Motion Record of the Applicants is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

DEFINED TERMS

2. **THIS COURT ORDERS** that capitalized terms used within this Order and not expressly defined herein shall have the meanings set forth in the Bewley Affidavits.

EMPLOYEE REPRESENTATIVE COUNSEL

3. **THIS COURT ORDERS** that Ursel Phillips Fellows Hopkinson LLP ("**Employee Representative Counsel**") is hereby appointed as employee representative counsel to represent the interests of the current and former employees with continuing entitlements from the Applicants or any of them as at the date of the Initial Order, and retirees of the Applicants, who are not represented by a union, or were not represented by a union at the time of their separation from employment (the "**Current and Former Employees**"), or any person claiming an interest under or on behalf of a current or former employee of the Applicants including beneficiaries and surviving spouses but excluding directors and officers of the Applicants (collectively, the "**Represented Employees**") in these CCAA proceedings, in any proceeding under the BIA or in any other proceeding respecting the insolvency of the Applicants which may be brought before this Court (collectively, the "**Insolvency Proceedings**"), with respect to:

- (a) Representing the Represented Employees in the Insolvency Proceedings;
- (b) Communicating with the Applicants, the Monitor and other stakeholders on behalf of the Represented Employees generally, and in respect of future motions and orders to be sought in the Insolvency Proceedings;
- (c) Advising the Represented Employees in respect of employment or other workplace matters arising within the Insolvency Proceedings;
- (d) Filing claims in any claims process that may be approved within the Insolvency proceedings;

- (e) Advising the Represented Employees in respect of matters involving their other post employment benefits entitlements;
- (f) Participating on behalf of the Represented Employees with the settlement or compromise of any rights, entitlements or claims of the Represented Employees; and
- (g) Participating in and assisting with, on behalf of the Represented Employees, claims filed under the Wage Earner Protection Program Act, if applicable; (collectively, the “**Purpose**”).

Which Purpose for greater certainty shall not include assisting with any entitlements of Current and Former Employees under the Pension Plans.

4. **THIS COURT ORDERS** that the Employee Representative Counsel shall be entitled but not required to commence the process of identifying up to -seven (7) Represented Employees to be nominated as Court-appointed representatives (hereinafter, both jointly and severally referred to as the “**Employee Committee**”) as soon as practicable following the date hereof. The Employee Committee shall, upon appointment, advise Employee Represented Counsel on behalf of all Represented Employees (excluding the Opt-Out Individuals (as hereinafter defined), if any in the Insolvency Proceedings, act in the overall best interests of the Represented Employees, and advise and where appropriate instruct Employee Representative Counsel, in each case, solely for the Purpose. Employee Representative Counsel may rely upon the advice, information and instructions received from the Employee Committee in carrying out its mandate without further communications with or instructions from the Represented Employees, except as may be recommended by Employee Representative Counsel or ordered by this Court.

5. **THIS COURT ORDERS** that, with the exception of Opt-Out Individuals, (a) the Employee Representative Counsel shall represent all Represented Employees in the Insolvency Proceedings; (b) the Represented Employees shall be bound by the actions of the Employee Representative Counsel in the Insolvency Proceedings; and (c) the Employee Representative Counsel shall be entitled, on the advice of the Employee Committee as appropriate, to advocate on behalf of the Represented Employees for the Purpose and to settle or compromise any rights, entitlements or claims of the Represented Employees.

6. **THIS COURT ORDERS** that the Applicants shall provide Employee Representative Counsel, the Employee Committee and their respective advisors, subject to confidentiality arrangements acceptable to the Applicants and the Monitor, without charge, the following information, documents and data (the “**Information**”) to only be used for the Purpose in the Insolvency Proceedings:

- (a) the names, last known addresses and last known telephone numbers and e-mail addresses (if any) of the Represented Employees (excluding Opt-Out Individuals, if any, who have opted out prior to delivery of the Information); and
- (b) upon request of Employee Representative Counsel, such documents and data as may be reasonably relevant to matters relating to the issues affecting the Represented Employees in the Insolvency Proceedings, and that, in providing all such Information, the Applicants are not required to obtain express consent from such Represented Employees authorizing disclosure of Information to Employee Representative Counsel for the Purpose and, further, in accordance with the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5. (Federal), the *Personal Information Protection Act*, S.B.C. 2003, c. 63 (British Columbia), the *Personal Information Protection Act*, S.A. 2003, c. P-6.5. (Alberta), and *An Act respecting the protection of personal information in the private sector*, R.S.Q., c. P-39.1. (Québec), this Order shall be sufficient to authorize the disclosure of the Information for the Purpose, without the knowledge or consent of the individual Represented Employees.

7. **THIS COURT ORDERS** that notice of the appointment of Employee Representative Counsel shall be provided by: (a) the Applicants delivering a letter on behalf of Employee Representative Counsel to the Represented Employees explaining the terms of such appointment; (b) the inclusion of the details of such appointment in the CCAA notice; and (c) the posting of notice of such appointment on the Monitor’s website, Hudson’s Bay’s internal website (thebay.com) and on Employee Representative Counsel’s website.

8. **THIS COURT ORDERS** that any individual Represented Employee who does not wish to be represented in the Insolvency Proceedings by the Employee Representative Counsel shall, within thirty (30) days of the date of the letter pursuant to paragraph 7 above, notify the Monitor, in writing that such Represented Employee is opting out of representation by

Employee Representative Counsel by delivering to the Monitor an opt-out notice in the form attached as Schedule "A" hereto (each an "**Opt-Out Notice**"), and shall thereafter not be bound by the actions of the Employee Representative Counsel and shall represent themselves or be represented by any counsel that such Represented Employee may retain exclusively at their own expense (any such Represented Employee that delivers an Opt-Out Notice in compliance with the terms hereof, an "**Opt-Out Individual**"). The Monitor shall deliver copies of all Opt-Out Notices received to counsel to the Applicants and Employee Representative Counsel as soon as reasonably practicable.

9. **THIS COURT ORDERS** that the Employee Representative Counsel shall be given notice of all motions in these Insolvency Proceedings and that it shall be entitled to represent those on whose behalf it is hereby appointed in all such proceedings.

10. **THIS COURT ORDERS** that, subject to the terms of the engagement letter between Hudson's Bay and Employee Representative Counsel and fee arrangements thereunder as agreed to by Hudson's Bay and Employee Representative Counsel or has have been ordered by this Court, the Employee Representative Counsel shall be paid its reasonable and documented fees and disbursements by the Applicants on a monthly basis, promptly upon rendering its accounts to the Applicants for fulfilling its mandate in accordance with this Order, and subject to such redactions to the invoices as are necessary to maintain solicitor-client privilege between Employee Representative Counsel and the Represented Employees. In the event of any disagreement with respect to such fees and disbursements, such disagreement may be remitted to this Court for determination.

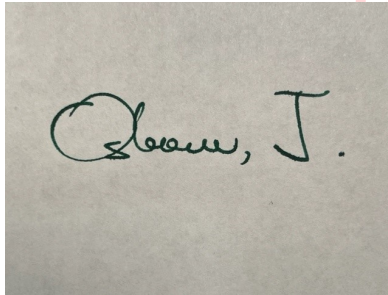
11. **THIS COURT ORDERS** that the Employee Representative Counsel shall be entitled to the benefit of the Administration Charge (as defined in the Amended and Restated Initial Order granted by this Court in these Insolvency proceedings on March 21, 2025), as security for its professional fees and disbursements incurred at its standard rates and charges, up to an aggregate maximum amount of \$100,000.

12. **THIS COURT ORDERS** that no action or proceeding may be commenced against Employee Representative Counsel or the Employee Committee in respect of the performance of their duties under this Order without leave of this court on seven (7) days notice to Employee Representative counsel, the Employee Committee, the Applicants and the Monitor.

13. **THIS COURT ORDERS** that Employee Representative Counsel is authorized to take all steps and do all acts necessary or desirable to carry out the terms of this Order, including dealing with any Court, regulatory body or other government ministry, department or agency, and to take all such steps as are necessary or incidental thereto. Employee Representative counsel and the Employee Committee shall have no liability as a result of their appointment or the fulfilment of their duties in carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on their part.

14. **THIS COURT ORDERS** that the Employee Representative Counsel and Employee Committee shall be at liberty and are authorized at any time to apply to this Honourable Court for advice and directions in the discharge or variation of their powers and duties.

15. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

A rectangular image showing a handwritten signature in black ink on a light-colored background. The signature is written in a cursive style and reads "Osborne, J.".

Digitally signed
by Osborne J.

Date:

2025.05.06

17:05:52 -04'00'

SCHEDULE "A"

FORM OF REPRESENTED EMPLOYEE OPT-OUT NOTICE

TO: Alvarez & Marsal Canada Inc., in its capacity as Court-Appointed Monitor of the Applicants
Royal Bank Plaza, South Tower
200 Bay Street, Suite 2900
PO Box 22
Toronto, ON M5J 2J1

Attention: Alvarez & Marsal
Email: HudsonsBay@alvarezandmarsal.com

I hereby provide written notice that I do not wish to be represented by Ursel Phillips Fellows Hopkinson LLP, employee representative counsel (the "**Employee Representative Counsel**") for the Represented Employees of the Applicants in their proceedings under the *Companies' Creditors Arrangement Act* (the "**CCAA Proceedings**"). I understand that by opting out of this representation, if I wish to take part in the CCAA Proceedings, then I would need to do so as an independent party. I understand that as an independent party to these CCAA Proceedings, I would then be responsible for retaining my own legal counsel should I choose to do so, and that I would be personally liable for the costs of my own legal representation.

I understand that a copy of this Opt-Out Form will be provided to the Employee Representative Counsel and to the Applicants

Witness

Signature

Name [please print]: _____

Address _____

Telephone _____

Note: To opt out, this form must be completed and received at the above address on or before _____, 2025.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

EMPLOYEE REPRESENTATIVE COUNSEL ORDER

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Lawyers for the Applicants

EXHIBIT "B"
referred to in the Affidavit of
THOMAS OBERSTEINER
Sworn June 18, 2026

Signed by:

Brittney Ketwaroo

EA383D685B5A42C...

Commissioner for Taking Affidavits
Brittney Ketwaroo



Financial Services Regulatory
Authority of Ontario



Ontario



Autorité ontarienne de réglementation
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VIA E-MAIL

September 8, 2025

Tejash Modi
Telus Health Toronto, ON M5J 2V9

Tejash.modi@telushealth.com

and

Allyson Marta
Bennett Jones Toronto, ON M5X 1A4

martaa@bennettjones.com

and

Natasha VandenHoven
Stikeman Elliott Toronto, ON M5L 1B9

NVandenhoven@stikeman.com

**Re: Hudson's Bay Company Pension Plan
Registration Number 0291419**

Enclosed, please find the Notice of Intended Decision (NOID) with respect to the above noted pension plan.

Yours truly,

Mitzi D'Souza
Administrative Assistant, Pensions

Enclosure

Copy: Michael Palozzi, Financial Services Regulatory Authority of Ontario



Financial Services Regulatory
Authority of Ontario



Ontario



Autorité ontarienne de réglementation
des services financiers

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the “Act”), in particular sections 69 and 89.

AND IN THE MATTER OF the **Hudson's Bay Company Pension Plan**; Registration Number **0291419** (the “Plan”).

NOTICE OF INTENDED DECISION

TO: TELUS Health
25 York St, 29th Floor
Toronto, ON, M5J 2V5

Attention: Tejash Modi
Partner
Tejash.modi@telushealth.com

Appointed Administrator & Applicant

AND TO: Bennett Jones
100 King St W Suite 3400,
Toronto, ON M5X 1A4

Attention: Allyson Marta
martaa@bennettjones.com

Counsel for CCAA Monitor

AND TO: Stikeman Elliott
199 Bay Street
Suite 5300, Commerce Court West
Toronto, Ontario M5L 1B9

Attention: Natasha VandenHoven
NVandenhoven@stikeman.com

Counsel for Employer

TAKE NOTICE THAT pursuant to section 69 of the Act, and by delegated authority from the Chief Executive Officer of the Financial Services Regulatory Authority of Ontario (the “Chief Executive Officer”), the Head, Pension Strategic Initiatives, intends to make an order to wind up the Plan effective September 1, 2025. Details of this intended decision are described below.

SI VOUS DÉSIREZ RECEVOIR CET AVIS EN FRANÇAIS, veuillez nous envoyer votre demande par courriel immédiatement à: contactcentre@fsrao.ca.

YOU ARE ENTITLED TO A HEARING BY THE FINANCIAL SERVICES TRIBUNAL (THE “TRIBUNAL”) PURSUANT TO SUBSECTION 89(6) OF THE ACT. A hearing by the Tribunal about this Notice of Intended Decision may be requested by completing the enclosed Request for Hearing Form (Form 1) and delivering it to the Tribunal within thirty (30) days after this Notice of Intended Decision is served on you. The Request for Hearing Form (Form 1) must be mailed, delivered, faxed or emailed to:

Address: Financial Services Tribunal
25 Sheppard Avenue West
7th Floor, Suite 100
Toronto ON M2N 6S6

Attention: Registrar

Fax: 416-226-7750

Email: contact@fstontario.ca

TAKE NOTICE THAT if you do not deliver a written request for a hearing to the Tribunal within thirty (30) days after this Notice of Intended Decision is served on you, an order will be issued as described in this Notice of Intended Decision.

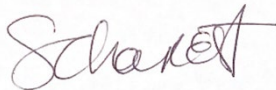
For additional copies of the Request for Hearing Form (Form 1), visit the Tribunal’s website at www.fstontario.ca.

The hearing before the Tribunal will proceed in accordance with the *Rules of Practice and Procedure for Proceedings before the Financial Services Tribunal* (“Rules”) made under the authority of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. The Rules are available at the website of the Tribunal: www.fstontario.ca. Alternatively, a copy can be obtained by telephoning the Registrar of the Tribunal at (416) 590-7294 or toll free at 1-800-668-0128 extension 7294.

REASONS FOR INTENDED DECISION

1. Hudson's Bay Company ULC (the "Company") sponsored the Plan with an effective date of July 1, 1961.
2. The Plan is a combination defined contribution/defined benefit plan.
3. On March 7, 2025, the Company commenced proceedings under the Companies' Creditors Arrangement Act ("CCAA"). Alvaraz & Marsal Canada Inc. was appointed as the court-appointed monitor of the Company in the CCAA proceedings (the "CCAA Monitor").
4. Pursuant to subsection 8(1.1) of the Act, the Insolvency Coordinator, by delegated authority from the Chief Executive Officer, appointed TELUS Health to act as the administrator (the "Administrator") of the Plan effective April 3, 2025.
5. Based on a report by the CCAA Monitor and communications from the Company, approximately 99% of employees will have been terminated from their employment by June 30, 2025.
6. Pursuant to section 69(1)(d) of the PBA, the Chief Executive Officer can wind up a pension plan if "all or substantially all of the members of the pension plan cease to be employed by the employer".
7. Although an effective wind-up date of July 1, 2025, could be considered since, at this date, the requirements of section 69(1)(d) would have been met, the Company informed the Administrator that it has over 50 employees as of July 9, 2025, many of whom will continue to be employed until August 31, 2025.
8. Pursuant to section 73(1) of the PBA, for the purpose of determining pension benefits, a member's employment is deemed to have terminated on the wind-up date (and thus a member cannot accrue pension benefits after the wind-up date).
9. The Administrator has recommended that all HBC Plan members who terminated employment between March 7, 2025, and August 31, 2025, should be included in the wind-up.
10. Therefore, the Chief Executive Officer has grounds pursuant to subsection 69(1)d to order a wind up of the Plan as substantially all of the employees are no longer employed with the Company.
11. Subsection 69(2) of the Act provides that the wind-up order must specify the effective date of the wind up. The Administrator proposes in the Wind-up Order Request to wind up the Plan effective September 1, 2025. Therefore, The Chief Executive Officer proposes a wind-up date of September 1, 2025.
12. Such further and other reasons as may come to my attention.

DATED at Toronto, Ontario, September 8, 2025.



Sylvie Charest
Head, Pension Strategic Initiatives
By delegated authority from the Chief Executive Officer



Financial Services Regulatory
Authority of Ontario



Ontario



Autorité ontarienne de réglementation
des services financiers

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VIA E-MAIL

October 20, 2025

Tejash Modi
Telus Health Toronto, ON M5J 2V9

Tejash.modi@telushealth.com

and

Allyson Marta
Bennett Jones Toronto, ON M5X 1A4

martaa@bennettjones.com

and

Natasha VandenHoven
Stikeman Elliott Toronto, ON M5L 1B9

NVandenhoven@stikeman.com

**Re: Hudson's Bay Company Pension Plan
Registration Number 0291419**

Enclosed, please find the Order with respect to the above noted pension plan.

Yours truly,

Mitzi D'Souza
Administrative Assistant, Pensions

Enclosure

Copy: Michael Palozzi, Financial Services Regulatory Authority of Ontario



Financial Services Regulatory
Authority of Ontario



Autorité ontarienne de réglementation
des services financiers

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the “PBA”), in particular sections 69 and 89;

AND IN THE MATTER OF the **Hudson's Bay Company Pension Plan**, Registration Number **0291419** (the “Plan”).

ORDER

On September 8, 2025, pursuant to section 89 of the PBA, and by delegated authority from the Chief Executive Officer of the Financial Services Regulatory Authority of Ontario (the “Chief Executive Officer”), the Head, Pension Strategic Initiatives (the “Head”) issued a Notice of Intended Decision to make an order to wind up the Plan effective September 1, 2025 under section 69 of the PBA.

The Notice of Intended Decision was delivered to the appointed administrator, Telus Health, the counsel for the CCAA Monitor, Bennett Jones, and counsel for the Employer, Stikeman Elliott on September 8, 2025. Section 89 of the PBA provides that any person on whom a Notice of Intended Decision is served has thirty (30) days after the Notice of Intended Decision is served to request a hearing by the Financial Services Tribunal (the “Tribunal”).

On October 16, 2025, the Registrar of the Tribunal confirmed that the people on whom the Notice of Intended Decision was served did not request a hearing by the Tribunal in accordance with section 89 of the PBA. Therefore, pursuant to section 69 of the PBA, the Head makes the following decision.

ORDER

An Order to wind up the Plan is hereby issued effective September 1, 2025, for the reasons set out in the Notice of Intended Decision.

DATED at Toronto, Ontario, October 20, 2025.

Sylvie Charest
Head, Pension Strategic Initiatives
By delegated authority from the Chief Executive Officer

Si vous désirez recevoir cet avis en français, veuillez nous envoyer votre demande par courriel immédiatement à : contactcentre@fsrao.ca.

EXHIBIT "C"
referred to in the Affidavit of
THOMAS OBERSTEINER
Sworn June 18, 2026

Signed by:

Brittney Ketwaroo

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Commissioner for Taking Affidavits
Brittney Ketwaroo

CITATION: Sutherland v. Hudson's Bay Company, 2011 ONCA 606

DATE: 20110922

DOCKET: C47636

COURT OF APPEAL FOR ONTARIO

Gillese, MacFarland and Rouleau JJ.A.

BETWEEN

Ronald Sutherland and John Scott on their own behalf and on behalf of the current members, retirees and other beneficiaries of the defined benefit component of the Dumai Pension Plan, CCRA Registration Number 0358572 (formerly, the Simpsons, Limited Supplementary Pension Plan) who were members of the Simpsons, Limited Supplementary Pension Plan as of January 1, 1988

Plaintiffs (Respondents by way of cross-appeal)

and

Hudson's Bay Company, Royal Trust Corporation, and Investors Group Trust Co. Ltd., and Pamela Bhikhari, John English, Gerald V. Garossino, Edward E. Shier, Helen Frizzel, Gale Ritchie and Angela Hosmar

Defendants (Appellants by way of cross-appeal)

Mark Zigler and Anthony Guindon, for the appellants

Jeff W. Galway and Kathryn Bush, for the Hudson's Bay Company and Investors Group Trust Co. Ltd.

Warren S. Rapoport, for John English, Gerald V. Garossino and Edward E. Shier

Laura C. Young, for Pamela Bhikhari and Gale Ritchie

Heard: March 31, 2011

On appeal from the judgment of Justice Herman J.W. Siegel of the Superior Court of

On appeal from the judgment of Justice Herman J.W. Siegel of the Superior Court of Justice, dated July 31, 2007, with reasons reported at 2007 CanLII 30293 (Ont. S.C.).

Gillese J.A.:

[1] This cross-appeal raises a significant question. Has the law governing ownership of surplus pension funds been changed by *Burke v. Hudson's Bay Co.*, [2010] 2 S.C.R. 273 (*Burke*), a recent Supreme Court of Canada decision?

[2] Rather than changing the law, in my view, *Burke* affirms it. Consequently, as I explain below, I would dismiss the cross-appeal.

BACKGROUND IN BRIEF

[3] Effective December 28, 1971, Simpsons Limited (Simpsons) established a defined benefit pension plan for its employees (the Simpsons pension plan). Initially, only Simpsons made contributions to the Simpsons pension plan. However, starting in 1976, Simpsons' employees also began contributing to it.

[4] The Simpsons pension plan was amended a number of times. It ultimately became the defined benefit component of the Dumai Pension Plan. For convenience, when referring to the pension plan from inception as the Simpsons pension plan up to and including its current form as the defined benefit component of the Dumai Pension Plan, I will refer to it as the Plan.

[5] The original Simpsons pension plan text was adopted in 1971 (the original Plan Text). It was subsequently amended and restated a number of times.¹ The relevant Plan provisions are reproduced in the following section of these reasons.

[6] The assets of the Simpsons pension plan were held in a trust fund. The trust was established and originally governed by an agreement between Simpsons and Canada Permanent Trust Company dated December 28, 1971 (the original Trust Agreement). The original Trust Agreement went through a number of changes.² The relevant provisions of the trust agreements are also set out in the following section.

[7] In 1979, the Hudson's Bay Company (HBC or the Company) acquired Simpsons and took over administration of the Simpsons pension plan.

[8] On January 1, 1988, the Simpsons pension plan was closed to new members.

[9] Zellers Inc. and Kmart Canada Co. are wholly owned HBC subsidiaries.

[10] In 1994, HBC re-opened the Simpsons pension plan and added a defined contribution component to it. It made approximately 8,000 Zellers employees, members of the defined contribution component of the Simpsons pension plan, on a "go-forward" basis. It was at this time that the name of the Simpsons pension plan was changed to the Dumai Pension Plan.

¹ The original Plan Text was amended and/or restated in 1976, 1988, 1994, 2000 and 2002.

² The original Trust Agreement was replaced with a trust agreement with Investors Group Trust Co. Ltd. in 1984. In 1998, Royal Trust Corporation of Canada replaced Investors Group as trustee and a new trust agreement was entered into effective November 1, 1998.

[11] In 1998, HBC further amended the Plan to introduce Kmart employees as members of the Plan. They joined the Plan on the same basis as the Zellers employees had joined the Plan.

[12] Between January 1, 1994, and December 31, 2006, approximately \$111 million of surplus assets in the Plan was applied to pay employer annual defined contribution costs for Zellers and Kmart employees.

[13] The plaintiffs in this class action are retirees who worked for Simpsons and who are members of the Simpsons pension plan. They represent members, retirees and beneficiaries of the Simpsons pension plan as of January 1, 1988.

[14] In this action, the plaintiffs alleged, among other things, that HBC improperly used surplus that had accrued in the trust fund for the Simpsons pension plan to pay for the employer contributions to the defined contribution pensions of Zellers and Kmart employees.

[15] By order dated April 28, 2005, this action was certified as a class proceeding.

[16] In early 2007, Siegel J. presided over an eight-day common issues trial.

[17] In comprehensive reasons for judgment dated July 31, 2007, the trial judge ruled, among other things, that: the Plan assets are impressed with a trust in favour of the Plan members; HBC is not a beneficiary of the trust; and, on Plan termination, the Plan members are entitled to any surplus assets in the trust fund.

[18] The plaintiffs (hereafter referred to as the respondents) appealed and HBC cross-appealed. The appeal was abandoned, leaving only the cross-appeal to be decided. In it, HBC – relying on *Burke* – challenges the trial judge’s conclusions that it (HBC) is neither a beneficiary of the Plan nor entitled to any surplus assets remaining on Plan termination.

THE RELEVANT TRUST AND PLAN PROVISIONS

The Original Trust Agreement

[19] Four provisions in the original Trust Agreement are relevant to this cross-appeal: articles 1, 2, 11 and 12.

[20] Article 1 annexed the Plan text and made it part of the original Trust Agreement.

It reads as follows:

ARTICLE 1. The Plan as annexed and exhibited hereto, and as amended from time to time, shall form part of this Agreement to the same extent as if all of its provisions were fully set forth herein and the definitions and meanings of words and terms as used in the Plan shall have the same meanings herein unless the context indicates otherwise.

[21] Article 2(a) established the trust fund and, by means of a clause at the end of that article, stipulated that the trust fund was to be used for the exclusive benefit of Plan members and their beneficiaries. The relevant parts of art. 2 read as follows:

ARTICLE 2. (a) The Company by this Agreement establishes with the Trustee a fund (herein called the “Trust Fund”) comprising all cash and property acceptable to the Trustee now and hereafter received by it in trust for the purposes of the Plan, together with all proceeds, investments, reinvestments and income and profits arising therefrom less

all payments, deductions and withdrawals therefrom authorized hereunder.

...

(c) The Trustee is hereby authorized to pay out of the Trust Fund

(i) all brokerage fees, transfer taxes and other expenses incurred in connection with the sale and purchase of investments;

(ii) all property, income and other taxes of any kind at any time levied or assessed under any present or future law upon, or with respect to, the Trust Fund or any property included in the Trust Fund;

(iii) amounts on account of income tax that may be payable by persons receiving payment from the Trust Fund;

(iv) all other expenses of administering the Trust Fund including reasonable compensation for its services as may from time to time be agreed upon to the extent that such expenses have not been met or provided for by the Company.

ALWAYS PROVIDED that no part of the Trust Fund may be used for, or diverted to any purposes other than those connected with the exclusive benefit of members of the Plan and their beneficiaries.

[22] Article 11 gave the Company the right to amend or terminate the original Trust Agreement, so long as any change or termination did not permit or result in any part of the trust fund being used other than for the exclusive benefit of Plan members.

ARTICLE 11. The Company shall have the right at any time or by or pursuant to a resolution of its Board of Directors to

change or modify by amendment any of the provisions of, and to terminate, this Agreement provided it shall first have given written notice of such amendment or termination to the Trustee and provided that –

(i) if any such amendment appears to the Trustee to affect the rights, duties or responsibilities of the Trustee, the Trustee may assent to such amendment by executing an agreement supplementary hereto or, failing to assent, the Trustee shall resign as provided in ARTICLE 9 hereof.

(ii) such change, modification or termination shall not authorize or permit or result in any part of the corpus or income of the Trust Fund being used for or diverted to purposes other than for the benefit exclusively of members of the Plan and their beneficiaries and for the payment of fees, expenses, taxes and other assessments as provided in ARTICLE 2 hereof unless with the approval of the Minister of National Revenue and such other governmental authority having governmental jurisdiction over the Plan or Fund.

[23] Article 12 required the trustee, on Plan termination, to dispose of the trust fund as directed by the Company and in accordance with the Plan provisions.

ARTICLE 12. In the event of the discontinuance of the Plan the Trustee shall dispose of the Trust Fund as directed in writing by the Company in accordance with the provisions of the Plan.

The Original Plan Text

[24] Section 13.01 of the original Plan Text contemplates the establishment of the trust fund and incorporates the trust agreement into the Plan. It reads as follows:

13.01 The Company will establish a Trust Fund for the purposes of the Plan by the execution of a Trust Agreement with individual Trustees at least three of whom shall be residents of Canada and one of whom is independent of the Company, or with a company or companies resident in

Canada and licenced to carry on a trust business in the Province of Ontario. The Company may, subject to the terms of such Trust Agreement, remove or replace any Trustee or Trustees at its discretion from time to time. A copy of the Plan will be attached to such Trust Agreement which shall thereby be made part of the Plan.

[25] Section 16.01 of the original Plan Text reserves to the Company the right to amend, suspend or discontinue the Plan. Section 16.02 provides that amendment or suspension shall not operate to reduce accrued benefits and stipulates that if the Plan is terminated, no part of the Plan assets can revert to the Company until all pension and benefits have been provided to Plan beneficiaries.

16.01 While it is the intention of the Company to maintain the Plan in force indefinitely, the right to amend, suspend or discontinue the Plan, either in whole or in part, is necessarily reserved by the Company in the event that future conditions, in the opinion of the Company, warrant such action, which conditions may include, without limiting the generality of the foregoing, changes in pensions, profit sharing plans, retirement income benefits or similar benefits provided by the Company or by or pursuant to any law, regulation or other governmental authority.

16.02 Amendment to or suspension of all or part of the Plan shall not operate to reduce any benefits which have accrued under the Plan prior to the date of such amendment or suspensions, as the case may be, to Members of the Plan. In the event that the Plan is terminated, no part of the assets of the Plan shall revert to the benefit of the Company until provision has been made for all pensions and other benefits in respect of service up to the date of such termination to Members of the Plan and for all benefits to former employees and pensioners.

Subsequent Trust and Plan Documents

[26] Later Plan restatements provided that on Plan termination and wind up, surplus assets are to go to the Company. See, for example, s. 14.04 of the 1988 Plan restatement, which reads as follows:

14.04 Wind-Up Surplus

If after provisions for all pension benefits and other benefits payable on the wind-up in whole or in part of the Plan, surplus assets remain in the Pension Fund, such surplus assets shall be refunded to the Company, provided that the Company complies with the requirements of the Act and the Income Tax Act (Canada).

[27] See also s. 15.04 of the 1994 Plan text and s. 15.05 of the 2000 Plan text, to the same effect.

[28] The current Plan text took effect on January 1, 2002. Section 16.05 of the 2002 Plan text also states that surplus is to revert to the Company. It reads as follows:

16.05 Wind-Up Surplus

If, after provision for the satisfaction of all liabilities under the Plan has been made, there should remain surplus assets in the Pension Fund, such assets shall revert to the Company, or shall be used as the Company may direct, subject to requirements of law. Where required by the Act, the consent of the appropriate regulatory authority will be obtained prior to the refund of any surplus assets to the Company.

[29] Article 8.3 of the 1998 Trust Agreement contains similar language. It reads as follows:

8.3 Surplus on Termination

In the event of the termination of the Plan, in whole or in part, or the termination of this Trust Agreement, any assets remaining in the Trust Fund, after the satisfaction of all liabilities under the Plan and subject to any regulatory or judicial approvals or orders required under applicable laws, shall remain in the Plan or revert to the Company, as determined by the Company.

THE ISSUE

[30] A single issue must be decided on this cross appeal: did the trial judge err in concluding that HBC is not a beneficiary of the trust fund and not entitled to surplus assets in the trust fund on Plan termination?

A Preliminary Matter

[31] Before turning to the merits of this matter, I will briefly address the respondents' argument that HBC is estopped from seeking a declaration that it is a beneficiary of the trust fund and entitled to surplus on Plan termination.

[32] The respondents point to HBC's factum at trial to show that below, HBC argued that there was no need to decide the issue of surplus ownership on Plan termination. They say that HBC is using the cross-appeal to seek such a declaration for the first time and contend that it ought not to be permitted to change its position on cross-appeal.

[33] I reject this submission for two reasons.

[34] First, it is important to recognize that this is not a situation in which HBC is attempting to raise a new issue on appeal. The question of whether HBC was a

beneficiary of the trust was squarely in play at trial. In fact, the first certified common issue at trial was whether the Plan assets were impressed with a trust and, if so, in favour of which beneficiaries. In deciding this issue, the trial judge expressly considered whether HBC was a beneficiary of the trust fund. Furthermore, HBC's position at trial, albeit in the alternative, was that it was entitled to surplus on Plan termination. The trial judge makes this point at para. 134 of his reasons, in which he recites HBC's position on the first common issue as consisting of two elements: that it was unnecessary to determine the matter but, in any event, that it (HBC) is entitled to surplus on Plan termination.

[35] Second, and in any event, it would be improper to permit this submission to succeed at this point in the proceeding. By endorsement dated August 6, 2008 (the Decision), Juriansz J.A. (in chambers) granted HBC an extension of time in which to file its notice of cross-appeal. The respondents did not seek to have the Decision reviewed.

[36] In granting the extension, Juriansz J.A. noted that this is an evolving area of law and the interests of justice warrant having the issue raised on the cross-appeal decided by this court. That is, the Decision gave HBC an extension of time so that it could pursue the cross-appeal and have the issue it raises decided on the merits. If the court were to accede to the respondents' submission, the result would be that it would refuse to decide the cross-appeal on its merits.

[37] Consequently, in my view, the respondents' submission amounts to a collateral attack on the Decision. Court orders are to be treated as binding unless they are set aside on appeal or lawfully quashed: see *R. v. Wilson*, [1983] 2 S.C.R. 594, at pp. 599-600. As it would be improper to permit the Decision to be attacked collaterally, the cross-appeal should be decided on its merits.

THE PARTIES' POSITIONS

HBC's Position

[38] HBC's submission is based largely on the Supreme Court of Canada's decision in *Burke*. To avoid confusion, recall that HBC was the respondent in the *Burke* case.

[39] In *Burke*, the Supreme Court held that the employees had no equitable interest in surplus on plan termination and, therefore, no equitable interest in the actuarial surplus while the pension plan was ongoing. Based on this determination, HBC says that *Burke* establishes that it (HBC) is entitled to any surplus assets that remain on the termination and wind up of the pension plan. HBC contends that the language in the Plan documents in the present case is, in all material respects, identical to that in *Burke*. Therefore, HBC submits, just as it was entitled to surplus in *Burke*, so too it is entitled to surplus in the present case.

[40] In furtherance of this general submission, HBC alleges that the trial judge erred in three specific ways.

[41] First, HBC submits that the trial judge erred in concluding that the original Trust Agreement required that any surplus on Plan termination was to be paid to Plan members.

[42] Second, HBC argues that the trial judge erred in failing to find that the surplus reversion language in s. 16.02 of the original Plan Text “trumped” the general language in arts. 2 and 11(ii) of the original Trust Agreement. HBC says that when the original Plan Text and the original Trust Agreement are read together, it is clear that the original Plan Text was intended to be the dominant document. Hence, the argument runs, s. 16.02 of the original Plan Text “trumps” any competing language in the original Trust Agreement. Further, HBC says, the trial judge misread art. 11(ii) of the original Trust Agreement by erroneously equating the termination of the original Trust Agreement with the termination of the Plan. The original Trust Agreement could be terminated (and was in 1984) without terminating the Plan by the decision to appoint a new trustee or to use a different funding vehicle to hold the Plan assets. When the original Trust Agreement – but not the Plan or the fund – was terminated, art. 11(ii) applied. If, however, the Plan as a whole had been terminated, the more specific terms of art. 12 would have been applicable.

[43] Third, HBC contends, the trial judge erred by negating the terms of art. 12 of the original Trust Agreement and s. 16.02 of the original Plan Text, which was incorporated by reference into the original Trust Agreement. This argument runs as follows. When the original Trust Agreement is read in its entirety, including the terms incorporated by reference from the original Plan Text, it is apparent that the exclusive benefit language in

arts. 2 and 11 of the original Trust Agreement was intended to apply only to the use of the trust fund in the ongoing Plan, not to the use of the trust fund on Plan termination. The use of funds on Plan termination was specifically dealt with in art. 12 of the original Trust Agreement and in terms of the Plan text incorporated by reference into it. Those terms permitted HBC to receive any surplus in the Plan, if and when it was terminated.

[44] In conclusion, HBC submits, on a proper reading of the original Plan documents, the Company was entitled to surplus from the outset, no issue arises as to the validity of the various amendments and there was no purported revocation of trust.

The Respondents' Position

[45] The respondents submit that the trial judge carefully analyzed the relevant plan and trust documentation, using the framework prescribed by the Supreme Court of Canada in *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (*Schmidt*). They say that the trial judge correctly allowed trust law principles to prevail in the face of conflicting contractual provisions. Finally, they say, *Burke* is readily distinguishable from the present case, based on differences in the wording of the pension plan documents.

ANALYSIS

[46] *Schmidt* was the first Supreme Court of Canada decision on entitlement to surplus monies in a pension fund on plan termination. It laid down the foundational principles

through which courts are to determine the question of surplus ownership. Consequently, a careful examination of *Schmidt* is the starting point for deciding this cross-appeal.

[47] After considering *Schmidt*, I will apply its principles to the present case. In the course of that analysis, I will deal with the errors that HBC submits the trial judge made when interpreting the Plan documents. I will conclude by showing how the Plan documents in the present case are materially different from those in *Burke*.

Schmidt

[48] Stearns-Roger Canada Ltd. (Stearns) and Catalytic Enterprises Ltd. (Catalytic) merged and eventually became Air Products Canada Ltd. (Air Products). Both Stearns and Catalytic had defined benefit pension plans for their employees, and both plans were in surplus. The pension plans and funds were amalgamated and evolved into two virtually identical Air Products pension plans: one for employees of the Construction Division and one for members of senior management. The employees' pension plan (the Plan) was the subject of the appeal to the Supreme Court. The Plan documentation said that surplus would revert to the Company after payment of all benefits.

[49] Following the sale of most of Air Products' assets, the Plan was terminated. A substantial surplus remained after all benefits had been paid. Both Air Products and the employees sought a declaration of entitlement to the surplus. A majority of the Supreme Court held that Air Products was entitled to surplus traceable to the Stearns plan but that the employees were entitled to surplus traceable to the Catalytic fund.

[50] At paras. 90-93 of *Schmidt*, Cory J., writing for the majority, sets out the steps that courts are to use when deciding the question of surplus ownership of pension plans. Those steps can be summarized as follows.

1. Begin with a careful analysis of the pension plan and the funding structures created under it. Using ordinary trust law principles, determine whether the pension fund is impressed with a trust.
2. If the pension fund, or any part of it, is not subject to a trust, any issues relating to outstanding pension benefits or to surplus entitlement must be resolved by applying contractual interpretation principles to the pension plan.
3. If the fund is impressed with a trust, it is governed by equity and, to the extent that equitable principles conflict with plan provisions, equity must prevail.
4. The trust will generally extend to surplus but an employer may explicitly limit the operation of the trust so that it does not so apply.
5. The employer, as settlor of the trust, may reserve a power to revoke the trust. To be effective, that power must be clearly reserved at the time the trust is created. A power to revoke the trust or any part of it cannot be implied from a general, unlimited power of amendment.

6. Surplus funds on plan termination and wind up may be subject to a resulting trust. Before a resulting trust can arise, it must be clear that all of the objectives of the trust have been fully satisfied. Even when that is done, the employer cannot claim the benefit of a resulting trust if the terms of the pension plan demonstrate an intention to part outright with all money contributed to the pension fund. In contributory plans, it is not only the employer's but also the employees' intentions that must be considered – both are settlors of the trust.

[51] On behalf of the majority, Cory J. explained why, following these steps, he had concluded that ownership of the surplus attributable to the Catalytic plan belonged to the employees.

[52] The Catalytic plan and trust agreement established a trust for the benefit of a defined group of persons (paras. 97-99). The trust had never been terminated and so continued to exist (para. 100). Air Products could only claim the surplus by means of a resulting trust or according to the terms of the trust itself (para. 102). No resulting trust could arise because the purposes of the trust were not fully satisfied by the payment of all defined benefits. One of the objects of the trust was to use any money in the trust fund for the benefit of the employees (para. 102). This objective could be implied from the “exclusive benefit” and “non-diversion” clauses contained in the original trust agreement (para. 103). The trust objects could never be exhausted so long as some money remained in the fund and some eligible employees could be found (para. 105).

[53] Therefore, Air Products could be entitled to the surplus only under the terms of the trust (para. 106). The validity of the amendments to the trust which purported to give surplus to Air Products depended on the terms of the original trust agreement (para. 108).

The original trust agreement contained the following provision:

ARTICLE V

MODIFICATION AND TERMINATION

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

[54] In art. V, Air Products reserved to itself a general amending power, subject to the provisos that no amendment could reduce accrued benefits or allow the trust fund to be used in any way other than for the employees' exclusive benefit. However, Air Products had not expressly reserved the power to revoke the trust. Such a power cannot be implied under the broad general amendment power (para.109).

[55] Therefore, the amendments purporting to give Air Products the right to surplus on termination were invalid. They represented attempts to partially revoke the original trust made in favour of the employees (para. 111).

[56] Applying these same steps, Cory J. explained why Air Products was entitled to the surplus attributable to the Stearns plan. The funds for the Stearns plan were not subject to a trust. Its funding vehicle was a group annuity policy with the Mutual Life Assurance Company. Furthermore, all relevant versions of the Stearns plan gave the employer discretion over distribution of surplus on plan termination.

The Schmidt Approach Applied

[57] *Schmidt* dictates that the first step in determining surplus entitlement is a careful historical review of the Plan documentation. It is important to start with the originating documents because, as we see from *Schmidt* itself, plan and trust amendments may not be valid.

[58] It is readily apparent that the pension fund in the current case is impressed with a trust – see art. 2 of the original Trust Agreement, which establishes the trust fund, and s. 13.01 of the original Plan Text, in which the Company undertakes to establish a trust fund for the purposes of the Plan. Accordingly, the second step in *Schmidt* does not apply.

[59] As the pension fund is impressed with a trust, the third step applies. Thus, the pension fund is governed by equity and, to the extent that equitable principles conflict with plan provisions, equity must prevail.

[60] The fourth step in *Schmidt* requires the court to determine whether the employer explicitly limited the operation of the trust so that it does not apply to surplus. Again, it is

abundantly clear in the present case that there is no such limitation: the trust explicitly extends to the surplus. Article 2 of the original Trust Agreement provides that the trust fund is comprised of “all cash and property ... now and hereafter received by [the trustee] in trust for the purposes of the Plan, together with all ... income and profits arising therefrom”.

[61] The fifth step directs the court to determine whether the employer reserved a power of revocation at the time the trust was created. Only an express power of revocation is sufficient. In this case, no such power of revocation was reserved to the Company. And, as *Schmidt* makes clear, the power of revocation cannot be implied from the general power of amendment in art. 11.

[62] Because of the significance of art. 11 of the original Trust Agreement to the following analysis, it is set out again now.

ARTICLE 11. The Company shall have the right at any time or by or pursuant to a resolution of its Board of Directors **to change or modify** by amendment any of the provisions of, and to terminate, **this Agreement** provided it shall first have given written notice of such amendment or termination to the Trustee and **provided that** –

(i) if any such amendment appears to the Trustee to affect the rights, duties or responsibilities of the Trustee, the Trustee may assent to such amendment by executing an agreement supplementary hereto or, failing to assent, the Trustee shall resign as provided in ARTICLE 9 hereof.

(ii) **such change, modification or termination shall not authorize or permit or result in any part of the corpus or income of the Trust Fund being used for or diverted to purposes other than for the benefit exclusively of**

members of the Plan and their beneficiaries and for the payment of fees, expenses, taxes and other assessments as provided in ARTICLE 2 hereof unless with the approval of the Minister of National Revenue and such other governmental authority having governmental jurisdiction over the Plan or Fund. [Emphasis added.]

[63] Given that there is no express power of revocation, just as in the case of the Catalytic plan in *Schmidt*, HBC can claim the surplus on termination only if the terms of the trust so provide. Do they? To answer that, we must determine the objectives of the trust (the sixth step in *Schmidt*).

[64] The emphasized words in art. 11 of the original Trust Agreement, above, clearly demonstrate the Company's intention to establish an irrevocable trust for the exclusive benefit of Plan members and their beneficiaries.

[65] Article 2 of the original Trust Agreement reinforces this as it reflects the Company's intention to part outright with all money contributed to the pension fund. It will be recalled that the salient parts of art. 2 read as follows:

ARTICLE 2. (a) The Company by this Agreement establishes with the Trustee a fund (herein called the "Trust Fund") comprising all cash and property acceptable to the Trustee now and hereafter received by it in trust for the purposes of the Plan, together with all proceeds, investments, reinvestments and income and profits arising therefrom less all payments, deductions and withdrawals therefrom authorized hereunder.

...

ALWAYS PROVIDED that no part of the Trust Fund may be used for, or diverted to any purposes other than those

connected with the exclusive benefit of members of the Plan and their beneficiaries.

[66] Therefore, just as in the case of the Catalytic plan, amendments to the Plan documents (texts and trust agreements) that purport to permit surplus to revert to the Company on Plan termination are invalid.

[67] The foregoing analysis disposes of the first and third alleged errors by the trial judge of which HBC complains. It will be recalled that the first alleged error was that the trial judge incorrectly concluded that the original Trust Agreement required that any surplus on Plan termination is to be paid to the Plan members. The third alleged error was that arts. 2 and 11 were intended to apply only to the use of the trust fund in the ongoing Plan, not to its use on Plan termination as the trial judge found. There is no such limiting language in arts. 2 and 11. In this regard it is worthy of note that the exclusive benefit language in arts. 2 and 11 of the original Trust Agreement is similar to the language in art. V of the Catalytic Plan in *Schmidt*, language which the Supreme Court found created surplus entitlement in the Plan members despite later amendments purporting to give surplus to the company.

[68] It remains to deal with the second error that HBC submits the trial judge made, namely, that the trial judge erred in failing to give proper effect to s. 16.02 of the original Plan Text. According to HBC, s. 16.02 of the original Plan Text and art. 12 of the original Trust Agreement show an intention that surplus on termination is to go to the Company. In any event, HBC says that s. 16.02 “trumps” the exclusive benefit

provisions in the original Trust Agreement because the Plan documents show an intention that the original Plan Text was to be the dominant document. Further, HBC says the trial judge misread art. 11(ii) by erroneously equating the termination of the original Trust Agreement with the termination of the Plan.

[69] I reject all parts of this submission.

[70] There is nothing in either the original Trust Agreement or the original Plan Text that expressly provides that the Plan Text is to be the dominant document. And, I see nothing in the originating documents that would lead to that conclusion. For example, while it is correct that s. 13.01 of the original Plan Text incorporates by reference the terms of the original Trust Agreement, art. 1 of the original Trust Agreement incorporates by reference the original Plan Text.

[71] In any event, *Schmidt* is a full answer to the suggestion that s. 16.02 of the Plan Text “trumps”. At para. 92 of *Schmidt*, Cory J. reiterates that where the pension fund is impressed with a trust, the trust is governed by equity and to the extent that equitable principles conflict with plan provisions, equity must prevail. To the extent that s. 16.02 of the original Plan Text implies that HBC can take surplus remaining after payment of all pension benefits, it conflicts with those provisions of the original Trust Agreement that give the employees entitlement to surplus on Plan termination and wind up. Equitable principles prevail; therefore, it is the original Trust Agreement, not the original Plan Text, that “trumps”.

[72] The final element of this submission is the argument that art. 11 of the original Trust Agreement governs the termination of the trust agreement, not what occurs on Plan termination. I disagree.

[73] I accept that the introductory paragraph of art. 11 gives the Company the right to change, modify or terminate the original Trust Agreement. However, clause (ii) of art. 11 is not limited to the termination of the original Trust Agreement – it governs any and all modifications to the trust. Article 11(ii) stipulates that no change, modification or termination shall “authorize or permit or result in any part of the corpus or income of the Trust Fund” being used other than for the exclusive benefit of Plan members and their beneficiaries. There is nothing in the exclusive benefit language in art. 11 which limits its application to the termination of the original Trust Agreement.

[74] Comparison to art. V of the Catalytic plan in *Schmidt* is instructive on this point. Article V of the Catalytic trust agreement gave Air Products the right to amend the plan and the trust agreement, provided that no amendment authorized or permitted any part of the trust fund to be used other than for the exclusive benefit of the plan beneficiaries. In *Schmidt*, as we have seen, the exclusive benefit language in art. V of the trust agreement led the Supreme Court to conclude that the intention was that the object of the trust was to use the money for the employees and that the trust objects could never be exhausted so long as money remained in the fund and some eligible employees could be found.

[75] The exclusive benefit language in art. 11 of the original Trust Agreement is very similar to the exclusive benefit language in art. V of the Catalytic trust agreement and leads necessarily to the same conclusion: that the intention was that the object of the trust was to use the money for the employees and the trust objects cannot be exhausted so long as money remains in the pension fund and some eligible employees can be found. Indeed, the scope of art. 11 in the present case is even broader and more all encompassing than that of art. V of the Catalytic trust agreement. Where art. V addressed only amendments, art. 11 covers any change, modification or termination. And, where art. V of the Catalytic trust agreement prohibited any amendment that should “authorize or permit” any part of the trust fund to be used other than for the exclusive benefit of employees, art. 11 of the original Trust Agreement expands the prohibition. Article 11 stipulates – in addition to that which is prohibited by art. V – that no change, modification or termination can “result in any part of the corpus or income of the Trust Fund” being used other than for the exclusive benefit of the employees.

[76] A careful review of the facts in *Schmidt* reinforces the conclusion that art. 11 extends to cover any changes to the trust fund and not merely changes to the trust agreement. In *Schmidt*, the Catalytic trust agreement was established in 1959. The trust agreement was actually brought to an end in 1974 when the Company transferred control of the pension fund to Confederation Life Insurance Company, pursuant to the terms of an investment contract (para. 100). Despite the ending of the trust agreement, the Supreme Court held that the trust was never terminated and the monies in the trust fund

continued to be impressed with a trust in favour of the employees (para. 102). Put another way, *Schmidt* tells us that where an irrevocable trust in favour of employees has been established, the ending of the trust agreement does not signify the end of the trust. Thus, in the present case, while art. 11 of the original Trust Agreement gave the Company the right to terminate the agreement, in light of the exclusive benefit language in clause (ii) of that provision, it did much more than that: it created an irrevocable trust in favour of the Plan members and beneficiaries, a conclusion that is reinforced by the concluding clause of art. 2 of the original Trust Agreement.

[77] Therefore, based on the *Schmidt* analysis, the cross-appeal should be dismissed. Now we must consider how, if at all, *Burke* alters the preceding analysis.

Burke Distinguished

[78] I begin by noting that in *Burke*, Rothstein J., writing for a unanimous Supreme Court, explicitly followed the *Schmidt* scheme of analysis when determining whether the employees had an equitable interest in surplus: see, for example, paras. 26, 48 and 53-59 of *Burke*. Hence my opening comment in these reasons that far from changing the law on surplus entitlement, *Burke* reinforces it.

[79] As I will explain, *Burke* is readily distinguishable from the present case because the plan documentation is materially different. Unlike the present case, the originating pension plan documents in *Burke* gave the employees entitlement only to the defined pension benefits on retirement. In the present case, as I have explained, since its

inception, all of the plan assets have been held in an exclusive benefit trust in favour of the Plan members and their beneficiaries.

[80] A brief factual overview of *Burke* will place these comments in context.

[81] HBC used to own the Northern Stores Division (the Division). In 1987, HBC sold the Division to the North West Company (NWC). As a result of the sale, approximately 1,200 HBC employees were transferred to NWC.

[82] As part of the sale, HBC and NWC entered into an agreement to protect the transferred employees' pensions. NWC agreed to establish a pension plan that would provide the transferred employees with benefits at least equal to those provided under the HBC pension plan. The transferred employees were removed from the HBC plan and placed into the NWC successor plan. HBC transferred assets from its pension fund sufficient to cover the accrued benefits of the transferred employees. Despite a sizeable surplus in the HBC pension fund, it transferred no share of the surplus.

[83] The transferred employees brought an action in which they sought, among other things, to have a portion of the surplus transferred to the NWC pension plan. The Supreme Court held that the employees had no equitable interest in surplus on plan termination and, therefore, no equitable interest in the actuarial surplus while the pension plan was ongoing. Thus, HBC was not obliged to transfer any share of the surplus assets.

[84] In reaching this conclusion, Rothstein J. began by considering the original plan documents. Based on ss. 11.03 and 14.01 of the original plan text, he concluded that the

employees' rights were limited to those expressly and specifically provided for in the plan text (para. 61).

11.03 *Rights in the Trust Fund*: ... No Member or person entitled to benefits under the Plan has any right or interest in the Trust Fund except as expressly provided in the Plan; ...

14.01 ... There shall be no right to any benefit under this Plan except to the extent such right is specifically provided under the terms of the Plan and there are funds available therefor in the hands of the Trustee.

[85] A review of the plan documents showed that the only employee benefits provided for under the terms of the plan are the employees' defined retirement benefits (para. 62).

[86] Furthermore, as Rothstein J. explains at para. 63, under the original plan provisions, the employees' entitlement on plan termination was expressly limited to their defined retirement benefits:

12.024 *Apportionment of Balance of the Trust Fund to be Proportional*: Any apportionment within each group, in the order stated, shall be proportionate to but not in excess of the actuarially determined present values at the date of the termination of the Plan of their respective retirement benefits and accrued retirement benefits. [Emphasis added by Rothstein J.]

[87] The conclusion that Rothstein J. reaches in para. 69 of *Burke* is very significant to its disposition, so I will set it out in full.

[69] Additionally, **the pension plan documents** (the pension plan text and trust agreement) **do not contain any of the language that would typically give employees an entitlement to surplus**. Except for the 1984 trust agreement, none of the pension plan documents include the "exclusive benefit" or "non-diversion" language which was found to

result in an employee entitlement to surplus in *Schmidt* (p. 659). (Below, I will discuss why the inclusion of this language in the 1984 trust agreement also does not provide the employees with such an entitlement to the surplus.) **Instead of using the language in *Schmidt*, the pension plan text indicates that the trust fund was held exclusively for the purposes of the *plan* and that no part could be diverted except for the purposes of the *plan*** (e.g. art. 11.02 of the 1961 plan text). [Emphasis added. Italics in original.]

[88] At para. 72, Rothstein J. reiterates that the purpose of the plan was to provide employees with only their defined retirement benefits.

[89] He then considered art. 2(d) of the 1984 trust agreement, the relevant portion of which reads as follows:

The Trustee is hereby authorized to pay out of each of the appropriate Funds:

- (i) all brokerage fees, transfer taxes ...
- (ii) all property, income and other taxes ..
- (iii) amounts on account of income tax ...
- (iv) all other expenses and costs of administering the Funds ...

ALWAYS PROVIDED that no part of the funds may be used for, or diverted to any purposes other than those connected with the exclusive benefit of members of the respective Plans and their beneficiaries.

[90] At para. 76 of *Burke*, Rothstein J. concluded that it was in the context of authorized expenses that no part of the funds may be used for or diverted to any purposes other than the exclusive benefit of members – “Having regard to the context, it is clear that these words [i.e. the exclusive benefit language] do not afford a new entitlement to

surplus which had not previously existed and which is expressly addressed in art. 12.025”.

[91] In other words, the exclusive benefit language in art. 2(d) of the 1984 trust agreement had to be read in the context of what the employees were entitled to before art. 2(d) was inserted. Their previous entitlement had been only to the defined benefits. Therefore, art. 2(d) did not confer on employees a new and additional entitlement (para. 78).

[92] In the present case, HBC points to art. 2(d) of the 1984 trust agreement in *Burke* and says that it is essentially the same as the exclusive benefit provisions in the original Trust Agreement in the present case. Therefore, HBC says, it is entitled to surplus in the present case.

[93] I disagree. First, this submission completely ignores art. 11 of the original Trust Agreement, a provision very similar to the one in the Catalytic plan in *Schmidt* that was held to give the employees entitlement to surplus. Second, as we have seen, the decision in *Burke* did not turn on the 1984 trust agreement provisions. It turned on the language and intentions expressed in the original (1961) plan and trust documentation, language which is materially different from the language of the original Trust Agreement in this case. In *Burke*, the original plan documentation expressly limited the employees’ rights to receipt of their pension benefits on retirement. In the present case, the original plan

documentation expressly created an irrevocable trust, over all of the assets in the pension trust fund, for the exclusive benefit of the employees.

[94] Thus, as I have said, *Burke* is readily distinguishable from the present case. *Burke* involved the interpretation of non-conflicting provisions of a different pension plan and trust agreement which, from inception, gave the employees the right only to the promised defined pension benefits. While art. 2(d) of the 1984 trust agreement in *Burke* raised a question as to whether those rights had been expanded, the absence of exclusive benefit language in the originating documents led the Court to conclude that it created no new rights in the employees. That is not this case.

[95] In the present case, as we have seen, the originating Plan documents established an irrevocable trust for the exclusive benefit of the Plan members and their beneficiaries. In accordance with *Schmidt*, later amendments purporting to strip the employees of that right are invalid.

CONCLUSION

[96] There is no basis in the present case to distinguish it from the ruling in *Schmidt* relating to the Catalytic plan. While the trial judge did not have the benefit of *Burke* at the time he rendered his decision, he carefully analyzed the relevant plan and trust documentation using the framework prescribed by the Supreme Court of Canada in *Schmidt*. That framework has not changed.

[97] The trial judge correctly recognized that in the absence of specific language to the contrary, trust law principles are to prevail in the face of conflicting contractual provisions. He correctly concluded that the Plan assets are impressed with a trust in favour of the Plan members and that it is the Plan members who are entitled to any surplus assets in the trust fund on Plan termination and wind up.

DISPOSITION

[98] Accordingly, I would dismiss the cross-appeal. If the parties are unable to resolve the matter of costs, they may make brief written submissions on the matter, such submissions to be received by the court within 15 days of the date of the release of these reasons.

RELEASED: SEP 22 2011

Handwritten initials

Handwritten signature: J. A. Sullivan

Handwritten signature: Judge MacFarland JA

Rouleau J.A. (Dissenting):**Overview**

[99] I have had the opportunity to read the reasons of my colleague and respectfully disagree. For the reasons that follow, I would allow the cross-appeal, set aside that portion of the judgment finding that HBC is not a beneficiary of the trust fund of the Plan, and substitute an order that under the plan and trust documentation, as currently worded, HBC is entitled to the surplus, if any, remaining upon discontinuance of the plan.

[100] As I will explain, when read together there is no conflict between the two documents. The combined effect of Article 12 of the original Trust Agreement and s. 16.02 of the original Plan Text is to clearly entitle HBC to the surplus. This is not a case like *Schmidt*, where the company attempted to create a right to the surplus through amending documents; rather, as was the case in *Burke*, HBC's right to the surplus was clearly established by the original Plan and Trust Agreements.

Analysis**I. The original Plan and Trust Agreements must be read together**

[101] The Plan and Trust Agreements must be read together; this much is beyond dispute. The pension trust does not stand alone. The two agreements are inseparable and together form an integrated whole: see *Buschau v. Rogers Communication Inc.*, [2006] 1 S.C.R. 973, at paras. 29 and 90.

[102] As a matter of contractual interpretation, both documents must be interpreted in a manner that, if possible, avoids conflict and gives effect to all provisions: see *Bundy of Canada Ltd. v. Canada Trust Co.* (1997), 17 C.C.P.B. 12 (Ont. C.A.), at para. 3; *Chitty on Contracts*, 29th ed. (London: Sweet & Maxwell Limited, 2004), at 738-739; and G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Carswell, 2006), at 457.

[103] Above and beyond these well established principles of interpretation, it is abundantly clear in the present case that the Plan and Trust Agreement must be read together as each document explicitly refers to and incorporates the text of the other. Article 1 of the original Trust Agreement expressly states:

ARTICLE 1. The Plan as annexed and exhibited hereto, and as amended from time to time, shall form part of this Agreement to the same extent as if all of its provisions were fully set forth herein and the definitions and meanings of the words and terms as used in the Plan shall have the same meanings herein unless the context indicates otherwise.

In unambiguous terms, this provision requires the Plan and Trust Agreements to be treated as if they were one self-contained document.

II. When read together there is no conflict between the documents

(a) The original agreements give HBC the express right to the surplus

[104] Since inception, the original documents have given HBC the express right to the surplus. Article 12 of the Trust Agreement provides:

ARTICLE 12. In the event of the discontinuance of the Plan the Trustee shall dispose of the Trust Fund as directed in writing by the Company in accordance with the provisions of the Plan.

[105] The Plan text further provides in s. 16.02:

16.02 Amendment to or suspension of all or part of the Plan shall not operate to reduce any benefits which have accrued under the Plan prior to the date of such amendment or suspensions, as the case may be, to Members of the Plan. *In the event that the Plan is terminated, no part of the assets of the Plan shall revert to the benefit of the Company until provision has been made for all pensions and other benefits in respect of service up to the date of such termination to Members of the Plan and for all benefits to former employees and pensioners.* [Emphasis added.]

[106] Though in most cases a trust will extend to any surplus, a settlor may reserve the right to the surplus, if this is clearly done at the time the trust is created (*Schmidt*, at p. 655). Keeping in mind that Article 1 requires the Plan and Trust Agreements to be treated as one document, the effect of the above provisions is to do just that – to create an express entitlement in favour of HBC to the surplus on termination.

[107] These provisions existed from the outset. As a result, therefore, HBC had reserved the right to direct payment to itself of those portions of the Trust Fund that upon termination of the Plan are not required to fund the benefits of the members of the Plan, from the outset. In my view, Article 12 of the Trust Agreement is central to this appeal and the interpretation of the agreements adopted by my colleague simply does not give full effect to it.

(b) There is no conflicting provision vesting all of the trust funds, including the surplus to the members

[108] Acknowledging that equity dictates that the trust agreement must prevail in the event of a conflict between trust and plan agreements, there is no such conflict in the present case. At its highest, the “exclusive benefit” language found in Articles 2 & 11 of the Trust Agreement refers to use of the actual funds in the ongoing plan; however, on termination, when the plan ceases to exist and a surplus may arise, Article 12 and s. 16.02 determine how those funds may be used, to wit, “as directed in writing by the Company in accordance with the provisions of the Plan.” In any event, as I will explain, the “exclusive benefit” language in Articles 2 and 11 of the Trust Agreement is of limited application and does not purport as to confer on the Plan members a general entitlement to the Trust Fund.

(i) At its highest, the “exclusive benefit” language refers to the use of the funds during the Plan’s existence – not on termination

[109] Section 13.01 of the Plan and Article 2(a) of the Trust Agreement provide that the Trust was established to receive and hold funds for the purposes of the Plan. It is also clear from both the text of the Trust Agreement and the text of the Plan that for as long as the Plan remains in existence that “purpose” is to hold funds in the Trust so as to ensure that the benefits to which the members of the Plan are entitled will be paid. There are clear limits as to the type of payments the trustees can make.

[110] However, on termination when the surplus, if any, arises, the Trust Agreement provides that a different regime applies. Article 12 and s. 16.02 provide that in the sole

event of termination the trust fund is to be paid out “as directed in writing by the Company [HBC] in accordance with the provisions of the Plan.”

[111] It is only upon termination of the Plan that a surplus is created. It is, therefore, neither surprising nor inappropriate for a trust agreement to provide that a different regime applies in the event of a plan’s termination. Before termination there is no surplus and “neither the employer nor the employees have a specific interest in this amount, since it only exists on paper” (*Schmidt*, at p. 654). At any rate, as I have set out below, the “exclusive benefit” referred to in Articles 2 and 11 is of limited scope.

(ii) *The interpretation of Articles 2 and 11 does not confer an entitlement to the surplus on the Plan members*

[112] In support of her conclusion that the Plan members are entitled to the surplus on termination, my colleague interprets Article 11 of the Trust Agreement, as reinforced by Article 2 of that Agreement, as demonstrating HBC’s intention to establish an irrevocable trust for the exclusive benefit of Plan members and their beneficiaries. For the reasons that follow, I do not interpret these articles as demonstrating HBC’s intention to go as far as conferring an entitlement on the Plan members to the surplus in the event of the Plan’s discontinuance. Such an interpretation would have the effect of rendering nugatory the clear wording of Article 12.

Interpreting Article 11

[113] Article 11 appears in the original Trust Agreement. It reads as follows:

ARTICLE 11. The Company shall have the right at any time or by or pursuant to a resolution of its Board of Directors to change or modify by amendment any of the provisions of, and to terminate, this Agreement provided it shall first have given written notice of such amendment or termination to the Trustee and provided that –

(i) if any such amendment appears to the Trustee to effect the rights, duties or responsibilities of the Trustee, the Trustee may assent to such amendment by executing an agreement supplementary hereto or, failing to assent, the Trustee shall resign as provided in Article 9 hereof.

(ii) such change, modification or termination shall not authorize or permit or result in any part of the corpus or income of the Trust Fund being used for or diverted to purposes other than for the benefit exclusively of members [*sic*] of the Plan and their beneficiaries and for the payment of fees, expenses, taxes and other assessments as provided in Article 2 hereof unless with the approval of the Minister of National Revenue and such other governmental authority having governmental jurisdiction over the Plan or Fund.

[114] The provision gives HBC the right to change, modify or terminate the Trust Agreement. However, Article 11(ii) is not a right granting provision. It is a provision that limits HBC's ability to make changes. It provides that any change, modification or termination made by HBC cannot affect the existing rights or entitlements of the Plan members.

[115] Read in context, this provision is neither a vesting provision nor does it conflict with Article 12 of the Trust Agreement and s. 16.02 of the Plan. Article 12 and s. 16.02

existed in the original texts and the rights they conferred on HBC were not the product of a “change, modification or termination” of the Trust Agreement.

[116] In *Burke*, Rothstein J. specifically rejected the submission that an identically worded Article 11(ii) conferred any entitlement to the Plan members that they did not previously have. At para. 78 he stated:

Article 11(ii) is addressed to changes. In other words, the “benefit exclusively of members” language must be read in the context of what the employees were entitled to before any change. The entitlements before any change were the defined benefits. No change may result in the funds being used other than for those defined benefits, except as specified. The provision does not confer on employees an additional entitlement they did not previously have.

[117] In other words, Article 11(ii) does not define the benefits; it simply provides that changes to the Trust Agreement cannot reduce those benefits that the members already have. If the Trust Agreement does contain a provision granting the Plan members the right to the surplus, so as to trump the combined effect of Article 12 and s. 16.02, that right must be found elsewhere in the documents.

[118] This is not, therefore, a case of deciding which provision governs, Article 11 or Article 12. It is a case of reading all of the provisions in the Trust Agreement and the Plan together in a manner that if possible avoids conflict and gives effect to all of them.

[119] Article 11 deals with amendments or termination of the Trust Agreement. There can, of course be many amendments or terminations. As noted by my colleague, there has already been at least one termination of the Trust Agreement. There will however, be

only one termination of the Plan. It is only upon the termination of the Plan that a surplus may be created and that a “specific interest” in the surplus is created. This unique event is precisely what Article 12 of the Trust Agreement and s. 16.02 of the Plan provide for.

Interpreting Article 2

[120] Article 2 is of some importance. It provides in part:

ARTICLE 2: (a) The Company by this Agreement establishes with the Trustee a fund (herein called the “Trust Fund”) comprising all cash and property acceptable to the Trustee now and hereafter received by it in trust for the purposes of the Plan, together with all proceeds, investments, reinvestments and income and profits arising therefrom less all payments, deductions and withdrawals therefrom authorized hereunder.

[...]

(c) The Trustee is hereby authorized to pay out of the Trust Fund:

- (i) all brokerage fees, transfer taxes and other expenses incurred in connection with the sale and purchase of investments;
- (ii) all property, income and other taxes of any kind at any time levied or assessed under any present or future law upon, or with respect to, the Trust Fund or any property included in the Trust Fund;
- (iii) amounts on account of income tax that may be payable by persons receiving payment from the Trust Fund;
- (iv) all other expenses of administering the Trust Fund including reasonable compensation for its services as may from time to time be agreed upon to the extent that such expenses have not been met or provided for by the Company.

ALWAYS PROVIDED that no part of the Trust Fund may be used for, or diverted to any purposes other than those connected with the exclusive benefit of members of the Plan and their beneficiaries.

[121] My colleague reads the paragraph that appears at the end of Article 2 as qualifying Article 2 in its entirety, not just s. 2(c). It is then argued that if the final paragraph is read as qualifying subparagraph (a) of Article 2, it suggests that HBC intended to part outright with all money contributed to the Pension Fund.

[122] I respectfully disagree. Firstly, the formatting of Article 2(c) is significant. The reproduction above appears in the same format as it did in the actual Trust Agreement. In my view, the lay-out of the provision shows that the final paragraph qualifies only subsection (c) of Article 2, the subparagraph dealing with the payment of expenses listed therein, and not Article 2 in its entirety.

[123] More importantly however, Rothstein J. dealt with an identically worded provision in *Burke* and interpreted the same proviso as qualifying the trustee's power to pay the expenses listed in the subsection. He found that:

It is in the context of authorized expenses that no part of the funds may be used for or diverted to any purpose other than those associated with the exclusive benefit of members. Having regard to the context, it is clear that these words do not afford a new entitlement to surplus which had not previously existed and which is expressly addressed in art. 12.025 (at para. 76).

There is no mention of s. 2(a) being relevant, nor did Rothstein J. or this court in the *Burke* decision, suggest that this final paragraph qualified s. 2(a).³

[124] As in *Burke*, in the present case there are provisions expressly addressing the surplus. In *Burke*, Article 12.025 provided that upon termination of the Plan “if any balance of the Trust Fund shall remain after the satisfaction of all obligations of the plan ... such balance shall be paid to the Company.” Article 12 of the Trust Agreement and s. 16.02 of the Plan, though structured slightly different than Article 12.025 of *Burke*, have precisely the same effect. They provide that if the Plan is terminated, HBC can direct how the Trust Fund is to be disposed of subject only to the limitation contained in s. 16.02 of the Plan - the same limitation as Article 12.025 of *Burke*, that “no part of the assets of the Plan shall revert to the benefit of the Company [HBC] until provision has been made for all pensions and other benefits in respect of service up to the date of such termination to members of the Plan and for all benefits to former employees and pensioners.” After providing for the pensions, HBC has, from the outset, reserved the right to direct payment of the surplus to itself.

[125] It is suggested that *Burke* can be distinguished on the basis that in the present case Articles 2 and 11 were part of the original Trust Agreement, whereas in *Burke* the similar provisions were added to the Trust Agreement by amendment.⁴ I disagree. The texts are

³ Article 2(a) in the *Burke* matter was substantially the same as Article 2(a) in the present case. Although Article 2 in *Burke* had four subsections, the formatting of the final paragraph was the same and s. 2(d) of *Burke* is substantially the same as s. 2(c) of the present Trust Agreement.

⁴ In *Burke*, the provisions were added when the company entered into a new trust agreement with Investors Group.

the same. The fact that they were added to the Trust Agreement by way of an amendment in *Burke* is not a basis to give the same provisions different meaning in the circumstances of this case. Agreements, whether the product of amendments or not must be read as a whole.

[126] In *Burke* the provisions were interpreted in the manner they were so as not to conflict with the originating documents which gave the company a right to the surplus. The amending documents had to be read in light of the originating documents; they had to be read as a whole. Because the originating documents gave the company an express right to the surplus, if the amendments were to limit that right they would have had to have done so clearly, otherwise the provisions would be in conflict.

[127] The case at bar presents a similar situation. The “exclusive benefit” language contained in Articles 2 and 11 has to be read in light of the whole document. By virtue of Article 1 of the Trust Agreement the whole document is the sum total of the original Plan and Trust Agreements. These two agreements must be read to avoid conflict and give meaning to all of the provisions contained therein - they must be read as whole. The interpretation of these provisions favoured by my colleague does not treat the documents as a cohesive whole; rather, it leaves Article 12 and s. 16.02 without purpose and meaning. Such a result is not in keeping with basic rules of contractual interpretation and could not have been intended by the settlor.

III. Schmidt distinguished

[128] I agree with my colleague that *Schmidt* laid down the foundational principles through which courts are to determine questions of surplus ownership. I also agree that *Burke* has not changed that law. However, because s. 16.02 of the Plan and Article 12 of the Trust Agreement expressly deal with what is to happen to the Trust Fund in the event of the Plan's termination and none of the other provisions in the two documents conflict with this directive, the intention of the settlor of the Trust is clear.

[129] *Schmidt*, therefore, can be distinguished on the facts. In *Schmidt* the original plan and trust documents created no entitlement to the surplus in favour of the company. It was only through later amendments to the Trust and Plan documents that the company purported to give itself a right to the surplus. In *Schmidt*, the court found that these later amendments were an attempt to partially revoke a trust originally established for the exclusive benefit of the employees (at p. 662).

[130] In contrast to *Schmidt*, the Trust Agreement in the present case provided from the very outset that upon termination of the Plan, HBC could direct how the Trust Fund would be paid out subject only to the limitation in the Plan that the benefits of the Plan members be provided for. The intention of the settlor of the trust is clear. After provision is made for the benefits of the members, HBC can at its discretion direct the trustees to pay the surplus to HBC. The payment of the surplus to HBC was thus provided for in the original text. This right to direct payment has been a part of the

objects of the Trust from the outset, albeit only in the singular event of the Plan's termination.

Conclusion

[131] In my view, therefore, the original Trust Agreement and Plan entitled HBC to the surplus. None of the subsequent amendments have impeded or removed that right. As the Plan is ongoing and the Plan and Trust Agreement can be amended before termination, the present decision only applies to the Plan and Trust Agreement as presently worded.

[132] In conclusion, I would allow the cross-appeal and set aside that portion of the judgment ordering that HBC is not a beneficiary of the Trust Fund of the Plan and substitute an order declaring that under the Trust and Plan Agreements as presently worded, HBC would be entitled to any surplus if the Plan were terminated as of the date of the hearing of the action. I would also order that, if the parties are unable to resolve the matter of costs, they are to make brief written submission on the matter and such submissions are to be received by the court within 15 days of the release of these reasons.



EXHIBIT "D"
referred to in the Affidavit of
THOMAS OBERSTEINER
Sworn June 18, 2026

Signed by:

Brittney Ketwaroo

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Commissioner for Taking Affidavits
Brittney Ketwaroo

Peter Christopher Burke, Richard Fallis and A. Douglas Ross, personally and in a representative capacity *Appellants*

v.

Governor and Company of Adventurers of England Trading into Hudson's Bay and Investors Group Trust Company Ltd. *Respondents*

**INDEXED AS: BURKE v. HUDSON'S BAY CO.
2010 SCC 34**

File No.: 32789.

2010: May 18; 2010: October 7.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Pensions — Pension plans — Surplus — Ongoing defined benefit pension plan — Sale of division of company resulting in employees being transferred to new company — Transferred employees removed from former employer's pension plan and incorporated into new pension plan — At time of transfer, former employer's pension plan had significant projected surplus — Former employer transferred enough pension funds to cover transferred employees defined benefits but no surplus funds transferred — Whether there was an obligation on former employer to transfer a pro rata portion of surplus on sale — Whether former employer's obligations to transferred employees were satisfied by assuring their defined benefits — Pension Benefits Act, 1987, S.O. 1987, c. 35.

Pensions — Pension plans — Expenses — Whether pension plan documentation allowed employer to charge plan administration expenses to fund.

In 1961, the Hudson's Bay Company ("HBC") provided a contributory, defined benefits pension plan for

Peter Christopher Burke, Richard Fallis et A. Douglas Ross, agissant en leur qualité personnelle et en leur qualité de représentants *Appellants*

c.

Gouverneur et Compagnie des aventuriers d'Angleterre faisant le commerce dans la Baie d'Hudson et la Compagnie de Fiducie du Groupe Investors Ltée *Intimés*

**RÉPERTORIÉ : BURKE c. CIE DE LA BAIE D'HUDSON
2010 CSC 34**

N° du greffe : 32789.

2010 : 18 mai; 2010 : 7 octobre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Pensions — Régimes de retraite — Excédent — Régime de retraite à prestations déterminées qui continue d'exister — La vente d'une division de la société ayant donné lieu à la mutation d'employés à une autre société — Les employés mutés ont été dissociés du régime de retraite de leur ancien employeur et ont intégré un nouveau régime — Lors du transfert, le régime de l'ancien employeur affichait un excédent projeté important — L'ancien employeur a transféré suffisamment d'éléments d'actif de la caisse de retraite pour financer les prestations déterminées des employés mutés, mais a conservé l'excédent — L'ancien employeur était-il tenu de transférer une portion de l'excédent, déterminée au prorata, lors de la vente? — L'ancien employeur a-t-il honoré ses obligations envers les employés mutés en garantissant leur régime à prestations déterminées? — Pension Benefits Act, 1987, S.O. 1987, ch. 35.

Pensions — Régimes de retraite — Frais — Les documents relatifs au régime de retraite autorisaient-ils l'employeur à imputer les frais d'administration du régime à la caisse de retraite?

En 1961, la Compagnie de la Baie d'Hudson (« HBC ») offrait à ses employés un régime de retraite contributif

its employees. Under this defined benefit pension plan members of the plan were guaranteed a specified benefit upon retirement. For the first twenty years of existence, the plan was in deficit and HBC made additional payments to keep the plan solvent. In 1982, the plan generated its first actuarial surplus and HBC began paying plan administration expenses out of the fund.

In 1987, HBC sold its Northern Stores Division to the North West Company ("NWC") and approximately 1,200 employees were transferred from HBC to NWC. The companies entered into an agreement to protect the pensions of the transferred employees. The agreement provided that NWC would establish a new pension plan and would provide the transferred employees with benefits at least equal to those provided under the HBC plan. HBC agreed to transfer assets sufficient to cover the defined benefits of the transferred employees. At the time of the transfer, HBC's pension plan had an actuarial surplus of about \$94 million. The companies discussed whether a portion of the actuarial surplus should be transferred; however, HBC suggested that transferring part of the surplus would increase the purchase price and the matter went no further.

The transferred employees allege that HBC, as plan administrator, breached its fiduciary duty to treat all pension plan members with an even hand. They argue that HBC was required to transfer a portion of the actuarial surplus to the successor plan and that HBC improperly charged pension plan administration expenses to the pension fund for approximately six years prior to their transfer. The trial judge found in favour of HBC on the issue of administration expenses, but held that the surplus was subject to trust principles, and that the transferred employees, as beneficiaries of the trust, had an equitable interest in the actuarial surplus. The disparate treatment of the beneficiaries was found to be a breach of an equitable trust which required the transfer of a portion of the actuarial surplus to remedy the breach. HBC appealed the issue of surplus and the transferred employees cross-appealed on the issue of administration expenses. The Court of Appeal allowed the appeal and dismissed the cross-appeal.

Held: The appeal should be dismissed.

An employer is obligated to pay for administration expenses when such an obligation is imposed by statute or common law. In this case, there were no statutory or common law obligations on HBC to pay administration

à prestations déterminées. Par ce régime de retraite à prestations déterminées, les participants étaient assurés d'obtenir une prestation fixe à la retraite. Au cours de ses vingt premières années d'existence, le régime accusait un déficit et HBC a versé des cotisations supplémentaires afin d'en assurer la solvabilité. En 1982, le régime a affiché son premier excédent actuariel et HBC a commencé à imputer à la caisse les frais d'administration du régime.

En 1987, HBC a vendu sa division des Magasins du Nord à la Compagnie du Nord-Ouest (« CNO ») et environ 1 200 employés de HBC ont été mutés à CNO. Les sociétés ont conclu une entente visant à protéger le régime de retraite des employés mutés. Cette entente prévoyait la constitution, par CNO, d'un nouveau régime de retraite qui offrirait aux employés mutés des prestations au moins égales à celles prévues par le régime HBC. HBC a consenti à transférer des éléments d'actif suffisants pour assurer les prestations déterminées des employés mutés. Au moment du transfert, le régime de retraite de HBC affichait un excédent actuariel d'environ 94 millions de dollars. Les sociétés ont discuté de la possibilité de transférer une partie de cet excédent, mais HBC a laissé entendre qu'une telle transaction ferait augmenter le prix d'achat et la question n'a plus été débattue.

Les employés mutés soutiennent que HBC, à titre d'administratrice du régime, a manqué à son devoir fiduciaire d'accorder un traitement égalitaire à tous les participants au régime de retraite. Selon eux, HBC était tenue au transfert d'une portion de l'excédent actuariel au régime subséquent et elle a imputé à tort les frais d'administration du régime à la caisse de retraite pendant une période d'environ six ans précédant le transfert. Le juge du procès a donné gain de cause à HBC sur la question des frais d'administration, mais il a conclu que l'excédent du régime était assujéti aux principes de la fiducie et que les employés mutés, en tant que bénéficiaires de la fiducie, avaient un intérêt en equity dans l'excédent actuariel. Il était d'avis que le traitement différent accordé aux bénéficiaires contrevient à une fiducie régie par l'equity et que, pour y remédier, une partie de l'excédent actuariel devait être transférée. HBC a interjeté appel à l'égard de la question de l'excédent, et les employés mutés ont formé un appel incident sur la question des frais d'administration. La Cour d'appel a accueilli l'appel et a rejeté l'appel incident.

Arrêt : Le pourvoi est rejeté.

L'employeur est obligé d'acquitter les frais d'un régime de retraite si une telle obligation est imposée par une source de nature législative ou jurisprudentielle. En l'espèce, aucune loi ni règle de common law n'imposait

expenses. The original trust agreement as well as the plan text do not expressly address plan administrative expenses. Subsequent trust agreements included a provision which expressly allowed HBC to charge plan administration expenses to the fund. The new trust agreements merely confirmed what was already implicitly provided for in the original trust agreement. HBC was therefore permitted to charge plan administration expenses to the pension fund.

The issue as to whether HBC was required to transfer a portion of the actuarial surplus when it sold its Northern Stores Division to NWC raises a novel question in pension law as the sale occurred in the context of an ongoing pension plan, rather than a terminated or wound-up plan. In all cases the interests in the surplus of a pension plan have to be determined according to the words of the relevant documents and applicable contract and trust principles and statutory provisions. Each situation must be evaluated on a case-by-case basis.

Here, subject to the text of the plan, the terms of the trust agreement, and relevant statutes, HBC, as plan administrator, had wide discretion with respect to the pension plan, which it could exercise unilaterally and which could affect the interests of the employees and to which exercise of discretion the employees were vulnerable. Therefore, a fiduciary relationship existed between HBC as administrator and the employees/beneficiaries under the pension plan.

Pensions legislation is not a complete code but rather it establishes minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of those entitled to receive them under private pension plans. Here, HBC complied with the 1987 *Pension Benefits Act* when it transferred the pension assets to NWC. The terms of the relevant plan and trust documentation may impose a higher standard. Thus, HBC's compliance with the 1987 *Pension Benefits Act* is not a complete answer to the transferred employees' claim. It is necessary to examine the common law and equitable principles that govern interpretation of the plan and trust documentation.

In a defined benefit pension governed by trust principles, as in this case, legal ownership of the defined benefits lies with the trustee. The funds needed to pay the employees' defined benefits are held in trust on their behalf. As beneficiaries, the employees have

à HBC l'obligation de payer ces frais. La convention de fiducie originale, ainsi que le texte du régime, ne traitent pas expressément des frais d'administration du régime. Les conventions de fiducie subséquentes auto-risèrent expressément HBC à imputer à la caisse les frais d'administration du régime. Les nouvelles conventions de fiducie n'ont fait que confirmer expressément ce que prévoyait implicitement la convention originale. Par conséquent, HBC pouvait imputer les frais d'administration du régime à la caisse de retraite.

La question de savoir si HBC était tenue de transférer une portion de l'excédent actuariel lorsqu'elle a vendu sa division des Magasins du Nord à CNO soulève une question nouvelle intéressant le droit applicable aux régimes de retraite, car le régime de retraite a continué d'exister après la vente; il n'y a pas été mis fin et il n'a pas été liquidé. Dans toutes les affaires, le droit à l'excédent d'un régime de retraite doit être déterminé en fonction du libellé des documents pertinents, des principes du droit des contrats et du droit des fiducies et des textes législatifs applicables. Chaque situation appelle un examen au cas par cas.

En l'espèce, sous réserve du texte du régime, de la convention de fiducie et des lois applicables, HBC, en qualité d'administratrice du régime, avait à l'égard du régime de retraite un vaste pouvoir discrétionnaire, qu'elle pouvait exercer unilatéralement de manière à avoir un effet sur les intérêts des employés et auquel ces derniers étaient vulnérables. Par conséquent, un lien fiducial unissait HBC, en tant qu'administratrice du régime, à ses employés, en tant que bénéficiaires du régime de retraite.

La loi sur les régimes de retraite n'est pas un code exhaustif; elle établit des normes minimales et une supervision réglementaire afin de protéger et de garantir les prestations et les droits des personnes qui y ont droit en vertu des régimes de retraite complémentaires. En l'espèce, HBC a respecté les dispositions de la *Pension Benefits Act* de 1987 lors du transfert des éléments d'actif de la caisse de retraite à CNO. Les documents constituant le régime et la fiducie peuvent imposer une norme supérieure. Par conséquent, le respect des dispositions de la *Pension Benefits Act* de 1987 par HBC ne suffit pas à réfuter l'argument des employés mutés. Il est nécessaire d'analyser les principes de common law et d'equity régissant l'interprétation des documents relatifs au régime et à la fiducie.

Dans le cadre d'un régime de retraite à prestations déterminées régi par les principes de la fiducie, comme en l'espèce, le fiduciaire détient le titre en common law sur les prestations déterminées. Les fonds nécessaires au versement des prestations déterminées aux employés

an equitable interest in the funds needed to cover their defined benefits. A review of the original and subsequent pension plan documentation indicates that the only employee benefits that are provided for under the terms of the plan are the employees' defined retirement benefits. Additionally, the pension plan documents (the pension plan text and trust agreement), having regard to the operative language of the plan as a whole, do not contain any of the language that would typically give employees an entitlement to surplus. Based on the provisions of the pension plan documentation, it cannot be said that the transferred employees had an equitable interest in the surplus on termination, and therefore no floating equity in the actuarial surplus during continuation of the plan.

The fact that HBC may have voluntarily chosen to increase pension benefits out of surplus funds or otherwise, does not change the nature of the employees' interest in the pension fund or extend fiduciary obligations to voluntary actions of the employer. Moreover, employees have no right to compel surplus funding to provide a cushion against insolvency. As a defined benefit plan, HBC's duty was to ensure that funds at all times meet the fixed benefits promised by the employer. The right of the employees is that their defined benefits be adequately funded, not that an actuarial surplus be funded. Just because HBC had fiduciary duties as plan administrator does not obligate it under any purported duty of evenhandedness to confer benefits upon one class of employees to which they have no right under the plan. Neither the retained nor the transferred employees had an equitable interest in the plan surplus. Thus, there was no duty of evenhandedness applicable to the surplus.

Finally, a beneficiary of a trust has the right to compel its due administration even if it does not have an equitable interest in all of the assets of the trust. In this case, because the transferred employees had an equitable interest in their defined benefits, they have the right to compel the due administration of the trust and to ensure that the employer, trustee and plan administrator are complying with their legal obligations in the pension plan documents. The circumstances of this case do not suggest that the actuarial surplus was abused by HBC or used for an improper purpose.

sont détenus en fiducie au profit de ces derniers. En leur qualité de bénéficiaires, les employés ont un intérêt en equity dans ces fonds. Un examen des documents initiaux et subséquents relatifs au régime de retraite indique que les prestations déterminées de retraite sont les seules prestations auxquelles les employés ont droit aux termes du régime. En outre, les documents relatifs au régime de retraite (le texte du régime et la convention de fiducie), eu égard aux termes performatifs du régime dans son ensemble, ne contiennent aucune des formules qui confèrent normalement aux employés un droit à l'excédent. Vu les dispositions des documents relatifs au régime de retraite, on ne saurait dire que les employés mutés avaient un intérêt en equity sur l'excédent à la cessation du régime, et donc aucun droit flottant en equity dans l'excédent actuariel pendant l'existence du plan.

Le fait que HBC ait librement décidé d'augmenter les prestations de retraite au moyen notamment d'une réaffectation de l'excédent ne change rien à la nature de l'intérêt que détiennent les employés dans la caisse de retraite ni n'a pour effet d'étendre les obligations fiduciaires de l'employeur à ses actes gratuits. En outre, les employés n'ont pas le droit d'exiger que l'excédent actuariel soit utilisé pour parer au risque d'insolvabilité. Dans le cadre d'un régime à prestations déterminées, le devoir de HBC consistait à faire en sorte que les fonds soient en tout temps suffisants pour assurer le versement des prestations déterminées qu'il a promises. Le droit des employés se rapporte à la capitalisation suffisante de leurs prestations déterminées et non d'un excédent actuariel. Le fait que HBC avait des obligations fiduciaires, en qualité d'administratrice du régime, ne la contraignait pas, en raison d'un quelconque devoir de traitement égalitaire, à reconnaître à un groupe d'employés des avantages que le régime ne leur confère pas. Ni les employés mutés ni ceux qui sont demeurés en poste chez HBC ne possédaient d'intérêt en equity dans l'excédent. Partant, aucun devoir de traitement égalitaire ne s'appliquait à l'égard de l'excédent.

Enfin, le bénéficiaire d'une fiducie est en droit d'exiger la bonne administration, et ce, même s'il ne possède pas d'intérêt en equity dans tous les éléments d'actif de la fiducie. En l'espèce, comme les employés mutés possédaient un intérêt en equity dans les prestations déterminées, ils avaient le droit d'exiger la bonne administration de la fiducie et de s'assurer que l'employeur, le fiduciaire et l'administrateur du plan s'acquittent des obligations juridiques prévues dans les documents relatifs au régime. Les circonstances de l'espèce ne laissent pas croire que HBC a utilisé l'excédent actuariel d'une façon ou à une fin irrégulière.

What occurred between HBC and NWC was a legitimate commercial transaction. HBC and NWC negotiated over the purchase price of the assets, including the pension plan. HBC was agreeable to transferring a portion of the surplus so long as NWC was willing to pay for the benefit of acquiring a plan in surplus. NWC was not willing to pay. Both companies complied with the legislative requirements, lending further support to the legitimacy of the transaction. In executing the transfer, HBC was entitled to rely on the terms of the plan. Under the plan documentation, the employees' rights and interests were limited to their defined benefits. HBC's legal obligations with respect to its employees, including the fiduciary duties that it owed to the transferred employees, were satisfied in this case by protecting their defined benefits. Based on the plan documentation, HBC did not have a fiduciary obligation to transfer a portion of the actuarial surplus.

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HBC et CNO ont conclu une opération commerciale légitime. HBC et CNO ont négocié le prix d'achat des éléments d'actif, y compris le régime de retraite. HBC était disposée à transférer une portion de l'excédent si CNO acceptait de payer davantage pour acquérir un régime excédentaire, ce que cette dernière n'était pas disposée à faire. L'opération est d'autant plus légitime que les deux sociétés se sont conformées aux prescriptions de la loi. Lorsqu'elle a conclu le transfert, HBC pouvait se fonder sur les dispositions du régime. Aux termes des documents relatifs à ce dernier, les droits et les intérêts des employés se limitaient à leurs prestations déterminées. En l'espèce, HBC a honoré ses obligations juridiques envers ses employés, et notamment ses devoirs fiduciaires envers les employés mutés, en protégeant leurs prestations déterminées. Selon les documents relatifs au régime, HBC n'avait aucune obligation fiduciaire de transférer quelque portion que ce soit de l'excédent actuariel.

Jurisprudence

Arrêt appliqué : *Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678; **distinction d'avec l'arrêt :** *Buschau c. Rogers Communications Inc.*, 2006 CSC 28, [2006] 1 R.C.S. 973; **arrêts mentionnés :** *North West Co. c. Hudson's Bay Co.*, [1991] O.J. No. 2449 (QL); *Schmidt c. Air Products Canada Ltd.*, [1994] 2 R.C.S. 611; *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, 2004 CSC 54, [2004] 3 R.C.S. 152; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377; *Frame c. Smith*, [1987] 2 R.C.S. 99; *Saunders c. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482; *Burke c. Hudson's Bay Co.*, 2008 ONCA 690, 241 O.A.C. 245.

Lois et règlements cités

Loi modifiant la Loi sur les régimes de retraite, L.O. 2010, ch. 9, art. 68.
Pension Benefits Act, 1965, S.O. 1965, ch. 96.
Pension Benefits Act, 1987, S.O. 1987, ch. 35, art. 56(1), 81.

Doctrine citée

Hepburn, Samantha J. *Principles of Equity and Trusts*, 4th ed. Sydney : Federation Press, 2009.
 Kaplan, Ari N. *Pension Law*. Toronto : Irwin Law, 2006.
Snell's Equity, 31st ed. by John McGhee, ed. London : Sweet & Maxwell, 2005.
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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Weiler and Gillese J.J.A.), 2008 ONCA 394, 236 O.A.C. 140, 67 C.C.P.B. 1, 40 E.T.R. (3d) 157, [2008] O.J. No. 1945 (QL), 2008 CarswellOnt 2801, reversing in part a decision of Campbell J. (2005), 51 C.C.P.B. 66, 25 E.T.R. (3d) 161, 2005 CanLII 47086, [2005] O.J. No. 5434 (QL), 2005 CarswellOnt 7334. Appeal dismissed.

David C. Moore and Kenneth G. G. Jones, for the appellants.

J. Brett Ledger, Christopher P. Naudie and Craig T. Lockwood, for the respondents.

The judgment of the Court was delivered by

ROTHSTEIN J. —

I. Introduction

[1] This appeal arises out of the sale of a division of the Hudson's Bay Company ("HBC") to the North West Company ("NWC"). The employees of the division were retained, but transferred to NWC in the sale, and their pensions were assured. The transferred employees were removed from the HBC pension plan and incorporated into a new successor plan. At the time of the transfer, the HBC plan had a projected surplus. HBC transferred enough of the pension fund to cover the transferred employees' defined benefits but did not transfer any of the surplus funds.

[2] The transferred employees allege that the employer breached its fiduciary duty to treat all pension plan members with an even hand. They argue that HBC was required to transfer a portion of the projected surplus to the successor plan. They argue that the result was uneven treatment: the remaining HBC employees benefited from a plan in surplus but the transferred employees did not. As a subsidiary issue, the transferred employees also argue that HBC improperly charged pension plan administration expenses to the pension

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Doherty, Weiler et Gillese), 2008 ONCA 394, 236 O.A.C. 140, 67 C.C.P.B. 1, 40 E.T.R. (3d) 157, [2008] O.J. No. 1945 (QL), 2008 CarswellOnt 2801, qui a infirmé en partie une décision du juge Campbell (2005), 51 C.C.P.B. 66, 25 E.T.R. (3d) 161, 2005 CanLII 47086, [2005] O.J. No. 5434 (QL), 2005 CarswellOnt 7334. Pourvoi rejeté.

David C. Moore et Kenneth G. G. Jones, pour les appelants.

J. Brett Ledger, Christopher P. Naudie et Craig T. Lockwood, pour les intimés.

Version française du jugement de la Cour rendu par

LE JUGE ROTHSTEIN —

I. Introduction

[1] Le pourvoi découle de la vente d'une division de la Compagnie de la Baie d'Hudson (« HBC ») à la Compagnie du Nord-Ouest (« CNO »). Au moment de la vente, les employés de la division n'ont pas été mis à pied; ils ont été mutés à CNO, et leur régime de retraite a été garanti. Les employés mutés ont été dissociés du régime de retraite de HBC et ont intégré un régime subséquent, créé à ce moment. Lors du transfert, le régime de HBC affichait un excédent projeté. HBC a transféré suffisamment d'éléments d'actif de la caisse de retraite pour financer les prestations déterminées des employés mutés, mais a conservé l'excédent.

[2] Les employés mutés soutiennent que l'employeur a manqué à son devoir fiduciaire d'accorder un traitement égalitaire à tous les participants au régime de retraite. Selon eux, HBC était tenue au transfert d'une portion de l'excédent projeté au régime subséquent et son défaut d'y procéder a donné lieu à un traitement inégal : les employés demeurés en poste chez HBC ont bénéficié d'un régime excédentaire, contrairement aux employés mutés. Subsidièrement, les employés mutés font valoir que HBC a imputé à tort les frais

fund for approximately six years prior to their transfer.

[3] In the reasons that follow, I conclude that the transferred employees' claims fail on both grounds. I conclude that the pension plan documentation allowed HBC to charge plan administration expenses to the fund. I also conclude that there was no obligation on HBC to transfer a pro rata portion of the surplus on the sale. HBC's obligations to the transferred employees were satisfied by assuring their defined benefits.

[4] At the outset, it might be useful to set out the pension terminology relevant to the facts of this case. HBC provided a defined benefit pension plan to its employees. This means that the members of the plan were guaranteed a specified benefit upon retirement. A defined benefit plan stands in contrast to a defined contribution plan, where retirement benefits are based on contributions and the earnings on the contributions set out in the pension plan. Under either type of plan, contributions may be made by both the employer and employees or just the employer. In order to fund the defined benefits in this case, both HBC and the employees made contributions to the pension plan. For employees who obtained five years seniority, pension plan participation was a mandatory condition of employment at HBC. Employees were required to contribute to their pensions. The basic employee contribution requirement was set at 5% of annual earnings. HBC contributed any additional amount needed to ensure coverage of the employees' defined benefits. HBC's contribution was based on the assessment of an actuary. The actuary's calculations rested on certain assumptions — inflation rates, investment returns, and future employees, amongst other things. This is an exercise in estimation that frequently results in deviation between the actuary's assessment and the real state of the pension fund.

[5] An ongoing pension fund may be said to have an actuarial surplus when the actuary's prediction is that the fund has more assets than liabilities (i.e. the

d'administration du régime à la caisse de retraite pendant une période d'environ six ans précédant le transfert.

[3] Dans les motifs qui suivent, je rejette les deux moyens d'appel soulevés par les employés mutés. Je conclus que les documents relatifs au régime de retraite autorisaient HBC à prélever les frais d'administration du régime sur la caisse de retraite. Je conclus également que HBC n'était pas tenue de transférer une portion de l'excédent, déterminée au prorata, lors de la vente. Elle a honoré ses obligations envers les employés mutés en garantissant leur régime à prestations déterminées.

[4] Pour commencer, il serait utile d'exposer la terminologie pertinente des régimes de retraite eu égard aux faits de l'espèce. HBC offrait à ses employés un régime de retraite à prestations déterminées. Ainsi, elle garantissait aux participants une prestation fixe à la retraite. Cette formule se distingue du régime à cotisations déterminées, où les prestations de retraite sont fonction des cotisations, établies par le régime, et des revenus générés par celles-ci. Dans l'un et l'autre cas, les cotisations peuvent être versées par l'employeur et l'employé, ou par l'employeur seul. En l'espèce, à la fois HBC et les employés cotisaient au régime. La participation au régime de retraite était une condition impérative d'emploi à HBC après une période d'emploi de cinq ans. Les employés étaient tenus d'y cotiser. La cotisation de base d'un employé correspondait à 5 p. 100 de son revenu annuel. HBC versait le reste de la somme requise pour financer les prestations déterminées des employés. Le montant des cotisations de HBC était fixé par un actuaire dont les calculs s'appuyaient sur certaines hypothèses — taux d'inflation, rendement du capital investi, employés à venir, etc. Un tel exercice d'estimation se traduit fréquemment par des écarts entre l'évaluation de l'actuaire et l'état réel de la caisse de retraite.

[5] On peut dire d'une caisse de retraite qu'elle enregistre un excédent actuariel lorsque l'actuaire conclut que l'actif du régime est supérieur à son

defined benefits). Where the prediction is that the liabilities are greater than the assets, the fund is said to be in deficit. Because of the nature of the actuarial predictions, it is sometimes said that an actuarial surplus or deficit only exists on paper. If the pension plan is terminated, or wound-up, the assets and liabilities can be tallied and whether a fund is *actually* in deficit or surplus can be determined. Therefore, it is sometimes said that an actual surplus only crystallizes on plan termination.

[6] The employer's and employees' respective rights and obligations with respect to the defined benefits, contributions and surplus are set out in the pension plan documentation. In the present case there are two types of pension plan documents: the pension plan text and the fund management agreement (also referred to as the trust agreement). Gillese J.A. succinctly described the role of each document in her reasons (2008 ONCA 394, 236 O.A.C. 140, at paras. 35-36). To paraphrase her reasons, the pension plan text is a contract between the employer and the employee. The plan text sets out the administration of the pension plan and addresses matters such as funding obligations of the employer and employees, defined benefits and the method by which the plan will be administered. The plan text is not a stand-alone document, however, as it is not a tool for accumulating funds. Therefore, a second document is required. In this case, there is a trust agreement between HBC and the trustees of the pension fund. This document established and requires the maintenance of the HBC pension trust fund. Certain provisions of the pension text and the trust agreement will be reviewed in more detail in the analysis that follows below.

II. Facts

[7] HBC provided a pension plan for its employees ("the plan"). It is a contributory, defined benefits pension plan.

[8] The plan was established in 1961. For the first twenty years of existence, the plan was in deficit — the fund did not contain enough assets to cover the defined benefits of the employees. HBC made

passif (c.-à-d. les prestations déterminées). Par contre, s'il conclut que le passif est supérieur à l'actif, la caisse est tenue pour déficitaire. À cause de la nature des avis actuariels, on dit parfois que l'excédent ou le déficit actuariel n'existe qu'en théorie. S'il est mis fin au régime de retraite, ou si le régime est liquidé, on peut comptabiliser l'actif et le passif et déterminer si la caisse est *réellement* déficitaire ou excédentaire. C'est pourquoi on dit parfois que l'excédent réel d'un régime ne se cristallise qu'à la date à laquelle on met fin au régime.

[6] Les droits et les obligations respectifs de l'employeur et des employés au regard des prestations déterminées, des cotisations et de l'excédent sont définis dans les documents relatifs au régime de retraite. En l'espèce, le régime est constitué par deux types de documents : le texte du régime et la convention de gestion de la caisse (aussi appelée la convention de fiducie). Dans ses motifs, la juge Gillese a décrit brièvement le rôle de chaque document (2008 ONCA 394, 236 O.A.C. 140, par. 35-36). Pour paraphraser ses propos, le texte du régime est un contrat entre l'employeur et l'employé. Il explique le fonctionnement du régime et traite de questions telles que l'obligation de cotiser de l'employeur et des employés, les prestations déterminées et le mode d'administration du régime. Or, il n'est pas un document autonome puisqu'il ne prévoit pas l'accumulation des fonds, d'où la nécessité d'un deuxième document qui, en l'espèce, consiste en une convention de fiducie entre HBC et les fiduciaires de la caisse de retraite. Ce document a constitué en fiducie la caisse de retraite de HBC et en prévoit la continuation. J'examinerai en détail certaines dispositions du texte du régime et de la convention de fiducie dans l'analyse qui suit.

II. Les faits

[7] HBC offrait à ses employés un régime de retraite contributif à prestations déterminées (« le régime »).

[8] Le régime a été constitué en 1961. Au cours de ses vingt premières années d'existence, il accusait un déficit — l'actif de la caisse ne suffisait pas à couvrir les prestations déterminées des employés.

additional payments to keep the plan solvent. In 1982, the plan generated its first actuarial surplus. In response to the surplus, HBC began taking contribution holidays — meaning that it did not have to continue contributing to cover the defined benefits. The actuarial surplus also allowed HBC to pay for plan administration expenses out of the fund without affecting the defined benefits. In 1986, HBC attempted to withdraw \$35 million of the estimated \$76 million surplus in the fund. It abandoned this process, at least in part, because of the employees' adverse reaction.

[9] Although the original 1961 plan documentation provided that HBC's contributions were "entirely voluntary" and that payment of defined benefits under the plan were not guaranteed, the documentation also states that HBC intended to contribute the amounts deemed necessary on the basis of actuarial computations to provide the retirement benefits under the plan (art. 4 and 11.01). As indicated, HBC did make the payments that were required to fund the defined benefits under the plan when it was in deficit.

[10] In 1965, *The Pension Benefits Act, 1965*, S.O. 1965, c. 96, came into force which required employers to pre-fund their defined benefit pension plans to maintain prescribed solvency levels (A. N. Kaplan, *Pension Law* (2006), at p. 43). In the *Pension Benefits Act, 1987*, S.O. 1987, c. 35 ("1987 PBA") (the Act in force at the time relevant to this appeal), s. 56(1) provided:

A pension plan is not eligible for registration unless it provides for funding sufficient to provide the pension benefits, ancillary benefits and other benefits under the pension plan in accordance with this Act and the regulations.

[11] In the 1985 plan that was amended and restated on January 1, 1985, art. 4.04 provided that HBC was obligated to make contributions sufficient

Afin d'assurer la solvabilité du régime, HBC a versé des cotisations supplémentaires. En 1982, le régime a affiché son premier excédent actuariel, ce qui a incité HBC à s'accorder des périodes d'exonération de cotisations, son apport n'étant plus nécessaire pour couvrir le montant des prestations déterminées. L'excédent actuariel lui permettait également de payer les frais d'administration du régime à même la caisse sans entamer les fonds réservés aux prestations déterminées. En 1986, HBC a voulu retirer 35 millions de dollars de l'excédent de la caisse estimé à 76 millions de dollars. Elle a abandonné l'idée, entre autres, en raison de la réaction négative des employés.

[9] Même si les documents initiaux relatifs au régime, qui datent de 1961, précisaient à propos des cotisations de HBC qu'elles seraient [TRADUCTION] « tout à fait volontaires » et que le versement des prestations déterminées par le régime n'était pas assuré, ils prévoyaient également que HBC entendait cotiser les fonds jugés nécessaires, suivant des calculs actuariels, au versement des prestations de retraite prévues au régime (art. 4 et 11.01). Comme il est indiqué précédemment, HBC a cotisé des sommes suffisantes pour financer le régime de prestations déterminées quand ce dernier était déficitaire.

[10] En 1965, la *Pension Benefits Act, 1965*, S.O. 1965, ch. 96, a exigé des employeurs la capitalisation anticipée de leurs régimes de retraite à prestations déterminées afin d'en assurer le degré de solvabilité prescrit (A. N. Kaplan, *Pension Law* (2006), p. 43). Le paragraphe 56(1) de la *Pension Benefits Act, 1987*, S.O. 1987, ch. 35 (« PBA de 1987 »), en vigueur à l'époque visée par le litige, dispose :

[TRADUCTION] Un régime de retraite n'est pas admissible à l'enregistrement s'il ne prévoit pas de financement suffisant pour assurer les prestations de retraite, les prestations accessoires et les autres prestations aux termes du régime de retraite, conformément à la présente loi et aux règlements.

[11] Dans le texte du régime modifié en date du 1^{er} janvier 1985, l'art. 4.04 prévoyait l'obligation pour HBC de cotiser des fonds suffisants pour financer

to cover the defined benefits under the plan. Article 4.04 provided in part:

The company shall from time to time, but not less frequently than annually, contribute such amounts to the Plan as are necessary, in the opinion of the Actuary, to provide the pension benefits accruing to Members during the current year and to amortize any initial unfunded liability or experience deficiency in accordance with the requirements of the Act, after taking into account the assets in the Trust Fund, the earnings thereon, the required contributions of Members during the year and all other relevant factors.

[12] Therefore, notwithstanding the apparent voluntary nature of HBC's contributions at the outset in 1961, HBC did make all contributions necessary to fund the defined benefits under the plan. In any event, HBC, pursuant to art. 4.04, expressly undertook and was required to satisfy the defined benefits prescribed under the plan.

[13] In 1987, HBC sold its Northern Stores Division to NWC. NWC agreed to retain the Northern Stores employees. This resulted in approximately 1,200 employees being transferred from HBC to NWC. As part of the sale, HBC and NWC entered into an agreement to protect the pensions of the transferred employees. The agreement provided that NWC would establish a new pension plan and would provide the transferred employees with benefits "at least equal to those presently provided under [the HBC plan]". HBC agreed to transfer assets sufficient to cover the defined benefits of the transferred employees. The actuarial report showed that HBC had to transfer approximately \$12.6 million to cover the defined pension benefits of the transferred employees.

[14] At the time of the transfer, the HBC plan had a significant actuarial surplus estimated to be about \$94 million. HBC and NWC discussed whether a portion of the actuarial surplus should be transferred. However, HBC suggested that transferring part of the surplus would increase the purchase price and the matter went no further.

[15] NWC contested the transferred amount on the basis that it did not sufficiently account for early

les prestations déterminées prévues au régime. Suit un extrait de l'art. 4.04 :

[TRADUCTION] Au moins une fois l'an, la société cotise au régime la somme nécessaire, selon l'actuaire, pour verser aux participants les prestations de retraite accumulées pendant l'année en cours et pour amortir tout déficit actuariel ou perte actuarielle conformément aux prescriptions de la loi, compte tenu des facteurs pertinents, notamment l'actif du fonds en fiducie, ses revenus et les cotisations que sont tenus de verser les participants au cours de l'année.

[12] Ainsi, en dépit du caractère apparemment volontaire de ses cotisations à l'époque de la constitution du régime, en 1961, HBC a versé tous les fonds nécessaires pour financer le régime de prestations déterminées. Du reste, à l'art. 4.04, HBC s'était engagée expressément à financer les prestations déterminées prévues au régime, et elle y était tenue.

[13] En 1987, HBC a vendu sa division des Magasins du Nord à CNO, qui a convenu de garder à son service les employés des Magasins du Nord. Environ 1 200 employés de HBC ont donc été mutés à CNO. Dans le cadre de la vente, HBC et CNO ont conclu une entente visant à protéger le régime de retraite des employés mutés. Cette entente prévoyait la constitution, par CNO, d'un nouveau régime de retraite qui offrirait aux employés mutés des prestations [TRADUCTION] « au moins égales à celles prévues par [le régime HBC] ». HBC a consenti à transférer des éléments d'actif suffisants pour assurer les prestations déterminées des employés mutés, soit environ 12,6 millions de dollars, selon le rapport de l'actuaire.

[14] Au moment du transfert, le régime de HBC affichait un excédent actuariel important estimé à quelque 94 millions de dollars. HBC et CNO ont discuté de la possibilité de transférer une partie de cet excédent, mais HBC a laissé entendre qu'une telle transaction ferait augmenter le prix d'achat et la question n'a plus été débattue.

[15] CNO a contesté la somme transférée, faisant valoir qu'elle ne suffirait pas au versement des

retirement benefits. The matter was heard before the Superintendent of the Pension Commission of Ontario. The Superintendent agreed with NWC and found that the transferred amount did not account for early retirement benefits. However, the Superintendent found that he did not have the jurisdiction to order a transfer of further funds to cover the shortfall. NWC brought an application in court to determine its rights under the agreement. Gotlib J. of the Ontario Court of Justice agreed with NWC and ordered the transfer of an additional \$1.27 million to cover early retirement benefits (*North West Co. v. Hudson's Bay Co.*, [1991] O.J. No. 2449 (QL)).

[16] The issue of transferring the actuarial surplus was presented to the Superintendent. He held that he did not have the jurisdiction to determine issues of surplus entitlement.

III. Lower Court Decisions

A. *Ontario Superior Court of Justice (2005), 51 C.C.P.B. 66*

[17] Peter Burke, Richard Fallis and A. Douglas Ross were Northern Stores employees who were transferred to NWC. They were appointed representatives of all the pension plan beneficiaries who were transferred to NWC. In their personal and representative capacity they claimed to be entitled to a portion of the actuarial surplus that existed in the HBC pension at the time of the transfer. They also sought to recover plan administration expenses that HBC charged to the fund, as well as the actuarial surplus funds that HBC used to take contribution holidays.

[18] Campbell J. heard the transferred employees' claims at the Ontario Superior Court of Justice. He concluded that the surplus was subject to trust principles, and that the transferred employees, as beneficiaries of the trust, had an equitable interest in the actuarial surplus. Campbell J. reasoned that the remaining employees stood to benefit from a greater pool of assets, because the entire actuarial surplus remained with HBC. Conversely, the transferred

prestations de retraite anticipée. L'affaire a été soumise au surintendant de la Commission des régimes de retraite de l'Ontario, qui a donné raison à CNO. Cependant, à son avis, il n'avait pas compétence pour ordonner le transfert de fonds supplémentaires pour combler la différence. CNO s'est alors adressée au tribunal afin que soient déterminés les droits que lui conférait l'entente. Le juge Gotlib de la Cour de justice de l'Ontario a souscrit à la thèse de CNO et a ordonné le transfert d'une somme additionnelle de 1,27 million de dollars qui servirait au versement des prestations de retraite anticipée (*North West Co. c. Hudson's Bay Co.*, [1991] O.J. No. 2449 (QL)).

[16] La question du transfert de l'excédent actuariel a été soumise au surintendant, qui s'est dit incompetent pour trancher les questions relatives au droit à l'excédent.

III. Décisions des juridictions inférieures

A. *Cour supérieure de justice de l'Ontario (2005), 51 C.C.P.B. 66*

[17] Peter Burke, Richard Fallis et A. Douglas Ross font partie des employés des Magasins du Nord qui ont été mutés à CNO. Ils ont été désignés à titre de représentants de l'ensemble des bénéficiaires du régime de retraite mutés à CNO. En leur qualité personnelle et en leur qualité de représentants, ils ont prétendu avoir droit à une partie de l'excédent actuariel qu'affichait le régime de HBC au moment du transfert. Ils ont également demandé le remboursement des frais d'administration du régime prélevés sur la caisse par HBC, de même que des fonds provenant de l'excédent actuariel dont cette dernière s'était servie pour s'accorder des périodes d'exonération de cotisations.

[18] Le juge Campbell de la Cour supérieure de justice de l'Ontario a instruit les demandes présentées par les employés mutés. Il a conclu que l'excédent du régime était assujéti aux principes de la fiducie et que les employés mutés, en tant que bénéficiaires de la fiducie, avaient un intérêt en equity dans l'excédent actuariel. Le juge Campbell a estimé que les employés demeurés en poste chez HBC auraient la chance de bénéficier d'une caisse

employees were deprived of the actuarial surplus that would have provided greater security for the payment and potential improvement of their benefits. The trial judge concluded that the disparate treatment of the beneficiaries was a breach of an equitable trust which required the transfer of a portion of the actuarial surplus to remedy the breach. The details of the remedy would be determined after further submissions from the parties.

[19] Campbell J. found in favour of HBC on the issue of expenses and concluded, based on contract principles, that HBC was entitled to charge plan administration expenses to the pension fund. Campbell J. also concluded that HBC was permitted to take contribution holidays. His conclusion on the latter issue was not appealed.

B. *Ontario Court of Appeal, 2008 ONCA 394, 236 O.A.C. 140*

[20] HBC appealed the issue of surplus to the Court of Appeal and the transferred employees cross-appealed on the issue of expenses. Gillese J.A., for a unanimous court, allowed the appeal and dismissed the cross-appeal.

[21] On the issue of surplus, Gillese J.A. determined that the matter could only be resolved by first determining whether the transferred employees had any entitlement to the actuarial surplus at the time of the transfer. If they did not, then HBC could not have had any obligation to transfer a portion of the actuarial surplus. Surplus entitlement is a matter of construction. Gillese J.A. analysed the language of the plan documentation and found that the documents did not contain any of the language that courts have found to establish employee entitlement to surplus. On the basis of several provisions in the plan text, Gillese J.A. found that the employees were entitled to only the defined benefits provided by the terms of the plan.

mieux garnie, parce que HBC avait conservé la totalité de l'excédent actuariel, tandis que les employés mutés se voyaient privés de ces fonds qui auraient mieux garanti leurs prestations et qui étaient susceptibles de les bonifier. Le juge du procès a conclu que le traitement différent accordé aux bénéficiaires contrevenait à une fiducie régie par l'équité et que, pour y remédier, une partie de l'excédent actuariel devait être transférée. Les détails de cette mesure de réparation seraient déterminés une fois que les parties auraient présenté leurs observations à cet égard.

[19] Le juge Campbell a donné gain de cause à HBC sur la question des frais d'administration et, se fondant sur les principes du droit des contrats, a conclu que HBC pouvait imputer les frais d'administration du régime à la caisse de retraite. Le juge Campbell a également conclu que HBC était autorisée à s'exonérer du versement des cotisations. Il n'a pas été interjeté appel de sa conclusion sur cette dernière question.

B. *Cour d'appel de l'Ontario, 2008 ONCA 394, 236 O.A.C. 140*

[20] HBC s'est pourvue devant la Cour d'appel sur la question de l'excédent, et les employés mutés ont formé un appel incident sur la question des frais d'administration. Dans une décision unanime, la juge Gillese a accueilli l'appel et a rejeté l'appel incident.

[21] Au sujet de l'excédent, la juge Gillese a conclu qu'elle ne pouvait trancher cette question qu'après avoir déterminé si les employés mutés avaient un droit quelconque à l'excédent actuariel au moment du transfert. Dans la négative, HBC ne pouvait avoir eu l'obligation d'en transférer une portion. Le droit à l'excédent est une affaire d'interprétation. Après avoir analysé le libellé des documents relatifs au régime, la juge Gillese était d'avis qu'ils ne contenaient aucune des formules reconnues par les tribunaux comme conférant un droit à l'excédent aux employés. Se fondant sur plusieurs dispositions du texte du régime, la juge Gillese a conclu que les employés n'avaient droit qu'aux prestations déterminées que leur accordait le régime.

[22] Gillese J.A. agreed with the trial judge that a fundamental principle of trust law is that the beneficiaries are to be treated with impartiality and an even hand. However, she noted, this principle is subject to the terms of the trust instrument. Gillese J.A. found that the plan documentation displaced the duty of even-handedness with respect to the actuarial surplus. Because the employees were only entitled to the defined benefits at the time of the transfer, the duty of even-handedness only required ensuring that the defined benefits were protected. In her opinion, the considerable discretion afforded to the employer on the use of actuarial surplus supported her conclusion.

[23] Based on the text of the plan documentation, Gillese J.A. found that HBC was entitled to charge plan administration expenses to the fund. Silence does not create a positive obligation on the employer to pay expenses. The plan text was silent on plan administration expenses; therefore, HBC was not obliged to pay out of its own pocket. Subsequent amendments to the documentation made this explicit, stating that administration costs could be paid out of the pension fund.

[24] Mr. Burke et al. (“Burke”) appeal the decision on both issues.

IV. Issues

[25] I will deal with the issues in the reverse order of the Court of Appeal. First, did HBC properly pay the plan administration expenses from the pension fund? Second, was HBC obligated to transfer a portion of the actuarial surplus in the sale of Northern Stores?

V. Analysis

[26] Both issues in this appeal concern HBC’s obligations with respect to surplus in the pension plan. Pension surpluses raise contentious issues that this Court has considered previously: *Schmidt*

[22] La juge Gillese a souscrit à la conclusion du juge du procès qu’un principe fondamental du droit des fiducies exige que les bénéficiaires soient traités de manière impartiale et égalitaire. Toutefois, a-t-elle fait remarquer, ce principe est assujéti à la convention de fiducie. Selon elle, les documents relatifs au régime supplantent le devoir de traitement égalitaire relativement à l’excédent actuariel. Comme les employés n’avaient droit qu’aux prestations déterminées au moment du transfert, le devoir de traitement égalitaire se limitait à la protection de ces prestations. À son avis, l’important pouvoir discrétionnaire conféré à l’employeur quant à l’utilisation de l’excédent actuariel étayait sa conclusion.

[23] Se fondant sur le libellé des documents relatifs au régime, la juge Gillese a conclu que HBC pouvait imputer les frais d’administration du régime à la caisse. L’absence d’une disposition sur le paiement des frais n’impose pas à l’employeur l’obligation positive de les acquitter. Le texte du régime ne prévoyait rien à l’égard des frais d’administration du régime; en conséquence, HBC n’était pas tenue de les payer de sa poche. Des modifications subséquentes aux documents ont clarifié la question, en permettant expressément le paiement des frais d’administration à même la caisse de retraite.

[24] M. Burke et les autres appelants (« le groupe de M. Burke ») ont interjeté appel du jugement rendu sur les deux questions.

IV. Questions en litige

[25] J’analyserai les questions dans l’ordre inverse de celui adopté par la Cour d’appel. Premièrement, HBC a-t-elle agi à bon droit en payant les frais d’administration du régime à même la caisse de retraite? Deuxièmement, HBC était-elle tenue de transférer une portion de l’excédent actuariel dans le cadre de la vente des Magasins du Nord?

V. Analyse

[26] Les deux questions dont notre Cour est saisie en l’espèce portent sur les obligations de HBC à l’égard de l’excédent accumulé par le régime de retraite. L’excédent d’une caisse de retraite soulève

v. Air Products Canada Ltd., [1994] 2 S.C.R. 611; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678. In all these cases the interests in the surplus of the pension plan have been determined according to the words of the relevant documents and applicable contract and trust principles and statutory provisions.

A. *Plan Administration Expenses*

[27] In 1982, when the pension fund had its first actuarial surplus, HBC began paying plan administration expenses out of the fund. Burke alleges that HBC improperly charged these expenses to the fund and that HBC, itself, should have paid the expenses. They seek to reclaim the funds used to pay expenses from 1982 until they were transferred to NWC in 1987.

[28] This Court recently addressed the issue of plan administration expenses in *Kerry*. While this Court's reasons in *Kerry* were released after the Court of Appeal's decision in the present appeal, my view is that the issue was correctly decided by Gillese J.A. I will briefly address why HBC properly paid the expenses from the fund in accordance with the principles in *Kerry*, but the Court of Appeal's decision correctly analyses this issue in more detail.

[29] In *Kerry*, this Court determined that absent a statutory or common law authority creating an obligation on the employer to pay for expenses, such an obligation must arise from the text and the context of the pension plan documents (para. 40). There was no statutory obligation on HBC to pay expenses. Accordingly, Burke argues that the obligation on HBC derives from the plan documents and the common law. This argument was rejected at the Court of Appeal, and for the following reasons I would also reject this argument.

des questions litigieuses sur lesquelles notre Cour a déjà été appelée à se pencher : *Schmidt c. Air Products Canada Ltd.*, [1994] 2 R.C.S. 611; *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, 2004 CSC 54, [2004] 3 R.C.S. 152; *Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678. Dans toutes ces affaires, le droit à l'excédent a été déterminé en fonction du libellé des documents pertinents, des principes du droit des contrats et du droit des fiducies et des textes législatifs applicables.

A. *Frais d'administration du régime*

[27] En 1982, année où le régime a affiché son premier excédent actuariel, HBC a commencé à payer à même la caisse les frais d'administration du régime. Le groupe de M. Burke prétend que HBC a irrégulièrement imputé ces frais à la caisse et qu'elle aurait dû les acquitter elle-même. Il sollicite le remboursement des fonds ayant servi au paiement de ces frais, de 1982 jusqu'à sa mutation à CNO, en 1987.

[28] Notre Cour a récemment traité de la question des frais d'administration d'un régime dans l'arrêt *Kerry*. Certes, nos motifs ont été publiés après l'arrêt de la Cour d'appel en l'espèce, mais j'estime que la juge Gillese a correctement tranché la question. Je traiterai brièvement des raisons pour lesquelles, selon les principes établis dans *Kerry*, HBC a agi à bon droit en payant ces frais à même la caisse, mais je rappelle que la Cour d'appel analyse correctement cette question plus en détail dans sa décision.

[29] Dans l'arrêt *Kerry*, la Cour a statué qu'en l'absence d'une source de nature législative ou jurisprudentielle qui obligerait l'employeur à acquitter les frais d'un régime de retraite, une telle obligation devrait découler du texte et du contexte des documents relatifs au régime (par. 40). Aucune loi n'imposait à HBC l'obligation de payer ces frais. Par conséquent, le groupe de M. Burke soutient que cette obligation découle des documents relatifs au régime et de la jurisprudence. Cet argument a été rejeté par la Cour d'appel et je suis d'avis de faire de même pour les motifs qui suivent.

[30] Burke argues that art. 21 of the original 1961 trust agreement imposes an obligation on the employer to pay plan administration expenses. The article provides:

21. COMPENSATION OF TRUSTEE

The Trustee shall be entitled to such compensation as may from time to time be mutually agreed in writing with the Company. Such compensation and all other disbursements made and expenses incurred in the management of the Fund shall be paid by the Company.

Burke puts particular emphasis on the last sentence of the provision and argues that “all other disbursements made and expenses incurred in the management of the Fund” is an ambiguous phrase and could include not only trustee expenses, but also additional plan administration expenses.

[31] In light of this broad wording, Burke argues that the ambiguity should be resolved having regard to the statements made in booklets distributed to the employees by HBC for the purpose of explaining their pension benefits. The HBC pension booklets for 1961, 1975 and 1980 stated that the entire cost of administering the plan will be borne or paid by the Company. Therefore, Burke argues that the combined effect of art. 21 and these booklets is that HBC improperly charged the plan administration expenses to the fund.

[32] I cannot accept this argument. In my opinion, art. 21 is not broad nor ambiguous. Article 21 deals with expenses incurred by the trustee “in the management of the Fund” and does not address plan administration expenses. The plan text, which deals with the administration of the plan, is silent on plan administration expenses. This Court reached the same conclusion in *Kerry*, where a similar article was found to impose an obligation on the employer to pay only for trustee expenses and not plan administration expenses. In my opinion, art. 21 is not ambiguous, as Burke suggests. The article

[30] Le groupe de M. Burke prétend que l’art. 21 de la convention de fiducie originale, qui date de 1961, impose à l’employeur l’obligation de payer les frais d’administration du régime. L’article est ainsi rédigé :

[TRADUCTION]

21. RÉMUNÉRATION DU FIDUCIAIRE

Le fiduciaire aura droit à la rémunération dont il aura convenu par écrit avec la société. Cette rémunération, ainsi que tous les autres débours et frais engagés dans le cadre de la gestion de la caisse, seront acquittés par la société.

Le groupe de M. Burke, insistant sur la dernière phrase de la disposition, fait valoir que la proposition [TRADUCTION] « tous les autres débours et frais engagés dans le cadre de la gestion de la caisse » est ambiguë et qu’elle pourrait viser non seulement les dépenses du fiduciaire, mais également les autres frais d’administration du régime.

[31] Invoquant le caractère général du libellé, le groupe de M. Burke prétend que l’ambiguïté devrait être résolue à la lumière des affirmations qui figurent dans les brochures distribuées par HBC à ses employés pour leur expliquer leur régime de retraite. Les brochures de 1961, 1975 et 1980 affirment que la totalité des frais relatifs à l’administration du régime seront assumés ou payés par la société. Partant, le groupe de M. Burke soutient que, compte tenu de l’art. 21 et des brochures, interprétés ensemble, HBC a agi irrégulièrement en prélevant sur la caisse les frais d’administration du régime.

[32] Je ne puis retenir cet argument. À mon avis, l’art. 21 n’est ni général ni ambigu. L’article 21 traite des dépenses engagées par le fiduciaire « dans le cadre de la gestion de la caisse » et non des frais d’administration du régime. Le texte du régime, qui porte sur l’administration de ce dernier, est muet sur la question des frais d’administration. La Cour est arrivée à la même conclusion dans l’arrêt *Kerry*, où elle a jugé qu’une disposition semblable imposait à l’employeur l’obligation de ne payer que les dépenses du fiduciaire, et non les frais d’administration du régime. Selon moi, l’art. 21 n’est pas

clearly outlines HBC's obligation with respect to trustee expenses and nothing else.

[33] In 1971, HBC entered into a new trust agreement. This new trust agreement included a provision which expressly allowed HBC to charge plan administration expenses to the fund. Again, in 1984, HBC entered into a new trust agreement. The 1984 trust agreement also expressly allowed HBC to charge plan administration expenses to the fund. Since the new trust agreements merely confirmed expressly what was already implicitly provided for in the original trust agreement, there is no need to discuss whether the new versions were valid as they introduce no new obligations or rights with respect to plan administration expenses.

[34] What, then, is the effect of the HBC pension booklets that stated that HBC would bear the entire cost of administering the pension plan? In light of my conclusion that art. 21 was unambiguous, it is not necessary to look to the booklets as an interpretative aid. Burke did not advance the argument in this Court that the statement in the booklets was a binding promise and created an estoppel.

[35] I would dismiss this ground of the appeal.

B. *Transfer of Surplus*

[36] The primary issue on this appeal is whether HBC was required to transfer a portion of the actuarial surplus when it sold Northern Stores to NWC in 1987. This is a novel question in pension law. The novelty arises from the fact that the sale occurred in the context of an ongoing pension plan, rather than a terminated or wound-up plan.

[37] Burke argues that, because the transfer occurred in the context of an ongoing plan, plan administration principles should govern the transfer. He says that he has an equitable interest in the

ambigu, comme le prétend le groupe de M. Burke. Cette disposition décrit clairement l'obligation de HBC à l'égard des dépenses engagées par le fiduciaire, et rien d'autre.

[33] En 1971, HBC a conclu une nouvelle convention de fiducie, laquelle autorisait expressément HBC à imputer à la caisse les frais d'administration du régime. En 1984, HBC a conclu une autre convention de fiducie, qui comportait elle aussi une disposition expresse à cet effet. Puisque les nouvelles conventions de fiducie n'ont fait que confirmer expressément ce que prévoyait implicitement la convention originale et n'ont pas créé de nouvelles obligations ni de nouveaux droits à l'égard des frais d'administration du régime, il n'y a pas lieu de se pencher sur leur validité.

[34] Quel est donc l'effet des brochures sur le régime de retraite de HBC qui affirmaient que cette dernière supporterait la totalité des frais relatifs à l'administration du régime? Vu ma conclusion que l'art. 21 n'est pas ambigu, il n'est pas nécessaire de recourir aux brochures comme outil d'interprétation. Le groupe de M. Burke n'a pas prétendu devant la Cour que l'affirmation figurant dans les brochures était une promesse exécutoire et qu'elle emportait la préclusion.

[35] Je suis d'avis de rejeter ce moyen d'appel.

B. *Transfert de l'excédent*

[36] La principale question en litige dans le présent pourvoi est de savoir si HBC était tenue de transférer une portion de l'excédent actuariel lorsqu'elle a vendu ses Magasins du Nord à CNO en 1987. Il s'agit d'une question nouvelle intéressant le droit applicable aux régimes de retraite. Sa nouveauté tient au fait que le régime de retraite a continué d'exister après la vente; il n'y a pas été mis fin et il n'a pas été liquidé.

[37] Le groupe de M. Burke soutient que le transfert, survenu dans le contexte du prolongement du régime, était assujéti aux principes applicables à l'administration du régime. Il affirme avoir un droit

total assets of the fund and therefore he can bring a claim against HBC for breach of fiduciary duty and compel due administration of the fund. He says HBC, as a fiduciary, had the obligation to treat the beneficiaries of the fund with an even hand and that in not transferring a portion of the surplus in the fund for the benefit of the transferred employees, HBC breached its fiduciary duty of even-handedness.

[38] I will first address the question of whether HBC is a fiduciary in the circumstances of this case. Second, I will address the role of the 1987 PBA in the transfer of assets to NWC. I will then turn to Burke's argument that he has an equitable interest in the total assets of the fund. After that, I deal with the even-handedness argument and finally the obligations of HBC in the due administration of the pension fund.

(1) HBC as Fiduciary

[39] In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 408, La Forest J. endorsed the indicia that help recognize a fiduciary relationship set forth by Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 136:

(1) [S]cope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power.

La Forest J. wrote that "Wilson J.'s mode of analysis has been followed as a 'rough and ready guide' in identifying new categories of fiduciary relationships" (see also D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 42).

[40] At para. 55 of her reasons, Gillese J.A. found that HBC, as pension plan administrator, was a fiduciary. Article 11.01 of the 1985 restatement of the pension plan designates HBC as the

en equity dans l'actif total de la caisse et pouvoir, en conséquence, intenter une action contre HBC pour violation de son devoir fiduciaire et exiger la bonne administration de la caisse. Selon lui, HBC était tenue, en sa qualité de fiduciaire, d'accorder un traitement égalitaire aux bénéficiaires de la caisse et elle aurait manqué à ce devoir fiduciaire par son défaut de transférer une portion de l'excédent au profit des employés mutés.

[38] Je trancherai d'abord la question de savoir si HBC est une fiduciaire dans le contexte qui nous occupe. J'examinerai ensuite le rôle de la PBA de 1987 dans le transfert des éléments d'actifs à CNO. J'analyserai par la suite la prétention du groupe de M. Burke selon laquelle il aurait un droit en equity dans l'actif total de la caisse. Enfin, je traiterai de l'argument relatif au traitement égalitaire et j'aborderai les obligations de HBC à l'égard de la bonne administration de la caisse de retraite.

(1) HBC agissant à titre fiduciaire

[39] Dans l'arrêt *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, à la p. 408, le juge La Forest fait siennes les caractéristiques qui aident le tribunal à reconnaître une relation fiduciaire énoncées par la juge Wilson dans *Frame c. Smith*, [1987] 2 R.C.S. 99, à la p. 136 :

(1) [U]n certain pouvoir discrétionnaire peut être exercé, (2) ce pouvoir discrétionnaire peut être exercé unilatéralement de manière à avoir un effet sur les intérêts juridiques ou pratiques du bénéficiaire, et (3) une vulnérabilité particulière à l'exercice de ce pouvoir discrétionnaire.

Le juge La Forest a précisé que « la méthode d'analyse du juge Wilson a été suivie en tant que "guide sommaire et existant" pour identifier de nouvelles catégories de rapports [fiduciaires] » (voir aussi D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3^e éd. 2005), p. 42).

[40] Au paragraphe 55 de ses motifs, la juge Gillese a conclu que HBC, en sa qualité d'administratrice du régime, agissait à titre fiduciaire. L'article 11.01 de la reformulation du régime de

plan administrator with the power to “conclusively decide all matters relating to the administration, interpretation, overall operation and application of the Plan”. Article 11.01 provides:

11.01 Company Administration

The Plan shall be administered by the Company which shall determine all questions relating to the length of Continuous Service, eligibility, early or postponed retirement, and rates and amounts of Annual Earnings and Average Earnings for the purposes of the Plan and shall conclusively decide all matters relating to the administration, interpretation, overall operation and application of the Plan, consistent, however, with the text of the Plan, the terms of the Trust Agreement, and the Act and the *Income Tax Act* (Canada). [Emphasis added.]

[41] Subject to the text of the plan, the terms of the trust agreement, and relevant statutes, there is no doubt that HBC had wide discretion with respect to the pension plan, which it could exercise unilaterally and which could affect the interests of the employees, and to which exercise of discretion the employees were vulnerable. Therefore, I agree with Gillese J.A. that in these circumstances HBC, as plan administrator, was a fiduciary and that a fiduciary relationship existed between HBC as administrator and the employees/beneficiaries under the pension plan. As Gillese J.A. wrote, at para. 55, “[h]ad there been a legal obligation to transfer part of the surplus at the time of Sale and had it been found that the Bay failed to cause that to occur, the proper nomenclature would have been a finding that the Bay was in breach of its fiduciary obligations to the Transferred Employees.” The question is whether there was such a legal obligation.

(2) The Pension Benefits Act, 1987

[42] HBC argues that s. 81 of the 1987 PBA is a specialized regime for transferring pension assets

retraite de 1985 désigne HBC à titre d’administratrice du régime et lui confère le pouvoir de régler [TRADUCTION] « définitivement toutes les questions relatives à l’administration, à l’interprétation, au fonctionnement général et à l’application du régime ». L’article 11.01 est ainsi libellé :

[TRADUCTION]

11.01 Administration par la société

Le régime est administré par la société, qui tranche toutes les questions relatives à la durée du service ininterrompu, à l’admissibilité, à la retraite anticipée ou différée, ainsi qu’aux taux et aux montants de revenu annuel et de revenu moyen pour l’application du régime et règle définitivement toutes les questions relatives à l’administration, à l’interprétation, au fonctionnement général et à l’application du régime, en conformité toutefois avec le texte du régime, avec la convention de fiducie et avec la Loi et la *Loi de l’impôt sur le revenu* (Canada). [Je souligne.]

[41] Sous réserve du texte du régime, de la convention de fiducie et des lois applicables, il ne fait aucun doute que HBC avait, à l’égard du régime de retraite, un vaste pouvoir discrétionnaire, qu’elle pouvait exercer unilatéralement de manière à avoir un effet sur les intérêts des employés, et que les employés étaient vulnérables à l’exercice de ce pouvoir. Par conséquent, je conviens avec la juge Gillese qu’en l’espèce, HBC, en qualité d’administratrice du régime, agissait à titre fiducial et qu’un lien fiducial unissait HBC, en tant qu’administratrice du régime, à ses employés, en tant que bénéficiaires du régime de retraite. Comme l’écrivait la juge Gillese au par. 55 : [TRADUCTION] « S’il avait existé une obligation juridique de transférer une portion de l’excédent lors de la vente, et s’il avait été déterminé que La Baie avait omis de faire en sorte que le transfert soit effectué, il aurait fallu dire, en conclusion, que La Baie avait manqué à ses obligations fiduciaires envers les employés mutés. » Il s’agit de déterminer si une telle obligation lui incombait effectivement en droit.

(2) La Pension Benefits Act, 1987

[42] HBC prétend que l’art. 81 de la PBA de 1987 constitue un régime spécialisé, régissant le

and that it was simply required to comply with this regime, which it did. It says this situation is like that in *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973, where this Court found that the general trust rule in *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.), which allows beneficiaries to collapse a trust in certain circumstances, was displaced by legislative provisions.

[43] The transfer of pension assets to NWC was subject to the *1987 PBA* (decision of the Superintendent of the Pension Commission of Ontario, April 30, 1990, Reference C-8389). I note that this statute has been subsequently amended, with the most recent revision receiving Royal Assent as of May 2010. I would also note that the issue of surplus transfer when there is a transfer of pension assets is dealt with under the yet to be proclaimed s. 80(13) of the amended statute (S.O. 2010, c. 9, s. 68). Section 81 of the *1987 PBA* deems the transfer of pension assets in this case to be a continuation of the HBC plan, and it ensures the protection of the employees' defined benefits already accrued, as well as any other benefits provided under the plan. This section provides:

81.—(1) Where an employer who contributes to a pension plan sells, assigns or otherwise disposes of all or part of the employer's business or all or part of the assets of the employer's business, a member of the pension plan who, in conjunction with the sale, assignment or disposition becomes an employee of the successor employer and becomes a member of a pension plan provided by the successor employer,

- (a) continues to be entitled to the benefits provided under the employer's pension plan in respect of employment in Ontario or a designated province to the effective date of the sale, assignment or disposition without further accrual;
- (b) is entitled to credit in the pension plan of the successor employer for the period of

transfert de l'actif d'un régime de retraite et qu'il suffisait qu'elle s'y conforme, ce qu'elle a fait. À son avis, la présente situation est semblable à celle qui était examinée dans l'arrêt *Buschau c. Rogers Communications Inc.*, 2006 CSC 28, [2006] 1 R.C.S. 973, où la Cour a statué que les dispositions législatives supplantent la règle de *Saunders c. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.), en matière de fiducie, selon laquelle les bénéficiaires peuvent mettre fin à une fiducie dans certaines circonstances.

[43] Le transfert à CNO de l'actif du régime de retraite était assujéti à la PBA de 1987 (décision du 30 avril 1990 du surintendant de la Commission des régimes de retraite de l'Ontario, n^o de dossier C-8389). Je signale que cette loi a été modifiée depuis. La dernière modification a reçu la sanction royale en mai 2010. Je tiens également à signaler que la question du transfert de l'excédent dans le cadre du transfert d'éléments d'actif d'une caisse de retraite est traitée dans le par. 80(13), non encore promulgué, de la loi modifiée (L.R.O. 2010, ch. 9, art. 68). Suivant l'art. 81 de la PBA de 1987, qui protège les prestations déterminées accumulées ainsi que tous les autres avantages accordés aux employés par les régimes, le transfert de l'actif de la caisse en l'espèce est réputé prolonger le régime de HBC. Cet article est ainsi libellé :

[TRADUCTION]

81.—(1) Si un employeur qui cotise à un régime de retraite vend ou cède la totalité ou une partie de ses affaires ou de l'actif de ses affaires, ou l'aliène autrement, un participant au régime de retraite qui, à la suite de la vente, de la cession ou de l'aliénation, devient un employé de l'employeur subséquent et un participant au régime de retraite offert par l'employeur subséquent :

- a) continue d'avoir droit aux prestations prévues aux termes du régime de retraite de l'employeur à l'égard de l'emploi en Ontario ou dans une province désignée jusqu'à la date de prise d'effet de la vente, de la cession ou de l'aliénation sans accumulation supplémentaire;
- b) a droit au crédit dans le régime de retraite de l'employeur subséquent pour la période

membership in the employer's pension plan, for the purpose of determining eligibility for membership in or entitlement to benefits under the pension plan of the successor employer; and

- (c) is entitled to credit in the employer's pension plan for the period of employment with the successor employer for the purpose of determining entitlement to benefits under the employer's pension plan.

(2) Clause (1) (a) does not apply if the successor employer assumes responsibility for the accrued pension benefits of the employer's pension plan and the pension plan of the successor employer shall be deemed to be a continuation of the employer's plan with respect to any benefits or assets transferred.

(3) Where a transaction described in subsection (1) takes place, the employment of the employee shall be deemed, for the purposes of this Act, not to be terminated by reason of the transaction.

(4) Where a transaction described in subsection (1) occurs and the successor employer assumes responsibility in whole or in part for the pension benefits provided under the employer's pension plan, no transfer of assets shall be made from the employer's pension fund to the pension fund of the plan provided by the successor employer without the prior consent of the Superintendent or contrary to the prescribed terms and conditions.

(5) The Superintendent shall refuse to consent to a transfer of assets that does not protect the pension benefits and any other benefits of the members and former members of the employer's pension plan or that does not meet the prescribed requirements and qualifications.

[44] I am not persuaded that s. 81 resolves the issue. Nor do I see this as analogous to the situation in *Buschau*.

[45] Pensions legislation is not a complete code (*Buschau*, at para. 35). As this Court said in *Monsanto* (speaking of the *Pension Benefits Act*, R.S.O. 1990, c. P.8), the *PBA*'s "purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans" (para. 38 (emphasis added)).

d'affiliation au régime de retraite de l'employeur, afin de déterminer l'admissibilité à l'affiliation au régime de retraite de l'employeur subséquent ou le droit aux prestations aux termes de ce régime;

- c) a droit au crédit dans le régime de retraite de l'employeur pour la période d'emploi chez l'employeur subséquent afin de déterminer le droit aux prestations aux termes du régime de retraite de l'employeur.

(2) L'alinéa (1) a) ne s'applique pas si l'employeur subséquent assume la responsabilité des prestations de retraite accumulées dans le régime de retraite de l'employeur. Le régime de retraite de l'employeur subséquent est réputé être un prolongement du régime de l'employeur à l'égard des prestations ou de l'actif transférés.

(3) Si une opération décrite au paragraphe (1) a lieu, l'emploi de l'employé est réputé, pour l'application de la présente loi, ne pas avoir pris fin en raison de l'opération.

(4) Si l'opération décrite au paragraphe (1) a lieu et que l'employeur subséquent assume la responsabilité totale ou partielle des prestations de retraite prévues aux termes du régime de retraite de l'employeur, aucun transfert de l'actif n'est fait de la caisse de retraite de l'employeur à celle du régime de retraite offert par l'employeur subséquent sans le consentement préalable du surintendant ou à l'encontre des conditions prescrites.

(5) Le surintendant refuse de consentir à un transfert d'actif qui ne protège pas les prestations de retraite et les autres prestations des participants et des anciens participants au régime de retraite de l'employeur ou qui ne répond pas aux exigences et aux conditions requises qui sont prescrites.

[44] Je ne suis pas convaincu que l'art. 81 tranche la question, ni que la présente situation est analogue à celle en cause dans *Buschau*.

[45] La loi sur les régimes de retraite n'est pas un code exhaustif (*Buschau*, par. 35). Ainsi que l'a affirmé la Cour dans *Monsanto* (au sujet de la *Loi sur les régimes de retraite*, L.R.O. 1990, ch. P.8), la loi « visé à établir des normes minimales et une supervision réglementaire afin de protéger et de garantir les prestations et les droits des participants, des anciens participants et des autres personnes qui ont droit à des prestations en vertu des

In my opinion, s. 81(5) does exactly that — establishes a minimum standard for the transfer of pension assets. The terms of the relevant plan and trust documentation may impose a higher standard.

[46] In this way it would not be inconsistent with the legislative scheme for the plan and trust documentation to require a higher standard than that set out in s. 81. By contrast, in *Buschau*, the application of the trust rule in *Saunders* would have allowed the employees to circumvent the statutory procedure and defeat the objective of the legislative scheme (para. 28). These concerns do not arise in the present case. Requiring an employer to transfer additional funds on a sale would not interfere with the procedure set out in s. 81, and would not impede the objective of protecting employees' pension benefits in the context of a sale. Thus, I cannot agree with HBC that compliance with the 1987 PBA is a complete answer to Burke's claim.

[47] It is therefore necessary to turn to the common law and equitable principles that govern the interpretation of the plan and trust documentation.

(3) Common Law and Equitable Principles

[48] Where a pension plan is created in the form of a trust, trust principles will apply. If there is no express or implied declaration of trust, then the pension plan will be governed by the terms of the plan (*Schmidt*, at p. 639).

[49] The parties agree that the pension fund is held in trust and that it must be administered according to trust principles. Based on the text of the plan documentation, the trust extends to the total assets in the fund (art. 1, 1961 trust agreement).

[50] The trust instrument in this case incorporates the terms of the pension plan (art. 2, 1961

régimes de retraite complémentaires » (par. 38 (je souligne)). À mon avis, c'est exactement l'effet du par. 81(5) : il établit des normes minimales pour le transfert de l'actif d'un régime de retraite. Les documents constituant le régime et la fiducie peuvent imposer une norme supérieure.

[46] Ainsi, l'imposition par les documents constituant le régime et la fiducie d'une norme plus élevée que celle prévue à l'art. 81 ne serait pas contraire au régime législatif. À l'opposé, dans *Buschau*, l'application de la règle de *Saunders* en matière de fiducie aurait permis aux employés de se soustraire aux modalités prévues par la loi, ce qui allait à l'encontre de l'objectif du régime législatif (par. 28). De telles considérations ne sont pas présentes en l'espèce. Obliger l'employeur à transférer des fonds additionnels dans le cadre d'une vente ne menace pas les modalités prévues à l'art. 81 et ne nuirait pas à l'objectif de protéger les prestations de retraite des employés dans le contexte d'une vente. Par conséquent, je ne puis admettre la thèse de HBC selon laquelle le respect des dispositions de la PBA de 1987 suffit à réfuter l'argument du groupe de M. Burke.

[47] Par conséquent, il est nécessaire d'analyser les principes de common law et d'equity régissant l'interprétation des documents relatifs au régime et à la fiducie.

(3) Principes de common law et d'equity

[48] Lorsqu'un régime de retraite est constitué en fiducie, les principes de la fiducie s'y appliquent. En l'absence d'une déclaration expresse ou implicite de fiducie, le régime de retraite est régi par les dispositions du régime (*Schmidt*, p. 639).

[49] Les parties reconnaissent que la caisse de retraite est détenue en fiducie et qu'elle doit être administrée conformément aux principes de la fiducie. Aux termes des documents relatifs au régime, la fiducie porte sur tous les éléments d'actif de la caisse (article premier, convention de fiducie de 1961).

[50] En l'espèce, la convention de fiducie incorpore par renvoi les dispositions du régime (art. 2,

trust agreement). Thus, both documents are relevant in determining the rights and obligations of the employees and employer under the plan.

(a) *Equitable Interest*

[51] Burke relies on the statement in *Schmidt* that employees have an equitable interest in pension plan surplus prior to termination. He argues that “the absence of a specific legal interest in surplus . . . does not mean that no rights or obligations exist in relation to plan surplus while a pension plan is ongoing” (A.F., at para. 67 (emphasis omitted)). He argues that his equitable interest in the total assets of the fund gives him the ability to bring his claim against his employer for breach of fiduciary duty of even-handedness in its dealings (or lack thereof) with the actuarial surplus.

[52] Burke relies on the following passage in *Schmidt*:

While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus. Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. The distinction between actual and actuarial surplus means that there is no inconsistency between the entitlement of the employer to contribution holidays and the disentitlement of the employer to recovery of the surplus on termination. The former relies on actuarial surplus, the latter on actual surplus. [Emphasis added; pp. 654-55.]

[53] In my view, it is necessary to first determine what is meant by the use of the phrase “equitable interest” in *Schmidt* and, second, to examine how this concept fits within the terms of this specific plan.

[54] Equitable interest typically means “an actual right of property, such as an interest under a trust” (J. McGhee, ed., *Snell's Equity* (31st ed. 2005),

convention de fiducie de 1961). Ainsi, ces deux documents sont pertinents dans l'analyse des droits et obligations des employés et de l'employeur en vertu du régime.

a) *Intérêt en equity*

[51] Le groupe de M. Burke invoque un passage de l'arrêt *Schmidt* selon lequel les employés ont un droit en equity sur l'excédent avant la cessation du régime. Selon lui, [TRADUCTION] « il ne faut pas déduire de l'inexistence d'un intérêt précis en common law dans l'excédent [. . .] l'inexistence de tout droit et de toute obligation relativement à l'excédent pendant l'existence du régime » (m.a., par. 67 (soulignement omis)). Il prétend que son intérêt en equity dans l'actif total de la caisse l'habilite à intenter une action contre son employeur pour violation de son devoir fiducial de traitement égalitaire dans l'utilisation qu'il fait — ou ne fait pas — de l'excédent actuariel.

[52] Le groupe de M. Burke invoque l'extrait suivant tiré de l'arrêt *Schmidt* :

Pendant l'existence d'un régime sous forme de fiducie, le surplus est un surplus actuariel. Ni l'employeur ni les employés n'ont de droit précis sur cette somme puisqu'elle n'existe que théoriquement, même si les employés bénéficiaires ont, en equity, un droit sur tous les éléments d'actif de la caisse pendant qu'elle existe. À la cessation du régime, le surplus actuariel devient un surplus réel et est dévolu aux employés bénéficiaires. La distinction entre le surplus réel et le surplus actuariel signifie qu'il n'y a pas d'incompatibilité entre le droit de l'employeur à des périodes d'exonération de cotisations et le fait qu'il n'a pas le droit de récupérer le surplus accumulé à la cessation du régime. Le premier repose sur un surplus actuariel et le second, sur un surplus réel. [Je souligne; p. 654-655.]

[53] À mon avis, il faut commencer par définir ce qu'on entend par un « intérêt en equity », ou par le terme « droit en equity » employé dans l'arrêt *Schmidt*, pour ensuite déterminer comment s'applique ce concept dans le cadre du régime qui nous intéresse.

[54] Un intérêt en equity est généralement [TRADUCTION] « un véritable droit de propriété, tel l'intérêt détenu en vertu d'une fiducie » (J. McGhee,

at para. 2-05). The holder of an equitable interest owns that property in equity (S. J. Hepburn, *Principles of Equity and Trusts* (4th ed. 2009), at p. 63). According to *Snell's Equity* an equitable interest is distinct from mere equities, floating equities and equitable remedies, though the term “equity” is often used to refer to any or all of these more specific concepts (para. 2-01).

[55] The phrase “equitable interest” was only used once by Cory J. in the course of his judgment in *Schmidt*. The question, then, is in what sense did he use this phrase? In my view, the following observations can be made.

[56] First, it is clear that in a defined benefit pension governed by trust principles, employees have an equitable interest in their defined benefits. As in the case of a classic trust, legal ownership of the defined benefits lies with the trustee. The funds needed to pay the employees’ defined benefits are held in trust on their behalf. As beneficiaries, the employees have an equitable interest in the funds needed to cover their defined benefits.

[57] Second, and importantly, when Cory J. referred to the employees’ equitable interest in the total assets of the fund, he was writing on the premise that the employees were entitled to the actual surplus on termination. This is clear from the language that follows his use of “equitable interest”, which I repeat:

Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence. When the plan is terminated, the actuarial surplus becomes an actual surplus and vests in the employee beneficiaries. [Emphasis added.]

If the employees are entitled to actual surplus on termination then they do have an equitable interest in that surplus, and, when added to their defined

dir., *Snell's Equity* (31^e éd. 2005), par. 2-05). Le détenteur d’un intérêt en equity dans un bien en est le propriétaire en equity (S. J. Hepburn, *Principles of Equity and Trusts* (4^e éd. 2009), p. 63). Suivant *Snell's Equity*, un intérêt en equity se distingue des simples droits en equity, des droits flottants en equity et des recours d’equity, même si le terme « *equity* », en anglais, sert souvent à désigner ces notions spécifiques individuellement ou collectivement (par. 2-01).

[55] Dans ses motifs dans l’affaire *Schmidt*, le juge Cory ne mentionne qu’une seule fois le « droit en equity » des employés. La question qui se pose alors est de savoir ce qu’il entendait par là. On peut à bon droit, selon moi, faire les observations suivantes.

[56] Tout d’abord, dans le cadre d’un régime de retraite à prestations déterminées régi par les principes de la fiducie, les employés ont à l’évidence un intérêt en equity dans les prestations déterminées. Comme dans le cas d’une fiducie classique, le fiduciaire détient le titre en common law sur les prestations déterminées. Les fonds nécessaires au versement des prestations déterminées aux employés sont détenus en fiducie au profit de ces derniers. En leur qualité de bénéficiaires, les employés ont un intérêt en equity dans ces fonds.

[57] Ensuite, fait important, lorsque le juge Cory mentionne que les employés ont un droit, en equity, sur tous les éléments d’actif de la caisse, il part du postulat que les employés ont droit à l’excédent réel à la cessation du régime. C’est ce qui ressort clairement de la phrase qui suit celle où il parle du droit en equity des employés et que je répète :

Ni l’employeur ni les employés n’ont de droit précis sur cette somme puisqu’elle n’existe que théoriquement, même si les employés bénéficiaires ont, en *equity*, un droit sur tous les éléments d’actif de la caisse pendant qu’elle existe. À la cessation du régime, le surplus actuariel devient un surplus réel et est dévolu aux employés bénéficiaires. [Je souligne.]

Si les employés ont droit à l’excédent réel à la cessation du régime, ils ont un intérêt en equity dans cet excédent. Or, le total de cet excédent et de leurs

benefits, this constitutes the total assets of the fund. Thus, I would agree with Cory J. that, where employees are entitled to actual surplus on termination, they have an equitable interest in the total assets of the fund.

[58] Cory J. did not elaborate on the significance, or content, of that equitable interest in the surplus while the plan is ongoing. However, it seems to me that it might be somewhat analogous to a floating equity. A floating equity attaches to, for example, the residue in a will. The residuary beneficiary does not immediately obtain an equitable interest in the residue of the estate, because the assets may be needed to pay debts. Even in the case of a solvent estate, it is still unclear what property constitutes residue until the administration of the estate is complete. The residuary beneficiary is therefore said to have a “floating equity”, which may or may not crystallise”. A floating equity “protects the beneficiaries, not by giving them equitable interests, but by ensuring the due administration of assets by the personal representatives” (*Snell's Equity*, at para. 2-06).

[59] It appears to me that entitlement to surplus on termination is analogous to the entitlement of a residuary beneficiary. The vesting of actual surplus in the employees is contingent on (a) the plan terminating, (b) there being an actual surplus once the liabilities are satisfied and (c) the employees surviving the date of the termination of the trust.

[60] Do the transferred employees in this case have a floating equity in the total assets of the HBC pension fund during its subsistence? In my view, they do not. As I will explain, the plan text limits their interest to their defined benefits and, unlike the circumstances in *Schmidt*, they are not entitled to surplus on termination.

(b) *The Employees' Rights and Interests Under the Plan*

[61] The original pension plan text provides that the employees' rights and interests under the plan

prestations déterminées correspond à l'actif total de la caisse. Par conséquent, je partage l'avis du juge Cory selon lequel les employés qui ont droit à l'excédent réel à la fin du régime ont un intérêt en equity sur tous les éléments d'actif de la caisse.

[58] Le juge Cory n'a précisé ni la portée ni la teneur de ce droit en equity sur l'excédent d'un régime qui existe toujours. Or, une analogie avec un droit flottant en equity me semble possible. Un droit flottant en equity se rattache, par exemple, au reliquat d'une succession testamentaire. Le bénéficiaire du reliquat n'obtient pas immédiatement un intérêt en equity dans le reliquat de la succession, dont les éléments d'actif risquent d'être affectés en totalité au paiement des dettes. Même lorsque la succession est solvable, on ne peut déterminer les biens qui constitueront le reliquat qu'au terme de l'administration successorale. On dit donc du bénéficiaire du reliquat qu'il possède un [TRADUCTION] « “droit flottant en equity”, qui se cristallisera ou non plus tard ». Un droit flottant en equity « protège les bénéficiaires, non pas en leur conférant un intérêt en equity, mais en assurant la bonne administration des éléments d'actif par les représentants successoraux » (*Snell's Equity*, par. 2-06).

[59] Selon moi, le droit des employés à l'excédent à la cessation du régime s'apparente à celui du bénéficiaire du reliquat. L'excédent réel ne leur est dévolu qu'à la réalisation des trois conditions suivantes : il est mis fin au régime, un excédent réel subsiste après la liquidation du passif et les employés survivent à la fin de la fiducie.

[60] En l'espèce, les employés mutés possèdent-ils un droit flottant en equity dans tous les éléments d'actif de la caisse de retraite de HBC pendant son existence? Je ne le crois pas. Comme je l'expliquerai, aux termes du texte du régime, leur intérêt se limite aux prestations déterminées, et ils n'ont pas droit à l'excédent lorsqu'il est mis fin au régime, comme c'était le cas dans l'affaire *Schmidt*.

b) *Les droits et intérêts conférés aux employés par le régime*

[61] Le texte initial du régime de retraite prévoit que les employés bénéficient uniquement des droits

are limited only to that which is expressly and specifically provided for in the plan.

et intérêts qui leur sont accordés expressément par le régime.

[TRADUCTION]

11.03 *Rights in the Trust Fund:* . . . No Member or person entitled to benefits under the Plan has any right or interest in the Trust Fund except as expressly provided in the Plan; . . .

11.03 *Droits sur la caisse de retraite :* [. . .] Les participants et personnes ayant droit à des prestations en vertu du régime n'ont aucun autre droit ni intérêt sur la caisse de retraite que ceux qui leur sont conférés expressément par le régime; . . .

. . .

. . .

14.01 . . . There shall be no right to any benefit under this Plan except to the extent such right is specifically provided under the terms of the Plan and there are funds available therefor in the hands of the Trustee.

14.01 . . . Le régime n'accorde aucun droit à quelque avantage ou prestation que ce soit, à moins que ses dispositions le prévoient expressément et que le fiduciaire dispose de fonds à cette fin.

[62] A review of the original and subsequent pension plan documentation indicates that the only employee benefits that are provided for under the terms of the plan are the employees' defined retirement benefits.

[62] Un examen des documents initiaux et subséquents relatifs au régime de retraite indique que les prestations déterminées de retraite sont les seules prestations auxquelles les employés ont droit aux termes du régime.

[63] Under the original pension plan provisions in this case, the employees' entitlements in the event of plan termination were expressly limited to their defined retirement benefits:

[63] Selon les dispositions initiales du régime de retraite, les droits des employés dans le cas où il serait mis fin au régime se limitaient expressément à leurs prestations déterminées de retraite :

[TRADUCTION]

12.024 *Apportionment of Balance of the Trust Fund to be Proportional:* Any apportionment within each group, in the order stated, shall be proportionate to but not in excess of the actuarially determined present values at the date of the termination of the Plan of their respective retirement benefits and accrued retirement benefits. [Emphasis added.]

12.024 *Répartition proportionnelle du solde de la caisse de retraite :* Toute répartition au sein de chacun des groupes, dans l'ordre prévu, sera proportionnelle, mais non supérieure, à la valeur actuarielle de leurs prestations de retraite respectives et prestations de retraite accumulées à la date où il est mis fin au régime. [Je souligne.]

[64] At the oral hearing of this appeal, counsel for Burke argued that art. 12.024 had to be interpreted in light of art. 12.022 and 12.023, which are other provisions dealing with plan termination. Counsel submitted that the operation of these provisions required that there had to be at least some employee entitlement to surplus on plan termination (transcript, at pp. 11-19). It was argued that art. 12 required a two-stage distribution to employees on plan termination: first, a distribution

[64] À l'audition du pourvoi, l'avocat du groupe de M. Burke a fait valoir que l'art. 12.024 devait être interprété à la lumière des art. 12.022 et 12.023, qui traitent aussi de la cessation du régime. Selon l'avocat, l'application de ces dispositions exigeait que les employés aient à tout le moins un droit quelconque à l'excédent lorsqu'il serait mis fin au régime (transcription, p. 11-19). On a fait valoir que la distribution aux employés prévue à l'art. 12 comportait deux étapes : premièrement, la distribution des

of contributions plus credited interest (under art. 12.022); and second, a distribution of defined retirement benefits (under art. 12.023). The limitation in art. 12.024, it was argued, only applied to the second distribution, which meant that “in order to fully satisfy both of these two distributions, arithmetically, there would have to be a surplus on hand to enable that to be done on plan termination” (transcript, at p. 13).

[65] HBC argued that art. 12 operated on termination to provide members with their contributions (and credited interest), and then to “top up” that amount to provide the defined retirement benefits (transcript, at p. 37). Counsel argued that the limitation in art. 12.024 applied to apportionment upon plan termination, and therefore applied with respect to both art. 12.022 and 12.023. Interpreting art. 12.024 in this manner would limit the employees’ entitlement on termination solely to their defined retirement benefits (transcript, at pp. 37-39).

[66] Articles 12.022 and 12.023, as set out in the original pension plan, are as follows:

12.022 *Allocation of the Trust Fund:* The Retirement Board shall then allocate to each Member, Retired Member (including Joint Annuitants and Beneficiaries, if any) and Terminated Members (including Beneficiaries, if any) a benefit, payable monthly, of an amount actuarially equivalent to (or, in lieu of such benefit, if so determined by the Retirement Board with respect to any or all such Members, Retired Members and Terminated Members, a lump sum payment equal to) the total of his own contributions plus Credited Interest to the date the Plan is terminated, less any retirement benefits, or returns of his own contributions and Credited Interest in accordance with the Plan, theretofore received by him. If the Trust Fund is insufficient for this purpose, it shall be allocated to each Member, Retired Member ([including] Joint Annuitants and Beneficiaries, if any) and Terminated Members (including Beneficiaries, if any) in the proportion that the amount of his contributions plus Credited

cotisations majorées de l’intérêt crédité (selon l’art. 12.022); deuxièmement, la distribution des prestations déterminées de retraite (selon l’art. 12.023). On a aussi soutenu que la limite prévue à l’art. 12.024 ne s’appliquait qu’à la deuxième étape, ce qui signifie que [TRADUCTION] « ces deux distributions ne pourront se faire intégralement, sur le plan arithmétique, que s’il existe un excédent suffisant au moment où il est mis fin au régime » (transcription, p. 13).

[65] HBC a fait valoir que l’art. 12 s’appliquait à la cessation du régime de façon que les participants recouvrent leurs cotisations (majorées de l’intérêt crédité) et reçoivent ensuite le montant additionnel nécessaire pour toucher leurs prestations déterminées de retraite (transcription, p. 37). Ses avocats ont soutenu que la limite prévue à l’art. 12.024 visait la répartition effectuée à la cessation du régime et qu’elle s’appliquait donc à la fois à l’art. 12.022 et à l’art. 12.023. Cette interprétation de l’art. 12.024 limiterait expressément les droits des employés lors de la cessation du régime à leurs prestations déterminées (transcription, p. 37-39).

[66] Voici les art. 12.022 et 12.023 du régime de retraite initial :

[TRADUCTION]

12.022 *Répartition de la caisse de retraite :* Le Comité de la caisse de retraite verse ensuite à tous les participants, participants retraités (y compris leurs corentiers et bénéficiaires, le cas échéant) et participants sortis (y compris leurs bénéficiaires, le cas échéant) une prestation mensuelle dont le montant équivaut, sur le plan actuariel, (ou, au lieu d’une telle prestation, si le Comité de la caisse de retraite en décide ainsi à l’endroit d’une partie ou de l’ensemble des participants, participants retraités et participants sortis, un paiement forfaitaire équivalent) au total de leurs cotisations majorées de l’intérêt crédité à la date où il est mis fin au régime, moins les prestations de retraite qui leur ont été versées ou les cotisations majorées de l’intérêt crédité qui leur ont été remboursées conformément au régime. Si la caisse de retraite est insuffisante pour ce faire, elle est répartie entre tous les participants, participants retraités ([y compris] leurs corentiers et bénéficiaires, le cas échéant) et participants sortis (y compris leurs

Interest to the date the Plan is terminated, less any retirement benefits, or returns of his own contributions plus Credited Interest in accordance with the Plan, theretofore received by him, bears to the total of such amounts with respect to all such Members, Retired Members and Terminated Members.

12.023 *Application of Balance of the Trust Fund:* If any balance of the Trust Fund shall remain, it shall then be applied in the following manner:

First, for the benefit of Retired Members and such of the Terminated Members who have reached their Normal Retirement Date and are entitled to retirement benefits under Article 6 of the Plan, in each case upon the basis of their retirement benefits; and

Second, as to any balance remaining, for the benefit of all Members and such of the Terminated Members who are entitled to retirement benefits under Article 6 of the Plan but who have not yet reached their Normal Retirement Date, in each case upon the basis of their accrued retirement benefits at the date of such termination of contributions.

[67] I do not agree with counsel for Burke that art. 12 requires two distributions and operates to provide employees with an entitlement to a portion of the surplus on plan termination.

[68] When art. 12.022, 12.023 and 12.024 are examined, there is nothing in the wording used that indicates there are two separate distributions. Article 12.022 discusses the allocation of the trust fund between three groups of members: members, retired members and terminated members. Under art. 12.022, each of the members is allocated a sum that represents contributions plus credited interest less any retirement benefits already received. The opening words of art. 12.023 are, “[i]f any balance of the Trust Fund shall remain”. It therefore deals with the application of the funds remaining after the initial allocation under art. 12.022. Article 12.023 acts to “top up” the amounts allocated to the three groups under art. 12.022 to a maximum of their defined benefits. It is not a separate distribution.

bénéficiaires, le cas échéant) selon la proportion que représente le montant de leurs cotisations majorées de l'intérêt crédité à la date où il est mis fin au régime, moins les prestations de retraite qui leur ont été versées ou les cotisations majorées de l'intérêt crédité qui leur ont été remboursées conformément au régime, par rapport au total de ces montants à l'égard de tous les participants, participants retraités et participants sortis.

12.023 *Attribution du solde de la caisse de retraite :* S'il reste un solde dans la caisse de retraite, il est attribué comme suit : Tout d'abord aux participants retraités et aux participants sortis qui sont arrivés à leur date normale de retraite et qui ont droit à des prestations de retraite selon l'article 6 du régime, dans tous les cas en fonction de leurs prestations de retraite respectives; ensuite, s'il reste toujours un solde, à tous les participants et aux participants sortis qui ont droit à des prestations de retraite selon l'article 6 du régime, mais qui ne sont pas encore arrivés à leur date normale de retraite, dans tous les cas en fonction de leurs prestations de retraite accumulées à la date où ils ont cessé de verser leurs cotisations.

[67] Je ne partage pas l'avis de l'avocat du groupe de M. Burke que l'art. 12 exige une distribution en deux étapes et s'applique de façon à conférer aux employés un droit sur une partie de l'excédent lorsqu'il est mis fin au régime.

[68] Lorsqu'on examine les art. 12.022, 12.023 et 12.024, on constate que les termes employés dans ceux-ci n'indiquent aucunement qu'il existe deux distributions distinctes. L'article 12.022 parle de la répartition de la caisse de retraite entre trois groupes de participants : les participants, les participants retraités et les participants sortis. Selon l'art. 12.022, tous les participants reçoivent une somme correspondant aux cotisations majorées de l'intérêt crédité, moins les prestations de retraite déjà versées. L'article 12.023 commence par les mots suivants : [TRADUCTION] « [s]il reste un solde dans la caisse de retraite ». Il traite donc de l'attribution des fonds qui restent après la répartition faite au départ conformément à l'art. 12.022. L'article 12.023 a pour effet de compléter les sommes réparties entre

Article 12.024 then operates in conjunction with art. 12.022 and 12.023, and deals with the apportionment of funds within the three groups of members. Article 12.024 expressly limits the apportionment within each of the three groups to the defined retirement benefits. Therefore, under art. 12, there is only one distribution of funds, which is expressly limited to the defined retirement benefits.

[69] Additionally, the pension plan documents (the pension plan text and trust agreement) do not contain any of the language that would typically give employees an entitlement to surplus. Except for the 1984 trust agreement, none of the pension plan documents include the “exclusive benefit” or “non-diversion” language which was found to result in an employee entitlement to surplus in *Schmidt* (p. 659). (Below, I will discuss why the inclusion of this language in the 1984 trust agreement also does not provide the employees with such an entitlement to the surplus.) Instead of using the language in *Schmidt*, the pension plan text indicates that the trust fund was held exclusively for the purposes of the *plan* and that no part could be diverted except for the purposes of the *plan* (e.g. art. 11.02 of the 1961 plan text).

[70] At the oral hearing, counsel for Burke argued that the purpose of the plan was to exclusively benefit employees, and that such a purpose could be inferred from the preamble to the trust agreement text (transcript, at pp. 8-10). If that purpose could be inferred, it was argued, an employee entitlement to the surplus existed in a similar manner to the employee entitlement to surplus that existed in one of the pension plans in *Schmidt*.

[71] The preamble provided in part:

WHEREAS the Company has established a Pension Plan (hereinafter referred to as “the Plan”) for the

les trois groupes en application de l’art. 12.022 jusqu’à concurrence de leurs prestations déterminées. Il ne s’agit pas d’une distribution distincte. L’article 12.024 s’applique ensuite en combinaison avec les art. 12.022 et 12.023, et porte sur la répartition des fonds au sein des trois groupes de participants. L’article 12.024 limite expressément la répartition au sein des trois groupes aux prestations déterminées de retraite. Par conséquent, l’art. 12 ne prévoit qu’une seule distribution des fonds, expressément limitée aux prestations déterminées.

[69] En outre, les documents relatifs au régime de retraite (le texte du régime et la convention de fiducie) ne contiennent aucune des formules qui confèrent normalement aux employés un droit à l’excédent. Exception faite de la convention de fiducie de 1984, aucun des documents relatifs au régime de retraite ne contient de disposition relative au « bénéfice exclusif » ou à « l’interdiction d’utiliser à d’autres fins », comme celles qui, a-t-on conclu dans *Schmidt* (p. 659), conféraient à un employé un droit à l’excédent. (J’expliquerai ci-dessous pourquoi l’insertion de ces formules dans la convention de fiducie de 1984 ne confère pas non plus aux employés un tel droit à l’excédent.) Au lieu de reprendre les formules employées dans l’affaire *Schmidt*, le texte du régime de retraite indique que la caisse de retraite devait servir exclusivement aux fins du *régime* et qu’aucune partie de la caisse ne pouvait être utilisée à d’autres fins que celles du *régime* (p. ex., l’art. 11.02 du texte du régime de retraite de 1961).

[70] À l’audience, l’avocat du groupe de M. Burke a fait valoir que le régime avait été créé exclusivement au bénéfice des employés, et que cette fin pouvait être inférée du préambule de la convention de fiducie (transcription, p. 8-10). On soutient que, s’il est possible d’inférer cette fin, un employé avait droit à l’excédent, tout comme l’employé avait droit à l’excédent de l’un des régimes de retraite dans *Schmidt*.

[71] Le préambule disait notamment ce qui suit :

[TRADUCTION]

ATTENDU que la Société a constitué un régime de retraite (ci-après appelé « le régime ») au bénéfice

benefit of employees engaged in its Canadian business

It is obvious that the plan was established for the benefit of employees. But the wording says nothing about the specific entitlements of the employees under the plan. Nothing about those entitlements can be inferred from the words of the preamble. To determine those entitlements it is necessary to have regard to the operative language of the plan as a whole.

[72] I agree with Gillese J.A. (at para. 44 of her reasons) that, when read as a whole, the plan provisions indicate that the purpose of the plan is to provide employees with their defined retirement benefits. In *Schmidt*, in addition to the preamble, the operative language of the pension plan documents, including that the trust fund was for the “exclusive benefit” of employees, “non-diversion” language, and other provisions re-allocating the contributions of certain employees who left the plan, allowed the inference to be drawn that the employees were entitled to actual surplus on termination (see *Schmidt*, at pp. 658-59). The operative language of the HBC plan is to the contrary.

[73] Article 12.024 in the original plan expressly limited the entitlement of the employees on termination of the plan to their defined benefits. The provisions dealing with plan termination were amended by HBC in 1980 with the addition of art. 12.025 and restated in 1985 with art. 14.05, which expressly referred to surplus, specifically providing that HBC was entitled to the surplus on termination:

12.025 Refund of Surplus to Company:

If any balance of the Trust Fund shall remain after the satisfaction of all obligations of the plan in accordance with the provisions of this article 12, such balance shall be paid to the Company.

14.05 Excess Assets

If after provision for the satisfaction of all liabilities under the Plan has been made, there should

des employés travaillant pour son entreprise canadienne

De toute évidence, le régime a été constitué au bénéfice des employés. Cependant, les termes employés ne disent rien des droits précis que le régime confère aux employés. Aucune inférence ne peut être tirée du texte du préambule quant à ces droits. Pour déterminer en quoi ils consistent, il faut tenir compte des termes performatifs du régime dans son ensemble.

[72] Je suis d'accord avec la juge Gillese (par. 44 de ses motifs) que, lues dans leur ensemble, les dispositions du régime indiquent qu'il a pour objet d'accorder aux employés leurs prestations déterminées de retraite. Dans *Schmidt*, outre le préambule, les termes performatifs des documents relatifs au régime de retraite, notamment l'affectation de la caisse de retraite au « bénéfice exclusif » des employés, « l'interdiction [de l']utiliser à d'autres fins » et d'autres dispositions réattribuant les cotisations de certains employés qui ont cessé de cotiser au régime, permettent de conclure que les employés avaient droit à l'excédent existant lorsqu'il a été mis fin au régime (voir *Schmidt*, p. 658-659). Les termes performatifs du régime de HBC ont l'effet contraire.

[73] L'article 12.024 du régime initial limitait expressément les droits des employés lors de la cessation du régime à leurs prestations déterminées. En 1980, HBC a modifié les dispositions traitant de la cessation du régime en ajoutant l'art. 12.025, reformulé en 1985 à l'art. 14.05, pour traiter expressément de l'excédent et préciser que HBC y avait droit à la cessation du régime :

[TRADUCTION]

12.025 Remboursement de l'excédent à la société :

S'il reste un solde quelconque dans la caisse de retraite après la liquidation complète du passif du régime en conformité avec les dispositions du présent article 12, ce solde est versé à la société.

14.05 Excédent

S'il reste un excédent dans la caisse de retraite après la liquidation complète du passif

remain assets in the Trust Fund, such assets shall revert to the Company or be used as the Company may direct, subject to the provisions of the Act and the rules and regulations of the Department of National Revenue as amended from time to time.

[74] With respect to the 1984 trust agreement, I am in agreement with the analysis of Gillese J.A. (at paras. 49 to 53 of her decision) that the inclusion of “exclusive benefit” and “non-diversion” language in that trust agreement does not give the employees an entitlement to surplus. Burke argued that art. 2(d) and 11(ii) of the 1984 trust agreement confirm that employees have an entitlement to surplus. I agree with Gillese J.A.’s reasons for rejecting this argument. The 1984 trust agreement has to be read consistently with the then existing provisions of the pension plan, including art. 12.025. To read art. 2(d) and 11(ii) in the manner suggested by Burke would result in an inconsistency with art. 12.025 of the pension plan, which expressly confers the surplus on termination on HBC.

[75] Article 2(d) deals with expenses incurred for the sale and purchase of investments, taxes and other expenses and costs of administering the funds by the Trustee. It provides in part:

The Trustee is hereby authorized to pay out of each of the appropriate Funds:

- (i) all brokerage fees, transfer taxes . . .
- (ii) all property, income and other taxes . . .
- (iii) amounts on account of income tax . . .
- (iv) all other expenses and costs of administering the Funds

ALWAYS PROVIDED that no part of the funds may be used for, or diverted to any purposes other than those connected with the exclusive benefit of members of the respective Plans and their beneficiaries.

conformément au régime, cet excédent est versé à la société ou est utilisé au gré de celle-ci, sous réserve de la Loi ainsi que des règles et règlements du ministère du Revenu national et de leurs modifications.

[74] Quant à la convention de fiducie de 1984, je souscris à l’analyse de la juge Gillese (par. 49 à 53 de sa décision) selon laquelle l’insertion de dispositions relatives au « bénéfice exclusif » et à « l’interdiction d’utiliser à d’autres fins » dans cette convention de fiducie ne confère pas aux employés un droit sur l’excédent. Le groupe de M. Burke a fait valoir que l’al. 2d) et le sous-al. 11(ii) de la convention de fiducie de 1984 confirment que les employés ont droit à l’excédent. Je suis d’accord sur les motifs pour lesquels la juge Gillese a rejeté cet argument. Il faut interpréter la convention de fiducie de 1984 conformément aux dispositions du régime de retraite en vigueur à cette époque, et notamment à l’art. 12.025. Si l’on donnait à l’al. 2d) et au sous-al. 11(ii) l’interprétation proposée par le groupe de M. Burke, ces dispositions seraient incompatibles avec l’art. 12.025 du régime de retraite, qui prévoit expressément le versement de l’excédent à HBC à la cessation du régime.

[75] L’alinéa 2d) porte sur les dépenses engagées pour la vente et l’achat de placements, les taxes et les autres frais d’administration des fonds par le fiduciaire. Cet alinéa prévoit notamment ce qui suit :

[TRADUCTION] La présente autorise le fiduciaire à payer toutes les dépenses suivantes à même les fonds appropriés :

- (i) les frais de courtage, les droits de mutation . . .
- (ii) l’impôt foncier, l’impôt sur le revenu et les autres taxes . . .
- (iii) les sommes à verser au titre de l’impôt sur le revenu . . .
- (iv) les autres frais d’administration du fonds . . .

TOUJOURS À LA CONDITION qu’aucune partie des fonds ne peut être utilisée à d’autres fins que celles liées au bénéfice exclusif des participants aux régimes respectifs et de leurs bénéficiaires.

[76] It is in the context of authorized expenses that no part of the funds may be used for or diverted to any purpose other than those associated with the exclusive benefit of members. Having regard to the context, it is clear that these words do not afford a new entitlement to surplus which had not previously existed and which is expressly addressed in art. 12.025.

[77] Article 11(ii) provides in part:

The Bay . . . shall have the right at any time . . . to change or modify by amendment any of the provisions of, and to terminate, this Agreement . . . provided that

- (ii) such change, modification or termination shall not authorize or permit or result in any part of the corpus or income of the Funds being used for or diverted to purposes other than for the benefit exclusively of members of the Plans

[78] Article 11(ii) is addressed to changes. In other words, the “benefit exclusively of members” language must be read in the context of what the employees were entitled to before any change. The entitlements before any change were the defined benefits. No change may result in the funds being used other than for those defined benefits, except as specified. The provision does not confer on employees a new and additional entitlement they did not previously have.

[79] Additionally, the pension plan documents have made the pension plan text the dominant document over the trust agreement. For example, art. 23 of the 1961 trust agreement provided that it could be amended but that “[n]o such amendment shall authorize or permit any part of the Fund to be used for or diverted to purposes other than those specified in the Plan” and art. 11.03 of the 1961 pension plan provided that “[n]o Member . . . has any right or interest in the Trust Fund except

[76] C’est dans le contexte des dépenses autorisées qu’aucune partie des fonds ne peut être utilisée à d’autres fins que celles liées au bénéfice exclusif des participants. Compte tenu du contexte, les dispositions ci-dessus ne confèrent manifestement pas un droit à l’excédent qui n’existait pas auparavant et dont le sort est fixé expressément à l’art. 12.025.

[77] L’alinéa 11(ii) prévoit notamment ce qui suit :

[TRANSDUCTION]

La Baie [. . .] peu[t] à son gré [. . .] remplacer ou modifier toute disposition de la présente convention et résilier la présente convention [. . .] pourvu que

- (ii) ce remplacement, cette modification ou cette résiliation n’autorise, ne rende possible ni n’entraîne l’usage d’une quelconque partie du capital ou des revenus de la caisse à d’autres fins qu’au bénéfice exclusif des participants aux régimes . . .

[78] Le sous-alinéa 11(ii) porte sur les modifications. Autrement dit, il faut interpréter l’expression « au bénéfice exclusif des participants » en tenant compte des avantages auxquels les employés avaient droit avant toute modification à la convention. Le droit dont ils bénéficiaient avant toute modification était le droit aux prestations déterminées. Sauf disposition contraire, aucune modification ne peut entraîner l’utilisation des fonds à une autre fin qu’aux fins des prestations déterminées. Cette disposition ne confère pas aux employés un droit supplémentaire qu’ils n’avaient pas auparavant.

[79] De plus, les documents relatifs au régime de retraite ont fait en sorte que le texte du régime l’emporte sur la convention de fiducie. Par exemple, l’art. 23 de la convention de fiducie de 1961 prévoyait que celle-ci pouvait être modifiée, mais que [TRANSDUCTION] « cette modification ne peut autoriser ni rendre possible l’utilisation d’une partie de la caisse à d’autres fins que celles prévues au régime » et, selon l’art. 11.03 du régime de retraite de 1961, [TRANSDUCTION] « [l]es participants [. . .] n’ont aucun

as expressly provided in the Plan". The pension plan text and the trust agreement have to be read together, so if art. 2(d) and 11(ii) of the 1984 trust agreement were interpreted in the manner suggested by Burke, there would be a conflict with art. 12.025 of the pension plan text. However, even if one were to conclude that art. 2(d) and 11(ii) should be interpreted in a manner that creates such a conflict, which I do not, the conflict would be resolved in favour of art. 12.025, as the pension plan is the dominant document.

[80] Thus, the pension plan documents in this case use language different than that found in *Schmidt*. The documents do not contain language that would give the employees an entitlement to the surplus.

[81] Burke relies on *Schmidt* to argue that employee entitlement to surplus may only be restricted if the language of the documentation is "explicit", which he argues is not the case here. As HBC has pointed out, "explicit" does not prescribe a word formula. HBC's entitlement to surplus must be clear. In my opinion, it is. As Gillese J.A. noted at para. 8 of her reasons, and as the foregoing analysis demonstrates, the documentation in this case limited the employees' entitlement to their defined benefits provided for in the plan.

[82] Based on the provisions of the pension plan documentation, it cannot be said that the transferred employees had an equitable interest in the surplus on termination.

(c) *Fiduciary Duty of Even-Handedness*

[83] Burke says that HBC undertook to improve pension benefits from time to time. He argues that the transferred employees' interest in the actuarial surplus stems from the lost possibility of future improvements to their defined benefits as such improvements might be received by the employees

autre droit ni intérêt sur la caisse de retraite que ceux qui leur sont conférés expressément par le régime ». Il faut interpréter conjointement le texte du régime de retraite et la convention de fiducie. Ainsi, si l'al. 2d) et le sous-al. 11(ii) de la convention de fiducie de 1984 recevaient l'interprétation proposée par le groupe de M. Burke, ils entreraient en conflit avec l'art. 12.025 du texte du régime. Toutefois, même si l'on statuait, contrairement à ce que je conclus, qu'il faut attribuer à l'al. 2d) et au sous-al. 11(ii) une interprétation qui occasionne un tel conflit, celui-ci serait résolu en faveur de l'art. 12.025, car le régime de retraite a préséance.

[80] Par conséquent, le libellé des documents relatifs au régime de retraite en l'espèce diffère de celui en cause dans l'affaire *Schmidt*. Les présents documents ne contiennent pas de disposition dont les termes conférerait aux employés un droit sur l'excédent.

[81] Le groupe de M. Burke se fonde sur *Schmidt* pour soutenir que le droit de l'employé à l'excédent ne peut être restreint que si le libellé des documents l'indique « explicitement », ce qui, prétend-il, n'est pas le cas ici. Comme l'a souligné HBC, il n'est pas impératif d'utiliser une formule précise pour l'indiquer « explicitement ». Le droit de HBC à l'excédent doit être clair. À mon avis, il l'est. Comme la juge Gillese l'a souligné au par. 8 de ses motifs, et comme le démontre l'analyse qui précède, les documents en l'espèce limitaient les droits des employés aux prestations déterminées que leur accordait le régime.

[82] Vu les dispositions des documents relatifs au régime de retraite, on ne saurait dire que les employés mutés avaient un intérêt en equity sur l'excédent à la cessation du régime.

c) *Devoir fiducial de traitement égalitaire*

[83] Aux dires du groupe de M. Burke, HBC s'était engagée à bonifier les prestations de retraite de temps à autre. Il prétend que l'intérêt dans l'excédent actuariel revendiqué par les employés mutés découle de la perte de cette possibilité d'amélioration de leur régime à prestations déterminées,

retained by HBC. Therefore, HBC breached its fiduciary duty of even-handedness by treating retained and transferred employees differently. I cannot agree. For the reasons I have given, employees, either retained or transferred, have no equitable interest in the surplus. The fact that an employer may voluntarily choose to increase pension benefits out of surplus funds or otherwise, does not change the nature of the employees' interest in the pension fund or extend fiduciary obligations to voluntary actions of the employer. The employees' equitable interest is limited to their defined benefits.

[84] At the oral hearing, counsel for Burke also argued that failing to transfer part of the surplus deprived the transferred employees of any protection against solvency swings that would be available to retained employees and that HBC was again in breach of its fiduciary duty of even-handedness (transcript, at p. 23). Although in practice actuarial surplus may provide a cushion against insolvency, employees have no right to compel surplus funding to provide this extra protection (*Kerry*, at para. 113). In the absence of such a right, no fiduciary obligation of even-handedness applies. As the plan was a defined benefit plan, HBC assumed the risk of ensuring that sufficient assets existed to fund the liabilities (i.e. defined benefits) of the pension. The employer's duty is to ensure that funds at all times meet the fixed benefits promised by the employer. Unlike defined contribution pension plans in which the employee bears the risk of fluctuations in capital markets, the risk of unfunded liabilities falls on HBC, as it is obligated under its defined benefit plan to provide the employees with their defined benefits. The right of the employees is that their defined benefits be adequately funded, not that an actuarial surplus be funded.

amélioration dont les autres employés de HBC sont susceptibles de bénéficier. Par conséquent, HBC aurait manqué à son devoir fiduciaire de traitement égalitaire en agissant différemment à l'égard des deux groupes d'employés. Je ne suis pas de cet avis. Pour les motifs que j'ai déjà exposés, ni les employés mutés ni ceux qui sont demeurés en poste chez HBC ne possèdent d'intérêt en equity dans l'excédent. Le fait que l'employeur soit libre de décider d'augmenter ou non les prestations de retraite au moyen notamment d'une réaffectation de l'excédent ne change rien à la nature de l'intérêt que détiennent les employés dans la caisse de retraite ni n'a pour effet d'étendre les obligations fiduciaires de l'employeur à ses actes gratuits. L'intérêt en equity des employés ne vise que leurs prestations déterminées.

[84] À l'audience, l'avocat du groupe de M. Burke a également fait valoir que le défaut de HBC de transférer une partie de l'excédent a privé les employés mutés de la protection contre les fluctuations de solvabilité de leur caisse dont les autres employés bénéficient toujours et constitue un autre manquement de la part de HBC à son devoir fiduciaire de traitement égalitaire (transcription, p. 23). Même si, dans la pratique, l'excédent actuariel peut servir à parer au risque d'insolvabilité, les employés n'ont pas le droit d'exiger qu'il soit utilisé pour leur assurer cette protection supplémentaire (*Kerry*, par. 113). Sans un tel droit, il n'existe pas d'obligation fiduciaire de traitement égalitaire. Comme il s'agit d'un régime à prestations déterminées, HBC assumait le risque inhérent à l'obligation que l'actif soit suffisant pour couvrir le passif de la caisse, c'est-à-dire les prestations déterminées. Le devoir de l'employeur consiste à faire en sorte que les fonds soient en tout temps suffisants pour assurer le versement des prestations déterminées qu'il a promises. Au contraire d'un régime de retraite à cotisations déterminées, dans le cadre duquel les employés assument le risque de fluctuations dans les marchés financiers, en l'espèce, le risque d'un déficit actuariel pèse sur HBC, puisqu'elle est tenue, par les modalités de son régime de retraite, de verser des prestations déterminées à ses employés. Le droit des employés se rapporte à la capitalisation suffisante de leurs prestations déterminées et non d'un excédent actuariel.

[85] The duty of even-handedness must be anchored in the terms of the pension plan documentation. It does not operate in a vacuum. The duty of even-handedness requires that where there are two or more classes of beneficiaries, each class receives exactly what the terms of the documentation confer (*Waters*', at p. 966). In its role as pension plan administrator, HBC was a fiduciary and had fiduciary obligations. However, just because HBC has fiduciary duties as plan administrator does not obligate it under any purported duty of even-handedness to confer benefits upon one class of employees to which they have no right under the plan. It was the obligation of HBC to carry out the terms of the pension plan documents and to ensure that in the administration of the plan they do not give an advantage or impose a burden when that advantage or burden is not found in the terms of the plan documents (*Waters*', at pp. 966-67). Neither the retained nor the transferred employees had an equitable interest in the plan surplus. Accordingly, there is no duty of even-handedness applicable to the surplus.

(d) *Due Administration of the Fund*

[86] Burke argues that it is their equitable interest in the total assets of the pension fund that allows them to compel due administration of the pension fund which they say would require transfer of a portion of the actuarial surplus. I agree that Burke has a right to compel the due administration of the pension trust fund, but not because they have an equitable interest in the surplus.

[87] A beneficiary of a trust has the right to compel its due administration even if he does not have an equitable interest in all the assets of the trust. In this case, because Burke has an equitable interest in their defined benefits, they have the right to compel the due administration of the trust and to ensure that the employer, trustee and plan administrator are complying with their legal obligations in the pension plan documents (see *Snell's Equity*, at para. 27-24; *Waters*', at pp. 1203-4).

[85] Le devoir de traitement égalitaire doit reposer sur le libellé des documents relatifs au régime de retraite; il n'existe pas dans l'absolu. Dans les situations mettant en cause au moins deux groupes de bénéficiaires, ce devoir exige que chaque groupe reçoive exactement les avantages conférés par les documents (*Waters*', p. 966). En tant qu'administratrice du régime, HBC agissait à titre fiduciaire, ce qui lui imposait des obligations fiduciaires. Toutefois, ses obligations fiduciaires ne la contraignaient pas, en raison d'un quelconque devoir de traitement égalitaire, à reconnaître à un groupe d'employés des avantages que le régime ne leur confère pas. HBC était tenue de donner effet aux documents relatifs au régime de retraite et de veiller, en administrant le régime, à ce qu'aucun avantage ne soit attribué ni fardeau imposé qui ne soit pas prévu dans ces documents (*Waters*', p. 966-967). Ni les employés mutés ni les autres n'avaient d'intérêt en equity dans l'excédent. Partant, aucun devoir de traitement égalitaire ne s'applique à l'affectation de l'excédent.

d) *Bonne administration de la caisse*

[86] Le groupe de M. Burke prétend que son intérêt en equity dans l'actif total de la caisse de retraite l'habilite à en exiger la bonne administration, ce qui nécessite, selon lui, le transfert d'une portion de l'excédent actuariel. Certes, le groupe de M. Burke a le droit d'exiger la bonne administration de la caisse de retraite, mais ce droit ne tient pas au fait qu'il aurait un intérêt en equity dans l'excédent.

[87] Le bénéficiaire d'une fiducie est en droit d'en exiger la bonne administration, et ce, même s'il ne possède pas d'intérêt en equity dans tous les éléments d'actif de la fiducie. En l'espèce, comme le groupe de M. Burke possède un intérêt en equity dans les prestations déterminées, il a le droit d'exiger la bonne administration de la fiducie et de s'assurer que l'employeur, le fiduciaire et l'administrateur du plan s'acquittent des obligations juridiques prévues dans les documents relatifs au régime (voir *Snell's Equity*, par. 27-24; *Waters*', p. 1203-1204).

[88] Thus, the employer does not have free rein in its use of the actuarial surplus. The obligations of the employer are governed by the terms of the pension plan. Thus, an employer is only permitted to use actuarial surplus in a way that is consistent with the plan documentation.

[89] It is the trustee's obligation to ensure that funds held in trust are distributed in a manner that is consistent with the terms of the trust. In the present case, this obligation on the trustee was made express in the original trust agreement:

The Retirement Board may from time to time require the Trustee to make payments out of the Fund to an insurer and to such persons, beneficiaries, personal representatives in such amounts, for such purposes and in such manner as the Retirement Board may from time to time in writing direct; provided that no payments shall be made out of the Fund until the Retirement Board shall have certified to the Trustee in writing that such payments are in accordance with the terms and conditions of the Plan. [Emphasis added.]

The trustee's role is to ensure that the funds are distributed in accordance with the plan and that any actuarial surplus is not abused by the employer and used for an improper purpose.

[90] While the record before this Court is sparse on the details of the communications between HBC and the trustees of its pension fund, I find it difficult to see how the circumstances of this case could suggest an improper purpose on the part of HBC.

[91] What occurred between HBC and NWC was a legitimate commercial transaction. HBC and NWC negotiated over the purchase price of the assets, including the pension plan. HBC was agreeable to transferring a portion of the surplus so long as NWC was willing to pay for the benefit of acquiring a plan in surplus. NWC was not willing to pay. Both companies complied with the legislative requirements, lending further support to the legitimacy of the transaction.

[92] In executing the transfer, HBC was entitled to rely on the terms of the plan. Under the plan

[88] C'est donc dire que l'employeur ne peut pas user de l'excédent actuariel à son gré. Ses obligations sont régies par les dispositions du régime de retraite. Par conséquent, il ne peut utiliser cet excédent que pour des fins compatibles avec celles prévues dans les documents relatifs au régime.

[89] Il incombe au fiduciaire de veiller à ce que les fonds détenus en fiducie soient distribués conformément aux conditions de la fiducie. En l'espèce, cette obligation du fiduciaire était prévue expressément en ces termes dans la convention de fiducie originale :

[TRADUCTION] Le Comité de retraite peut ordonner par écrit au fiduciaire de verser un montant déterminé, par prélèvement sur la caisse, à un assureur et aux personnes, bénéficiaires et représentants successoraux désignés, aux fins et de la manière précisées dans ses instructions, à la condition qu'aucun versement ne soit effectué sans que le Comité de retraite ait au préalable attesté par écrit au fiduciaire que ce versement est conforme aux dispositions du régime. [Je souligne.]

Le fiduciaire a pour rôle de veiller à ce que les fonds soient distribués conformément au régime et à ce que l'employeur n'utilise pas un excédent actuariel d'une façon ou à une fin irrégulière.

[90] Certes, le dossier qui a été présenté à la Cour était avare de détails sur les communications entre HBC et les fiduciaires de la caisse de retraite, mais je vois mal en quoi les circonstances pourraient laisser croire que HBC aurait utilisé les fonds à des fins inappropriées en l'espèce.

[91] HBC et CNO ont conclu une opération commerciale légitime. HBC et CNO ont négocié le prix d'achat des éléments d'actif, y compris le régime de retraite. HBC était disposée à transférer une portion de l'excédent si CNO acceptait de payer davantage pour acquérir un régime excédentaire, ce que cette dernière n'était pas disposée à faire. L'opération est en outre d'autant plus légitime que les deux sociétés se sont conformées aux prescriptions de la loi.

[92] Lorsqu'elle a conclu le transfert, HBC pouvait se fonder sur les dispositions du régime. Aux

documentation, the employees' rights and interests were limited to their defined benefits. The plan documentation permitted HBC to take contribution holidays and charge administrative expenses to the plan. Moreover, if an individual employee had left HBC, either voluntarily or by reason of discharge, that individual employee would not be entitled to any portion of the actuarial surplus under the terms of the plan.

[93] HBC's legal obligations with respect to its employees, including the fiduciary duties that it owed to the transferred employees, were satisfied in this case by protecting their defined benefits. Based on the plan documentation, HBC did not have a fiduciary obligation to transfer a portion of the actuarial surplus.

VI. Conclusion

[94] I would dismiss the appeal on the issue of plan administration expenses. The HBC pension plan did not impose an obligation on HBC to pay plan administration expenses. HBC was permitted to charge plan administration expenses to the pension fund. The issue of whether HBC was permitted to take contribution holidays was not appealed. However, the language in the pension plan documents indicates that the employer's contributions were determined by an actuary. Therefore, the trial judge was correct in concluding that HBC was permitted to take contribution holidays.

[95] I would also dismiss the appeal on the issue of the transfer of the surplus. Gillese J.A. correctly found that the transferred employees did not have an equitable interest in the surplus of the pension fund. Their only interest was in their defined benefits. As the defined benefits were protected in the transfer, HBC did not breach any fiduciary obligation that it owed.

[96] I should emphasize that this decision depends upon the text and context of the pension plan documentation that was before this Court. An analysis of that documentation leads to the finding

termes des documents relatifs à ce dernier, les droits et les intérêts des employés se limitaient à leurs prestations déterminées. Ces documents habilitaient HBC à s'accorder des périodes d'exonération de cotisations et à imputer les frais d'administration à la caisse. De plus, selon les dispositions du régime, l'employé qui quittait HBC, de son gré ou par suite d'un congédiement, n'avait droit à aucune portion de l'excédent actuariel.

[93] En l'espèce, HBC a honoré ses obligations juridiques envers ses employés, et notamment ses devoirs fiduciaux envers les employés mutés, en protégeant leurs prestations déterminées. Selon les documents relatifs au régime, HBC n'avait aucune obligation fiduciaire de transférer quelque portion que ce soit de l'excédent actuariel.

VI. Conclusion

[94] Je suis d'avis de rejeter le pourvoi en ce qui concerne la question des frais d'administration du régime. Le régime de retraite de HBC n'obligeait pas cette dernière à en assumer les frais d'administration. HBC pouvait imputer les frais d'administration du régime à la caisse de retraite. La question de savoir si HBC pouvait s'accorder des périodes d'exonération de cotisations n'était pas portée en appel. Toutefois, aux termes des documents relatifs au régime, les cotisations de l'employeur étaient déterminées par un actuaire. Par conséquent, j'estime juste la conclusion du juge du procès que HBC était autorisée à s'accorder de telles périodes.

[95] Je suis également d'avis de rejeter le pourvoi en ce qui concerne la question du transfert de l'excédent. La juge Gillese a conclu, à bon droit, que les employés mutés ne possédaient aucun intérêt en equity dans l'excédent de la caisse de retraite. Ils avaient seulement un intérêt dans leurs prestations déterminées. Comme ces dernières ont été protégées dans le cadre du transfert, HBC n'a manqué à aucune obligation fiduciaire lui incombant.

[96] Je tiens à souligner que la présente décision découle du libellé et du contexte des documents relatifs au régime de retraite soumis à la Cour. L'analyse de ces documents mène à la conclusion

that the employees are not entitled to any portion of the surplus on their transfer to NWC. This decision does not purport to deal with other situations involving actuarial surplus and plan transfer. Each situation must be evaluated on a case-by-case basis. Specifically, the resolution of the issue of surplus transfer when the pension plan documents indicate that employees are entitled to surplus on plan termination is best left to another case where that issue arises.

[97] The Court of Appeal's ruling on costs was not challenged in this Court. Gillese J.A. found that for this case it was appropriate for costs to be paid out of the pension trust fund because this case dealt with issues surrounding the due administration of the pension trust fund and was for the benefit of all the beneficiaries (*Burke v. Hudson's Bay Co.*, 2008 ONCA 690, 241 O.A.C. 245). The parties submit that this is an appropriate case for costs in this Court to be paid to both parties on a full-indemnity basis out of the trust fund. Therefore, in accordance with the terminology used in this Court, I order costs on a solicitor-and-client basis in this Court, including costs of the leave application, to be paid to both parties out of the trust fund.

Appeal dismissed with costs.

Solicitors for the appellants: Bellmore & Moore, Toronto.

Solicitors for the respondents: Osler, Hoskin & Harcourt, Toronto.

que les employés n'avaient droit à aucune part de l'excédent au moment de leur mutation à CNO. La présente décision ne prétend pas répondre à d'autres situations mettant en cause un excédent actuariel et le transfert d'un régime. Chaque situation appelle un examen au cas par cas. Tout particulièrement, il est préférable de laisser irrésolue la question du transfert de l'excédent d'un régime dont les documents accordent aux employés un droit à l'excédent à la cessation du régime pour la trancher lorsqu'elle sera éventuellement soulevée dans un autre pourvoi.

[97] Il n'était pas interjeté appel, devant la Cour, de la décision de la Cour d'appel quant aux dépens. La juge Gillese était d'avis qu'il convenait dans ce cas de prélever les dépens sur la caisse de retraite parce que le litige portait sur des questions intéressant la bonne administration de la caisse de retraite détenue en fiducie et que leur règlement allait profiter à tous les bénéficiaires (*Burke c. Hudson's Bay Co.*, 2008 ONCA 690, 241 O.A.C. 245). Les parties font valoir qu'il conviendrait, en l'espèce, que la Cour accorde les dépens devant la Cour sur la base d'une indemnisation totale aux deux parties et ordonne qu'ils soient prélevés sur la caisse de retraite. Pour reprendre la formule usuelle, par conséquent, j'accorde les dépens devant la Cour aux deux parties sur la base procureur-client, y compris les dépens relatifs à la demande d'autorisation d'appel, et ordonne qu'ils soient prélevés sur la caisse de retraite.

Pourvoi rejeté avec dépens.

Procureurs des appelants : Bellmore & Moore, Toronto.

Procureurs des intimés : Osler, Hoskin & Harcourt, Toronto.

EXHIBIT "E"
referred to in the Affidavit of
THOMAS OBERSTEINER
Sworn June 18, 2026

Signed by:

Brittney Ketwaroo

FA383D6B5B5A42C

Commissioner for Taking Affidavits
Brittney Ketwaroo



Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

JOHN SCOTT and JAMES COMMON, on their own behalf and on behalf of all members of the formerly entitled Dumai Pension Plan, Registration Number 0358572, which is now part of the Hudson's Bay Company Pension Plan, Registration Number 0291419

Applicants

- and -

TELUS HEALTH (CANADA) LTD. and RBC INVESTOR SERVICES TRUST

Respondents

APPLICATION UNDER Rule 14.05 (3)(a),(b),(d), and (h) of the *Rules of Civil Procedure*
Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim made by the applicants appear on the following page.

THIS APPLICATION will come on for a hearing:

- In person
- By telephone conference
- By video conference

at the following location: 330 University Avenue, Toronto, Ontario, on a day to be set by the Registrar.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicants' lawyer or, where the applicants do not have a lawyer, serve it on the applicants, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicants' lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: June 6, 2025

Issued by:

Local Registrar

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court office:

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Lawyers for FSRA

APPLICATION

1. The Applicants make application for:

- (a) **AN ORDER** for damages in the amount of the surplus assets in the Hudson's Bay Company Pension Plan, Registration Number 0291419 (the "**HBC Plan**") as of the wind up date, that are attributable to the trust fund (the "**Dumai Trust Fund**") established in respect of the formerly entitled Dumai Pension Plan, Registration Number 0358572 (the "**Dumai Plan**"), which is now part of the HBC Plan, in accordance with the Orders of the Ontario Superior Court of Justice in *Sutherland v. Hudson's Bay Company*, [2007] OJ No 2979 (ONSC) (hereinafter, "**Sutherland (2007)**") as affirmed by the Ontario Court of Appeal in *Sutherland v. Hudson's Bay Company*, 2011 ONCA 606 (hereinafter, "**Sutherland (2011)**").
- (b) **AN ORDER** that the surplus assets in the HBC Plan as of the wind up date that are attributable and traceable to the Dumai Plan are impressed with a resulting trust or alternatively, another form of trust, and ordering the Respondents, TELUS Health (Canada) Ltd. ("**Telus**") and the RBC Investor Services Trust ("**RBC Trust**"), to return the trust property still in their possession or control to the retirees and beneficiaries of the Dumai Plan;
- (c) **AN ORDER** directing the Respondents, Telus and RBC Trust, to distribute the surplus assets in the HBC Plan as of the wind up date that are attributable to and traceable to the Dumai Trust Fund, to the retirees and beneficiaries of the Dumai Trust Fund in accordance with the Orders of the Ontario Superior Court of Justice

in *Sutherland (2007)* and *Sutherland (2011)* in the amounts in accordance with their entitlements.

- (d) **AN ORDER** certifying this action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. ("**CPA**") and appointing the Applicants as representative plaintiffs for the Class as defined herein.
- (e) **AN ORDER** directing the Respondents to perform an accounting of the assets in the trust fund of the HBC Plan to *inter alia* trace and quantify the amount of the surplus assets attributable to the Dumai Plan, which is now part of the HBC Plan, and to determine the amount of surplus payments payable to each of the Class members as of the wind up of the HBC Plan.
- (f) **AN ORDER** rectifying or, in the alternative, directing Telus in its capacity as the administrator of the HBC Plan, to amend section 16.05 of the HBC Plan text effective as of January 1, 2018, with the heading "Wind-Up Surplus" or any other applicable section or amendment of the HBC Plan, to reflect that the surplus assets attributable to the Dumai Plan are to be distributed to the members and beneficiaries of the Dumai Trust Fund in compliance with the Orders in *Sutherland (2007)* and *Sutherland (2011)*.
- (g) **AN ORDER** that the costs of the Applicants be paid on a pre-emptive basis from the fund of the HBC Plan on a full indemnity basis.
- (h) **AN ORDER** in the alternative for costs:
 - (i) pursuant to the CPA, including the costs of notices and administering the plan of distribution of the recovery of this application, plus applicable taxes;

- (ii) paid from the surplus attributable and traceable to the Dumai Trust Fund in the HBC Plan on a full indemnity basis; or
- (iii) paid by the Respondents on a full indemnity basis;
- (i) Pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1995, c. C.43, as amended; and
- (j) Such further and other relief as may be required by the CPA, or as this Honourable Court may deem just.

THE GROUNDS FOR THE APPLICATION ARE:

The Applicants

2. John Scott is a retired employee of the Hudson's Bay Company ("**HBC**") who retired on April 30, 2004. He is a former employee of Simpsons Ltd. and became an employee of HBC after HBC acquired Simpsons in 1979. He was a member of the Simpsons Pension Plan and is entitled to and receiving monthly defined benefit pension benefits from the Dumai Plan section (the former Simpsons Pension Plan) of the HBC Plan.

3. John Scott was the Representative Plaintiff in the previously certified class action in *Sutherland (2007)*, which was certified by Court Order dated April 28, 2005.¹ The co-Representative Plaintiff in that certified class action, Ronald Sutherland, is now deceased.

¹ *Sutherland et al v Hudson's Bay Company Limited et al* (28 April 2025), Toronto Court File No. 02-CV-233990CP (ONSC).

4. The Applicant James Common is a retired employee of HBC who retired on March 29, 2018. He is a former employee of Simpsons Ltd. and became an employee of HBC after HBC acquired Simpsons in 1979. He was a member of the Simpsons Pension Plan and is entitled to and receiving monthly defined benefit pension benefits from the Dumai Plan section (the former Simpsons Pension Plan) of the HBC Plan.

The Plaintiff Class

5. The Class that the Representative Plaintiffs in this action seek to represent comprises all members of the formerly entitled Dumai Plan (i.e., the former Simpsons Pension Plan) who the Court has ordered in *Sutherland (2007)* and *Sutherland (2011)* are entitled to receive the surplus assets attributable to the trust fund in respect of the Dumai Plan (which is now part of the HBC Plan), as of the wind up of the plan (the "**Class Members**").

The Respondents

6. Telus is a corporation incorporated pursuant to the laws of Ontario, with its head office in Toronto, Canada.² On April 3, 2025, the Financial Services Regulatory Authority of Ontario ("**FSRA**") appointed Telus as the replacement pension plan administrator over the HBC Plan, pursuant to subsection 8(1.1) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("**PBA**").³

² In September 2022, Telus acquired Life Works, formerly Morneau Shepell, an actuarial consulting firm. Lifeworks was then integrated into Telus Health.

³ Subsection 8(1.1) of the PBA states:

Appointment, etc., by Chief Executive Officer

(1.1) The Chief Executive Officer may, in prescribed circumstances, appoint an administrator for a pension plan and may terminate the appointment if the Chief Executive Officer considers the termination reasonable in the circumstances.

7. Telus is the pension plan administrator under the PBA of the HBC Plan.⁴

8. The respondent, RBC Trust is a company pursuant to the laws of Canada with its head office in Toronto, Ontario. RBC Trust is the current custodial trustee and holder of the assets of the HBC Plan, including the trust funds attributable and traceable to the Dumai Plan.

The Applicants' Claims follow the Orders made in Sutherland (2007) and Sutherland (2011)

9. This Application follows from *Sutherland (2007)*, as affirmed by the Ontario Court of Appeal in *Sutherland (2011)*.

Summary of Sutherland (2007) and Sutherland (2011)

10. In *Sutherland (2007)*, the certified plaintiff Class was comprised of the former employees of Simpsons Ltd. who were members of the Simpsons Pension Plan. The Simpsons Plan was commenced by Simpsons in 1971 as a defined benefit pension plan. In 1976, Simpsons amended the Simpsons Plan to require the employee members to regularly contribute a portion of their pay to the fund of the Simpsons Plan, making it a *contributory* defined benefit pension plan.

11. The Simpsons Plan developed surplus assets, which were directly contributed to by the Simpsons employees' regular contributions to the plan.

12. HBC acquired Simpsons Ltd. in 1979. As part of the acquisition, it took over as the administrator of the Simpsons Pension Plan.

⁴ HBC is not the administrator of the HBC Plan.

13. After HBC acquired Simpsons, the Simpsons employees became employees of HBC, and they continued to pay into and accrue defined benefit pensions in the Simpsons Pension Plan.

14. HBC amended the Simpsons Plan as of January 1, 1988 to limit membership to the employees who were members of the Simpsons Plan as of January 1, 1988. Employees who were members of the Simpsons Plan as of that date continued to accrue pension benefits on a defined benefit basis in accordance with the terms of the Simpsons Plan.

15. In *Sutherland (2007)*, the Class Plaintiffs (John Scott and Ron Sutherland) commenced a class action against HBC complaining that as of January 1, 1994, HBC amended the Simpsons Plan to introduce Zellers⁵ employees along with a new defined contribution component for the Zellers employees, and that HBC was using the surplus from the Simpsons Plan to pay for its contributions to the Zellers employees' defined contribution accounts. As of the same date, January 1, 1994, HBC also amended the Simpsons Plan to change its name to the "Dumai Pension Plan".

16. The Class Plaintiffs in *Sutherland (2007)* also complained that as of January 1, 1998, HBC amended the Dumai Plan to introduce Kmart⁶ employees along with a new defined contribution component for the Kmart employees, and that HBC was using the surplus from the Simpsons Plan to pay for its contributions to the Kmart employees' defined contribution accounts.

17. The trial judge performed a comprehensive analysis of surplus ownership in the Dumai Plan, and ordered that:

⁵ Zellers was owned by HBC at the time.

⁶ Kmart was owned by HBC at the time.

- (a) The assets of the trust fund established in respect of the Dumai Plan (i.e., the formerly entitled the Simpsons Plan) are impressed with a trust in favour of the members of the Dumai Plan from time to time including, at the present time, the members of both the defined benefit section (i.e., the formerly Simpsons Plan members who were accruing benefits on a defined benefit basis) and the defined contribution section (the Zellers and Kmart employees who HBC introduced into the Dumai Plan);
- (b) There is no separate or distinct trust fund whose beneficiaries are limited to the members of the defined contribution section of the Dumai Plan;
- (c) HBC is not a beneficiary of the Dumai Trust Fund; and,
- (d) On the termination (i.e., wind up) of the Dumai Plan, the members are entitled to the surplus assets remaining in the Dumai Trust Fund (after provision for any liabilities of the Dumai Plan).

18. The provisions of the *Sutherland (2007)* Judgment ordering that HBC is not a beneficiary of the Dumai Trust Fund follows:

1. THIS COURT ORDERS AND ADJUDGES, with respect to common issue number 1, that:

- (a) the assets of the trust fund established in respect of the Plan are impressed with a trust in favour of the members of the Plan from time to time including, at the present time, the members of both the defined benefit section and the defined contribution section of the Plan;
- (b) there is no separate or distinct trust fund whose beneficiaries are limited to the members of the defined contribution section of the Plan; and
- (c) HBC is not a beneficiary of the trust fund of the Plan.

19. The provisions of the Reasons for Judgment in *Sutherland (2007)* ruling that the beneficiaries of the Dumai Trust Fund (i.e. the plan members) are entitled to the surplus remaining in the Trust Fund follows:

[142] Accordingly, I conclude that there is a conflict between the provisions of the Trust Agreement and the Plan respecting the entitlement of HBC to any surplus assets in the Trust Fund upon the winding-up or other termination of the Plan. In these circumstances, equitable principles require that the provisions of the Trust Agreement must prevail. **I therefore find that on termination of the Plan, the Members are entitled to any surplus assets remaining in the Trust Fund after provision for any liabilities of the Plan.**

[143] HBC argues that it is also a beneficiary of the Trust. **However, it is clear from Air Products at pages 654-684 that HBC's ability to take contribution holidays while the Plan is on going does not constitute an interest in the surplus. Given the finding that it does not have any entitlement to surplus on termination of the Plan, HBC has no equitable interest in the Trust Fund. On this basis, HBC is not a beneficiary of the Trust Fund.** [emphasis added]

20. The Class Plaintiffs appealed the Order in *Sutherland (2007)* that held that HBC could utilize the surplus in the Dumai Plan to pay for its contributions for the Zellers and Kmart members of the Dumai Plan. That appeal was settled and did not proceed to a hearing. The settlement was approved by the Court in *Sutherland v Hudson's Bay Co.*, [2009] O.J. No. 3472.

21. HBC cross-appealed the Orders in *Sutherland (2007)* that ruled that HBC was not a beneficiary of the Dumai Trust Fund, and that on the wind up of the Dumai Plan, the Dumai Plan members are entitled to receive all the surplus. The cross-appeal proceeded to a hearing before the Ontario Court of Appeal, which dismissed HBC's cross appeal.

22. The Ontario Court of Appeal performed another comprehensive analysis of the surplus ownership in the Dumai Plan, upheld the trial judge, and dismissed HBC's cross-appeal:

[97] The trial judge correctly recognized that in the absence of specific language to the contrary, trust law principles are to prevail in the face of conflicting contractual provisions. ***He correctly concluded that the Plan assets are impressed with a trust in favour of the Plan members and that it is the Plan members who are entitled to any surplus assets in the trust fund on Plan administration and wind up.*** [emphasis added]

23. HBC sought leave to appeal to the Supreme Court of Canada. Leave was denied.⁷

24. Therefore, the issue of who owns the surplus assets remaining in the Dumai Plan on its wind up has already been decided by the Ontario Superior Court and affirmed by the Ontario Court of Appeal in favour of the Class Members. This issue is *res judicata*.

The Merger of the Dumai Plan with other HBC pension plans by HBC

25. At the time *Sutherland (2007)* was commenced in 2005, and the time of the rendering of the Court Orders and Judgment, the Court acknowledged that HBC had already passed board resolutions to merge together the Dumai Plan, the HBC Executive Plan, the HBC Company Plan, and the Zellers Plan (collectively, the "**Pre-Merger Plans**") and operate them as one pension plan with different sections for the Dumai, Zellers, HBC Executive and HBC Plan members and under one name: the HBC Plan. The Court in *Sutherland (2007)* also acknowledged that the merger was only awaiting regulatory approval by the pension regulator (the Financial Services Commission of Ontario; "FSCO", now FSRA), which was eventually provided.

26. The merger by HBC of the Pre-Merger Plans does not affect or alter the entitlement of the Class Members to the ownership of the surplus assets in respect of the Dumai Trust Fund as determined by the Orders and Decisions in *Sutherland 2007* and *Sutherland (2011)*.

⁷ *Garossino, Edward E. Shier and Gale Ritchie*, 2012 CanLII 26660 (SCC).

27. The current HBC Plan operates as the culmination of the merger by HBC of the Pre-Merger Plans and the specific terms of each of the Pre-Merger Plans operate in separate sections of the HBC Plan:

- (a) the Dumai Plan (formerly, the Simpsons Plan) - a defined benefit (for the Simpsons retirees) and defined contribution plan (for the Zellers and Kmart members added to the plan in 1994 and 1998, respectively);
- (b) the Hudson's Bay Company Pension Plan - a defined contribution plan (with some historical defined benefit members);
- (c) the Hudson's Bay Executive Plan - a defined contribution plan (with some historical defined benefit members); and
- (d) the Zellers Inc. Pension Plan - a defined contribution plan (with some historical defined benefit members).

28. The FSRA website reports that the HBC Plan has 4,976 active members. There are approximately 17,000 active and inactive members with defined contribution entitlements. Most of the active members in the HBC Plan are earning entitlements under the defined contribution sections.

29. The total assets of the HBC Plan as of January 1, 2024 are approximately \$460.07 M.

30. The Applicant James Common's 2023 annual pension statement reports that as at January 1, 2024, there is approximately \$167.03M in surplus assets (calculated on an actuarial going concern basis) in the HBC trust fund of the HBC Plan.

31. In the January 1, 2018 restatement of the HBC Plan text, HBC included Article 16.05 entitled "Wind Up Surplus" which says broadly that any surplus remaining in the HBC Plan after the wind up reverts to HBC. However, such a provision as it could pertain to the Dumai Trust Fund, is contrary to the Orders of this Honourable Court and the Ontario Court of Appeal in *Sutherland (2007)* and *Sutherland (2011)*. The Applicants state that Article 16.05 or any such other provision cannot contravene the previous Orders of the courts, and would constitute a collateral attack on those court Orders. Accordingly, the Applicants state that the provision, and any other similar HBC Plan text or amendment provision, must be rectified or amended by the pension plan administrator.

HBC is not the Administrator of the HBC Plan – Telus is the Administrator. The wind up is inevitable.

32. On March 7, 2025, HBC obtained protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). While under CCAA protection, HBC is not restructuring. It is liquidating all of its assets, has closed its stores and has terminated all its employees, other than those employees retained to wind down the business. All HBC stores are in the process of being closed by June 30, 2025. HBC has terminated, or in the process of terminating employee and retiree benefits. HBC is not paying severance pay and other amounts that it owes to the terminated employees and retirees, causing many hardships.

33. As noted, on April 3, 2025, FSRA appointed a replacement administrator (Telus) under the PBA over the HBC Plan.

34. In the circumstances, the wind up of the HBC Plan is inevitable.

35. The wind up process by Telus of the HBC Plan will generally entail:

- (a) arranging for the purchase of annuities for the members who are entitled to receive pension benefits on a defined benefit basis to continue payment of those benefits;
- (b) the transfer of the accounts of the members who accrue defined contribution balances to locked-in retirement accounts (LIRA), or used by members to purchase a deferred annuity, and
- (c) the distribution of all the surplus assets.

36. The Applicants and the class members plead and rely upon the provisions of the *Trustee Act*, R.S.O. 1990, c. T-23, the *Pension Benefits Act*, R.S.O. 1990, c. P.8 and the *Class Proceedings Act, 1992*.

37. The Applicants request that this application be heard in the City of Toronto.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:

- 38. Affidavit of John Scott, to be sworn;
- 39. Affidavit of James Common, to be sworn;
- 40. *Sutherland v Hudson's Bay Company*, [2007] OJ No 2979 (ONSC);
- 41. *Sutherland v Hudson's Bay Company*, 2011 ONCA 606;
- 42. *Sutherland et al v Hudson's Bay Company Limited et al* (28 April 2025), Toronto Court File No. 02-CV-233990CP (ONSC);
- 43. Annual Dumai Plan Pension Statement (2023 and 2022) of James Common;

44. FSRA Letter Appointing Telus as Administrator, dated April 3, 2025;
45. *Sutherland v Hudson's Bay Company*, [2009] OJ No 3472 (ONSC);
46. FSRA Page Summary for the HBC Pension Plan; and
47. Such further and other evidence as counsel may advise and this Honourable Court may permit.

June 6, 2025

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Lawyers for Applicants

JOHN SCOTT et al.

v.

**TELUS HEALTH
(CANADA) LTD. et al.**

Applicants

Respondents

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**
Proceeding commenced at Toronto

NOTICE OF APPLICATION

**APPLICATION UNDER Rule 14.05 (3)(a),(b),(d),
and (h) of the Rules of Civil Procedure**

Proceeding under the *Class Proceedings Act*, 1992

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Lawyers for the Applicants

EXHIBIT "F"
referred to in the Affidavit of
THOMAS OBERSTEINER
Sworn June 18, 2026

Signed by:

Brittney Ketwaroo

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Commissioner for Taking Affidavits
Brittney Ketwaroo

EXHIBIT "F"

PROPOSED REPRESENTATIVE COUNSEL'S PRIOR EXPERIENCE

Ursel Phillips Fellows Hopkinson LLP

Ursel Phillips Fellows Hopkinson LLP has significant experience representing pension plan members in insolvency proceedings, having acted as court-appointed representative counsel in the following matters:

1. 1000156489 Ontario Inc. (f/k/a **DCL Corporation**) (2025-26) - Pension Representative Counsel representing the interests of all members of the hourly and salaried pension plans (including unionised members) with respect to the question of entitlement to and distribution of surplus funds in each of the pension plans.
 - a. Working with a representative of Teamsters Chemical, Energy and Allied Workers (Local Union No. 1979) in respect of the Hourly DB Plan, and a committee of up to three members of the Salaried DB Plan in respect of the Salaried DB Plan
 - b. Negotiating terms of a pension surplus sharing agreement which was approved by the Court on August 25, 2025, and in respect of which the Financial Services Regulatory Authority of Ontario issued Consent Orders on January 9, 2026;
 - c. Communicating and advising plan members with respect to the CCAA proceedings, maintenance of a dedicated webpage and fully monitored email and 1-800 telephone line
2. **Essar Steel Algoma** (2015-2018) – Pension Representative Counsel on behalf of approx. 6,000 retired members of the hourly and salaried pension plans. Scope of representation included:
 - a. Representing retirees' interests in the CCAA Proceedings;
 - b. Working with a retiree representative committee for the purposes of the mandate;
 - c. Representing retirees' interests in related oppression remedy litigation filed by the Monitor;
 - d. Negotiating with stakeholders with respect to pension plan funding, including negotiation and participation in discussions with the Ontario Government and the

Financial Services Regulatory Authority regarding a special regulation for pension funding under the *Pension Benefits Act*; and

- e. Communicating and advising retirees with respect to the CCAA proceedings and pension and benefits matters, including several in-person presentations and webinars, as well as maintenance of a dedicated webpage and a fully monitored 1-800 telephone line.
3. **Air Canada** (2003-2004) - Pension Representative Counsel on behalf of retirees in union pension plans. Scope of representation included:
- a. Representing union retirees' interests in the CCAA Proceedings through membership on and work with the multi-party union/retiree Pension Benefits Group, and with the Union Retiree Representative Committee;
 - b. Negotiating with stakeholders with respect to pension plan funding, including negotiation and participation in discussions with the Federal Government and the Federal Regulator Office of the Superintendent of Financial Institutions regarding a special regulation for pension funding under the *Pension Benefits Standards Act*. This work included membership in and work with the Technical Working Group established to develop and implement a representative consent mechanism satisfactory to OSFI and the Government regarding an employer specific regulation; and
 - c. Communicating and advising retirees with respect to the CCAA proceedings and pension and benefits matters, including regular information bulletins and maintenance of a dedicated webpage.

In addition, Ursel Phillips Fellows Hopkinson LLP have significant experience representing large and diverse groups of employees in significant retail insolvencies, including the current proceeding which gives Ursel Phillips Fellows Hopkinson LLP familiarity with the issues:

1. **Hudson's Bay Company (2025-present)** – Employee Representative Counsel acting on behalf of approx. non-unionized 9,000 employees across Canada. Scope of representation includes:
 - a. Representing employees' interests in the CCAA Proceedings;

- b. Representing employees in respect of applications under the Wage Earner Protection Program (WEPP), including review of WEPP payment calculation methodology, coordination with the Monitor and Service Canada, assisting employees in filing WEPP Applications and providing advice in reviewing denied WEPP applications
 - c. Negotiating terms of a Court-approved Hardship Programs;
 - d. Representing former executives in respect of Supplemental Executive Retirement Program entitlements, including addressing legal disputes related to the entitlement to and distribution of funds held in Trust;
 - e. Communicating and advising employees with respect to the CCAA proceedings generally, their employment obligations during the liquidation, their entitlements and obligations under applicable provincial law; and
 - f. Communicating and advising employees with respect to the CCAA proceedings, maintenance of a dedicated webpage and fully monitored email and 1-800 telephone line.
2. **Nordstrom Canada** (2023-2024) – Employee Representative Counsel on behalf of approx. 2,700 employees from three provinces. Scope of representation included:
- g. Representing employees' interests in the CCAA Proceedings;
 - h. Negotiating terms of a Court-approved Employee Trust to provide for payment of statutory minimum termination entitlements for all employees, and addressing disputes related to payments from the Employee Trust;
 - i. Negotiating a formula for payment of additional contractual termination entitlements for certain employees, which were then filed through a negative notice process in the Court-approved claims process;
 - j. Filing and resolving additional claims under the Court-approved claims process;
 - k. Communicating and advising employees with respect to the CCAA proceedings generally, their employment obligations during the liquidation, their entitlements

under the Employee Trust, their entitlements and obligations under applicable provincial law, and with respect to the claims process; and

- I. Communicating and advising employees with respect to the CCAA proceedings, maintenance of a dedicated webpage and fully monitored email and 1-800 telephone line.
3. **Sears Canada (2017-2022)** - Employee Representative Counsel on behalf of approx. 18,000 employees from nine provinces. Scope of representation included:
- a. Representing employees' interests in the CCAA Proceedings;
 - b. Working with an employee representative committee for the purposes of the mandate;
 - c. Representing employees' interests in related litigation filed by the Monitor, the Court-appointed Litigation Trustee and the pension plan administrator, including participating in the Litigation Creditor Committee;
 - d. Negotiating terms of a Court-approved Employee Hardship Fund, and assisting and advising employees with respect to applications for payments from that fund;
 - e. Negotiating with the Monitor and the Applicants to establish an Employee and Retiree Claims Procedure, including negotiation of a Termination Claims Methodology and a Common Law Severance Formula for that procedure, and filing and resolving additional employee claims under that procedure;
 - f. Cooperating with the Monitor, the Applicants and representatives of Service Canada with respect to the Receivership and applications to the Wage Earner Protection Program;
 - g. Communicating and advising employees with respect to the CCAA proceedings generally, their employment obligations during the liquidation, their entitlements under the Employee Hardship Fund, their entitlements and obligations under applicable provincial law, their claims under the Wage Earner Protection Program, and with respect to the CCAA claims process, including webinar presentations for employees at various stages of the procedure; and

- h. Communicating and advising employees with respect to the CCAA proceedings, including webinars, as well as maintenance of a dedicated webpage and fully monitored email and 1-800 telephone line.

EXHIBIT "G"
referred to in the Affidavit of
THOMAS OBERSTEINER
Sworn June 18, 2026

Signed by:

Brittney Ketwaroo

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Commissioner for Taking Affidavits
Brittney Ketwaroo

EXHIBIT "G"
PROPOSED REPRESENTATIVE COUNSEL'S PRIOR EXPERIENCE

KOSKIE MINSKY

1. The Applicants believe that Koskie Minsky LLP ("**Koskie Minsky**") is an appropriate representative counsel for persons with entitlements under either or both of the defined benefit provision and defined contribution provision under the Pension Plan which were specifically accrued under the Dumai Plan prior to January 1, 2002.

2. Koskie Minsky has extensive experience with pension plan issues in both insolvency and non-insolvency proceedings, involving plans that are underfunded as well as plans with surplus assets.

3. Koskie Minsky has been appointed by the Courts as representative counsel for employees and retirees in proceedings including, among others, Sears Canada, Stelco (involving several plans, both in deficit and with surplus), Nortel Networks, Hollinger Canadian Publishing Holdings, Bloom Lake/Wabush Mines (Quebec), Eaton's, and Confederation Life.

4. Koskie Minsky has also represented employees, retirees, unions, and pension plan administrators in the insolvency proceedings of Accuride, Yellow Pages (CBCA reorganization), Indalex, Fraser Papers, Smurfit-Stone, General Chemical, Vicwest, Catalyst Paper (B.C.), Ivaco, Grant Forest, Slater Steel, and Algoma Steel.

5. Koskie Minsky also has substantial experience in non-insolvency cases involving pension plan surplus, including the following:

- a) *Kidd v. Canada Life*, 2012 ONSC 740;
- b) *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678;
- c) *Montreal Trust Company of Canada v. Ontario (Superintendent of Financial Services)*, 2009 ONFST 1;
- d) *National Trust Company v. Smallhorn*, 2007 CanLII 41893 (ON SC);
- e) *Sutherland v. Hudson's Bay Company*, 2007 CanLII 30293 (ON SC), aff'd 2011 ONCA 606;

- f) *Vivendi Universal Canada Inc. v. Jellinek*, 2006 CanLII 31913 (ON SC);
- g) *Montreal Trust Company of Canada v. Armstrong*, 2006 CanLII 33473 (ON SC);
- h) *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152;
- i) *Markle v. Toronto (City of)*, 2003 CanLII 18252 (ON CA);
- j) *Aegon Canada Inc. v. ING Canada Inc.*, 2003 CanLII 22441 (ON CA);
- k) *Bathgate v. National Hockey League Pension Society*, 1994 CanLII 1427 (ON CA);
- l) *Anova Inc. Employee Retirement Pension Plan (Administrator of) v. Manufacturers Life Insurance Co.*, 1994 CanLII 7519 (ON SC); and
- m) *Re Collins et al. and Pension Commission of Ontario et al.; Re Batchelor et al. and Pension Commission of Ontario et al.*, 1986 CanLII 2568 (ON SC).

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, AND IN THE MATTER OF 1242939 B.C. UNLIMITED LIABILITY COMPANY et al.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**AFFIDAVIT OF THOMAS OBERSTEINER
(Sworn June 18, 2026)**

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Lawyers for the Applicants

TAB 3

Court File No. CV-25-00738613-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
1242939 B.C. UNLIMITED LIABILITY COMPANY, 1241423 B.C. LTD., 1330096 B.C. LTD.,
1330094 B.C. LTD., 1330092 B.C. UNLIMITED LIABILITY COMPANY, 1329608 B.C.
UNLIMITED LIABILITY COMPANY, 2745263 ONTARIO INC., 2745270 ONTARIO INC.,
SNOSPMIS LIMITED, 2472596 ONTARIO INC., AND 2472598 ONTARIO INC.**

Applicants

**AFFIDAVIT OF THOMAS OBERSTEINER
(Sworn June 18, 2026)**

I, Thomas Obersteiner, of the City of New York, in the State of New York, MAKE OATH
AND SAY:

1. I am an independent consultant performing services similar to those of a general counsel of 1242939 B.C. Unlimited Liability Company (f/k/a Hudson's Bay Company ULC Compagnie de la Baie d'Hudson SRI) (the "**Company**"), and certain other Applicants.¹
2. I, together with other members of management, have been involved in overseeing various aspects of the Applicants' restructuring efforts. As such, I have knowledge of the matters to which I hereinafter depose, except where otherwise stated. I have also reviewed the records, press releases, and public filings of the Company and have spoken with certain of the directors, officers and/or employees of the Company, as necessary, together with Alvarez & Marsal Canada Inc., in its capacity as the monitor of the Applicants (the "**Monitor**") and Reflect LLC, in its capacity as the Applicants' financial advisor, and outside counsel to the Applicants. Where I have relied upon such information, I believe such information to be true. The Applicants do not, and do not intend to, waive privilege by any statement herein.

¹ The Court-authorized name changes of the Applicants are attached as Exhibit "A" to the affidavit of Franco Perugini sworn August 12, 2025, which became effective as of August 12, 2025.

3. All capitalized terms used in this affidavit and not otherwise defined have the meanings given to them in my affidavit sworn March 13, 2026 (the “**Initial Obersteiner Affidavit**”).
4. I swear this affidavit in support of a motion by the Applicants for the issuance of an order (the “**Stay Extension and Second KERP Order**”), among other things:
 - a) extending the Stay Period from June 30, 2026, until and including October 31, 2026;
 - b) approving the second key employee retention plan (the “**Second KERP**”) and granting a Court-ordered priority charge against the property in the maximum amount of \$527,500 as security for payment under the Second KERP (the “**Second KERP Charge**”); and
 - c) sealing the unredacted Second KERP pending further order of this Court.
5. The Applicants are also seeking a Pension Representative counsel order and mediator order at the June 26th hearing, and those motions are being addressed in a separate affidavit.
6. All references to monetary amounts in this affidavit are in Canadian dollars unless otherwise indicated.

I. BACKGROUND

7. The Company and its subsidiaries collectively operated as a premier North American department store retailer with a portfolio of real estate assets in Canada.
8. The Applicants suffered severe liquidity issues due to, among other things, the evolving retail landscape, the deteriorating brick-and-mortar retail environment, a decline in foot traffic at its stores, including as a result of the COVID-19 pandemic, and ongoing trade tensions with the United States, including the threat of tariffs, retaliatory tariffs, and newly imposed tariffs.
9. Unable to successfully restructure their operations, or secure replacement financing or investment outside of formal insolvency proceedings, the Applicants sought and were granted protection under the CCAA by the Court on March 7, 2025. Since then, this Court has granted a significant amount of relief – only the relief that is relevant to this motion is described below.
10. At the Comeback Motion which commenced March 21, 2025, the Applicants sought and obtained: (a) the ARIO which, among other things, (i) approved the key employee retention plan

(the “**First KERP**”) and the KERP Charge in the aggregate amount of \$3,000,000 (the “**First KERP Charge**”) to secure payments to the Key Employees under the First KERP; and (ii) extended the Stay Period; (b) the SISP Order which, among other things, approved the SISP and authorized the Applicants and Reflect to conduct the SISP under the supervision of the Monitor (which was amended pursuant to an Order granted on April 24, 2025, to remove the Company’s Art Collection and Charter (as defined below) from the Property available for sale pursuant to the SISP); (c) the Liquidation Sale Approval Order which, among other things, authorized the Applicants to commence the Liquidation Sale at all but six of the Company’s 96 stores across Canada; and (d) the Lease Monetization Order which, among other things, authorized the Applicants and Oberfeld to conduct the Lease Monetization Process to market Hudson’s Bay Canada’s Leases under the supervision of the Monitor. The Stay Period has continued to be extended by the Court from time-to-time, most recently to June 30, 2026, pursuant to an Order granted on March 19, 2026.

11. The Liquidation Sale, the Lease Monetization Process, and the SISP have concluded. These processes resulted in the closing of various value-maximizing sales and transactions of the Applicants’ assets for the benefit of the Applicants and their stakeholders.

12. On September 25, 2025, the Court granted the Art Auction Process Order which, among other things, approved the Art Collection Auction Procedures, authorized the Auctioneer to conduct the Art Collection Auction, and approved the individual Lots constituting the Art Collection to be vested in the Buyers emerging from the Art Collection Auction, free and clear of all claims and encumbrances.

13. On December 11, 2025, following a motion by the Applicants, this Court granted an approval and vesting Order, among other things, approving the sale of the Royal Charter of 1670 (the “**Charter**”) to Wittington Investments, Limited and DKRT Family Corp. The transactions contemplated by the Charter AVO closed on December 19, 2025, and the Charter was immediately donated to the identified public institutions.

14. On February 11, 2026, the Court granted an Order (the “**Hardship Programs Order**”) which approved a term sheet (the “**Term Sheet**”) entered into between the Applicants, Ursel Phillips Fellows Hopkinson LLP, in its capacity as Employee Representative Counsel (“**ERC**”), Restore Capital, LLC (the “**FILO Agent**”), the Trustees of the Zellers Limited Health and Welfare Trust, Manufacturers Life Insurance Company (“**Manulife**”), and the Monitor. The Term Sheet

represented a compromise with respect to competing claims by the Applicants, the Applicants' secured lenders (being the FILO Agent, Pathlight and 2171948 Ontario Inc.) (the "**Secured Lenders**") and the Represented Employees on the assets of the Zellers Limited Health and Welfare Trust Fund. The Term Sheet provides for a process to assist 157 former Company employees to receive continued long-term disability benefits as well as the potential for an Employee Hardship Fund to be implemented if various financial conditions are met.

15. As the current Stay Period expires on June 30, 2026, the Applicants are seeking to extend the Stay Period to and including October 31, 2026. As set out below, the Applicants have acted in good faith and with due diligence since the most recent Order of the Court extending the Stay Period. The extension of the Stay Period will permit the Applicants to, among other things, conclude the Art Collection Auctions and distribute available proceeds, continue to advance the implementation of the Employee Hardship Program, address the SERP Trustee Motion in respect of the HBC SERP matters (which is described in greater detail below), continue to attend to matters involving the RioCan JV Receivership with respect to certain remaining locations including properties in Calgary, Vancouver, Windsor and Montreal, finalize Shared Services arrangements, and address document and data retention matters, all in order to maximize the value of the Applicants' remaining assets for the benefit of their stakeholders and advance the orderly wind-down of the Applicants.

16. The extended Stay Period will also permit the Company to commence pre-mediation and if necessary, mediation negotiations with the assistance of a mediator, to address the Pension Surplus matters (which, as noted above, will be discussed in greater detail in a separate affidavit).

II. UPDATE ON THE APPLICANTS' ACTIVITIES

17. Since the granting of the Stay Extension Order on March 19, 2026, the Applicants, in consultation with, and with the assistance of the Monitor, the ERC, the Secured Lenders, and their respective advisors, as applicable, have addressed a variety of issues and have continued to diligently pursue various efforts within the CCAA Proceedings to maximize value for the benefit of the Applicants' stakeholders. A summary of these activities is set out below.

A. Liquidation Sale Update**a) FF&E Removal**

18. As noted above, on March 21, 2025, the Court granted the Liquidation Sale Approval Order which authorized the Applicants to commence the Liquidation Sale on March 24, 2025. The Liquidation Sale has since concluded, and the Stores were closed to the public by June 1, 2025. Since completion of the Liquidation Sale, the Company and Reflect, under the oversight of the Monitor, have been coordinating removal of the FF&E directly, and in consultation with the Landlords. As of the date of this affidavit, FF&E removal and demolition activities have been completed on all HBC Stores as well as those under the RioCan JV receivership proceedings.

b) Signage Removal

19. Removal of external signage at the Company's and RioCan JV's Stores was initially paused following a demand from the FILO Agent that the Company not incur any further costs associated with signage removal. Ultimately, on November 14, 2025, the FILO Agent confirmed that, provided the estimated signage removal costs remained below a threshold previously discussed, it would not take steps to have the signage issue addressed by the Court. Removal of all external signage has been completed by the Company, with aggregate costs incurred of approximately \$1.7 million, inclusive of applicable sales tax, which was below the threshold established by the FILO Agent.

20. Since receipt of the FILO Agent's position, the Company has been working with various contractors and landlords to coordinate the removal of signage while minimizing costs. As of the date of this affidavit, HBC has completed the removal of signage at all former store locations (or has funded the applicable landlord for such removal, as the case may be) except for one location which is being completed by the landlord pending the receipt of the appropriate city permits. No further costs are required to be incurred by the Company in respect of this location.

B. Art Collection Auction Update

21. Following the approval of the Art Auction Process Order, a live auction took place in Toronto at the Auctioneer's gallery on November 19, 2025, with all pieces of art in the live auction catalogue being sold for amounts in excess of the estimates set by the Auctioneer.

22. With respect to online auctions, individual items are made available for auction in batches. The first batch of items auctioned in this format went live for bidding on November 12, 2025. There have been a total of 6 subsequent online auctions, with the final two online auctions scheduled to close on June 18, 2026, and in early July 2026.

23. The Applicants have received aggregate Auction Proceeds of approximately \$9.3 million, net of the Auctioneer's commissions and inclusive of applicable sales taxes.

C. Update on Employee Matters

24. As at the date hereof, the Applicants employ six employees and have retained three consultants to assist the Company with the completion of final wind-down matters.

a) Hardship Programs²

25. On February 11, 2026, as discussed above, ERC sought and obtained an order approving the Term Sheet, providing for three programs designed to alleviate various forms of hardship by the Company's former employees.

26. Since that time the Company and the Trustees, with the assistance of ERC and the Monitor have been working to implement the Term Sheet, including seeking various payments from Manulife and Scotia Wealth as contemplated in the Term Sheet.

27. Pursuant to section B(2) of the Term Sheet, the Company received the Company Reserve Fund totalling approximately \$1,692,000 on March 10, 2026, and completed the purchase of the Woodward's Replacement Policy.

28. Pursuant to section A(5) of the Term Sheet, and paragraph 6 of the Hardship Programs Order, the Company received \$1,050,000 by way of reimbursement of the Post-Filing LTD Payments paid through February 15, 2026. The Company has also made arrangements with Manulife to facilitate the payment of monthly Interim LTD Payments while the necessary Tax Comfort contemplated in the Term Sheet is being obtained.

² Capitalized terms used in this section but otherwise not defined herein have their meanings ascribed to them in the Affidavit of Rita De Fazio sworn February 4, 2026, found within the Motion Record of the Employee Representative Counsel dated February 4, 2026 regarding the Hardship Program Term Sheet Motion.

29. The Company has initiated communications in respect of the Tax Comfort which the Company is required to obtain in order to facilitate the LTD Termination Payment (the final contemplated payment). Despite its efforts, the Company was unable to satisfy this term through alternative options and instead has proceeded by way of seeking a clearance certificate from the CRA. The 2025 tax return for the Trust has been filed, and a proforma of the 2026 tax return is complete subject to receipt of the clearance certificate. The application for a clearance certificate has been filed with the CRA.

30. The Term Sheet contemplated the possibility of a Hardship Fund being made available to eligible individuals, provided certain preliminary conditions were met. As the preliminary conditions are not yet finalized, the Hardship Fund has not yet been established and no applications in respect thereof have been received.

b) Pension Surplus

31. The Company established and sponsored a registered pension plan, the Hudson's Bay Company Pension Plan (the "**Pension Plan**"), which includes both defined benefits and defined contributions accrued under the Pension Plan itself as well as several predecessor pension plans, whether through prior mergers and/or the transfer of assets and liabilities to or from such predecessor plans.

32. The Pension Plan is registered with the Financial Services Regulatory Authority of Ontario ("**FSRA**"), pursuant to the *Pension Benefits Act* (Ontario). As noted in earlier affidavits, FSRA appointed an independent pension administrator, Telus Health (Canada) Ltd. (the "**Independent Pension Administrator**"), in respect of the Company's Pension Plan effective April 3, 2025.

33. On September 8, 2025, FSRA issued a notice of intended decision to wind-up the Pension Plan effective September 1, 2025. FSRA subsequently issued an Order to wind up the Pension Plan on October 20, 2025, pursuant to its authority under the *Financial Services Regulatory Authority of Ontario Act* to wind up a pension plan if all or substantially all of the members cease to be employed by the employer. The Independent Pension Administrator has issued communications directly to former employees providing updates on the wind-up process. The Company has been in consultation with the FILO Agent, Pathlight, the Monitor and the Independent Pension Administrator in respect of these matters.

34. In conjunction with this motion, the Applicants are bringing the Pension Plan Representative Counsel Order and Mediator Order motion (the “**Pension Rep Counsel and Mediation Motion**”). That motion seeks, among other things, the appointment of pension plan representative counsel for persons with entitlements to benefits under the Pension Plan, as well as a mediator, to participate in and facilitate respectively, a mediation process aimed at reaching a consensual resolution of the competing interests in respect of the Pension Plan and Pension Surplus on a cost-efficient and expedient basis. Further information concerning the Pension Rep Counsel and Mediation Motion can be found in the accompanying Affidavit of Thomas Obersteiner dated June 18, 2026.

c) Royal Trust³

35. A detailed summary of the HBC RCA’s can be found in the Initial Obersteiner Affidavit.

36. Royal Trust is the current trustee (in such capacity, the “**SERP Trustee**”) of four retirement compensation arrangement trusts pursuant to which certain current and former employees of the Company are beneficiaries (collectively, the “**HBC RCAs**”). The HBC RCAs represent assets potentially available for the payment of benefits under the HBC SERPS, established to provide eligible members with benefits that are in addition to benefit entitlements under the Company’s registered pension plan.

37. Following the commencement of these CCAA Proceedings, the Company notified the SERP Trustee that it was terminating the HBC SERPs, requiring the SERP Trustee to wind up the HBC RCAs and distribute the assets therein in accordance with the terms governing each HBC RCA.

38. On February 13, 2026, the SERP Trustee served a motion for a date to be determined seeking advice and directions with respect to twelve primary matters which it believes must be resolved to facilitate a wind-down of the HBC RCAs and make distributions therefrom (the “**SERP Trustee Motion**”). The SERP Trustee also seeks authorization to pay costs incurred to date and ongoing costs from the assets of the HBC RCAs. A date for the hearing of this matter has not yet been sought.

³ Capitalized terms used in this section but otherwise not defined herein have the meaning ascribed to them in the Affidavit of Susannah B. Roth sworn February 10, 2026, found within the Motion Record of the Royal Trust Corporation of Canada dated February 13, 2026, regarding the HBC RCAs.

39. Since the service of that motion, the Company has continued to work with the SERP Trustee, the Monitor and ERC to determine the timeline and process to proceed with the SERP Trustee Motion, additional related issues that may require the Court's assistance, and work to narrow issues for the Court to the greatest extent possible. The Company believes that there has been significant progress in narrowing the issues that require the Court's determination. The Company understands that the SERP Trustee and the ERC wish to have the issues outlined in the SERP Trustee Motion addressed within the Stay Period.

D. Make-Whole Payments

40. The Company has encouraged the Secured Lenders to discuss the make-whole.

E. Saks Global Chapter 11 Proceedings and Shared Services

41. On January 13 and 14, 2026, Saks Global Enterprises LLC ("**Saks Global**") and 112 affiliated companies filed voluntary petitions for relief under Chapter 11 before the United States Bankruptcy Court for the Southern District of Texas (the "**Saks Global Chapter 11 Proceedings**").

42. Saks Global and the Applicants historically shared certain services, and the Shared Services have been discussed and managed between the Applicants and Saks Global, in consultation with the Monitor, throughout these CCAA Proceedings. The Company and Saks Global were negotiating the terms of a final Shared Services Protocol at the time of the Chapter 11 Proceedings. While Company continues to have access to Shared Services, it has gradually reduced the scope of services it receives from Saks Global to align with its limited operations, and continues to review the scope of Shared Services to identify further reductions. Saks Global has agreed to continue providing Shared Services to the Applicants on the same basis and under the same arrangements as have been in place during the CCAA Proceedings through to December 2026. The Applicants have monitored, and will continue to monitor, the Saks Global Chapter 11 Proceedings.

F. Updates on Mr. Robert Turpin

43. Since January 4, 2026, the Monitor and the Company have received a significant volume of correspondence from Robert Rene Turpin ("**Mr. Turpin**"). Mr. Turpin is a self-represented litigant who claims to have a proprietary interest in land, the Charter and HBC art and artifacts, based on what he describes as a "10-generation lineage" establishing sovereign rights to those

items (the “**Proprietary Claims**”). In its Thirteenth Report and the supplement thereto, the Monitor described its interactions with Mr. Turpin to that date.

44. Mr. Turpin first contacted the Monitor in January 2026, after the Court-approved sale of the Charter had already closed on December 19, 2025. Since then, Mr. Turpin has directed correspondence at various times to the Monitor and its counsel, counsel to the Applicants, this Court’s staff (often addressed directly to the presiding judge), various governmental entities, and the entire CCAA service list. In this correspondence, Mr. Turpin has, among other things:

- a) made various unsubstantiated assertions regarding his Proprietary Claims;
- b) requested significant accommodations, including that all proceedings involving him be conducted entirely in writing; and
- c) purported to object to various actions in these CCAA Proceedings, including the sale of the Charter (once the sale had already been approved and closed) and the Hardship Programs Order.

45. On March 9, 2026, Mr. Turpin sent an email to the Applicants, the Monitor and the Court and purportedly blind copied the Service List attaching a “Notice of Motion” seeking “An Order confirming that all proceedings involving Robert Rene Turpin be conducted in plain text/writing to ensure equitable participation under the AODA and the Human Rights Code” (the “**Accommodation Motion**”). Mr. Turpin also indicated his intention to bring a motion (the “**Proprietary Claims Motion**”) seeking a declaration regarding the Proprietary Claims.

46. On April 13, 2026, the Court issued its endorsement on Mr. Turpin’s Accommodation Motion and Proprietary Claims Motion. The Court accepted Mr. Turpin’s statements regarding his diagnoses and need for accommodations but declined to grant a blanket direction that all proceedings be conducted entirely in writing, finding such a request “not reasonable” in the context of these complex CCAA Proceedings. However, in the interest of resolving Mr. Turpin’s Proprietary Claims, the Court directed that the Proprietary Claims Motion proceed entirely in writing and established a timetable for the exchange of materials.

47. On April 24, 2026, a case conference was convened at the request of the Applicants to address deficiencies in the motion materials Mr. Turpin delivered in purported compliance with the April 13, 2026, timetable. The Court found that Mr. Turpin had not served a compliant Motion Record, a proper index, or a sworn affidavit with documents attached as exhibits, as the Court

had directed. The Court provided Mr. Turpin with detailed written guidance on what was required and granted him an extension of time to comply. Mr. Turpin did not oppose the Applicants' request for the case conference, and there was no opposition to the Court granting him additional time.

48. Pursuant to the amended timetable established by the Court in a further endorsement on April 27, 2026, Mr. Turpin has now delivered his Motion Record and factum in support of the Proprietary Claims Motion. The Applicants have delivered their responding materials. The remaining steps in the timetable include the filing of any reply materials filed by Mr. Turpin, the Monitor's report and factum, and any sur-reply materials, following which the matter will be submitted to the Court for an in-writing determination.

G. RioCan JV Matters

49. In this last stay extension period, the Company worked with the Receiver of the RioCan JV in respect of the sale of certain real properties, including real properties municipally known as (a) 674 Granville Street, Vancouver, British Columbia (the "**Vancouver Real Property**"); (b) 3030 Howard Street, Windsor, Ontario (the "**Devonshire Real Property**"); and (c) 200 8th Avenue S.W., Calgary, Alberta (the "**Calgary Real Property**").

50. The Company is the nominal title holder without beneficial rights, beneficial ownership, or beneficial interest in and to each of the Vancouver Real Property, a portion of the Devonshire Real Property, and the Calgary Real Property. Snospmis Limited, an applicant in these CCAA proceedings, is the nominal title holder without beneficial rights, beneficial ownership, or beneficial interest in and to the other portion of the Devonshire Real Property. Pursuant to the relevant nominee agreements, the Company and Snospmis Limited act as nominal title holder for and on behalf of RioCan-HBC Limited Partnership ("**RC-HBC LP**"), and RioCan-HBC General Partner Inc., as general partner to RC-HBC LP. Under these nominee agreements, HBC and Snospmis Limited must convey registered title of the Vancouver Real Property, the Devonshire Real Property, and the Calgary Real Property, as applicable, to RC-HBC LP or its identified successors or assignees when so requested by RC-HBC LP.

51. The Receiver marketed the Vancouver Real Property, the Devonshire Real Property, and the Calgary Real Property beginning in late 2025. Also, during this period, the Receiver marketed the real property municipally known as 73, 85 and 87 Rideau Street, Ottawa, Ontario (the "**Ottawa Real Property**") (the Company is not, however, the nominee title holder to the Ottawa Real Property). The Receiver ultimately executed purchase agreements with respect to the Vancouver

Real Property, the Devonshire Real Property, the Calgary Real Property and the Ottawa Real Property in early 2026.

52. The transaction in respect of the Calgary Real Property involves assigning to the purchaser certain ancillary agreements to which the Company was a party, such as a retail lease and a ground lease. The retail lease and the ground lease intersect with a separate receivership involving the commercial building known as Stephen Avenue Place located at 700 2nd Street SW in Calgary, Alberta, in which MNP Ltd is the receiver. The assignment of the retail lease and ground lease to the purchaser in the RioCan JV receivership has therefore involved additional steps compared to the other RioCan JV sale transactions.

53. The Company and its advisors worked with the Receiver and its counsel as necessary in these sales processes given the Company's role as nominee and/or potential party to ancillary agreements which were the subject of the proposed transactions.

54. During the course of the last Stay Period, the following hearings were held and Orders granted:

- a) Hearing held on April 15, 2026, in the Stephen Avenue Place receivership proceedings, and Order granted by Justice Mah of the Court of King's Bench of Alberta approving the sale of property adjacent to the Calgary Real Property and sale/assignment of ancillary agreements relating thereto;
- b) Hearing held on May 4, 2026, in the RioCan JV Receivership Proceedings, and Order granted by Justice Kimmel approving sale of Ottawa Real Property;
- c) Hearing held on May 25, 2026, in the RioCan JV Receivership Proceedings and the CCAA Proceedings (such proceedings conducted jointly) and Order granted by Justice Kimmel approving sale of the Calgary Real Property, the Vancouver Real Property, and the Devonshire Real Property.

55. The transactions with respect to the Devonshire Real Property were completed on June 5, 2026. It is anticipated that the transactions with respect to the Calgary Real Property and the Vancouver Real Property will be completed in the upcoming weeks.

H. Other Activities

56. In addition to the activities of the Applicants described above, since the granting of the last order extending the Stay Period on March 19, 2026, the Applicants have, among other things:

- a) addressed matters that impacted the Applicants as a result of the Saks Global Chapter 11 Proceedings;
- b) engaged with Saks Global with respect to cost allocations for Shared Services and advanced data retention matters in connection with the wind-up of the CCAA Proceedings;
- c) engaged in extensive discussions with the Independent Pension Administrator, Secured Lenders, Monitor and proposed Rep Counsel with respect to the proposed process to address the Pension Surplus, as described in further detail in my affidavit sworn June 18, 2026;
- d) responded to and continued to work to address all creditor and stakeholder enquiries and matters regarding these CCAA Proceedings; and
- e) engaged in numerous communications with the Secured Lenders and their advisors in respect of the Company's cash flows, and the CCAA Proceedings generally.

III. RELIEF SOUGHT

A. Approval of the Second KERP and Second KERP Charge

57. On March 21, 2025, the Applicants sought and obtained approval of the ARIO, which, among other things, approved the First KERP and the First KERP Charge, in the amount of \$3,000,000, to secure payments to the Key Employees under the First KERP. The First KERP was implemented in accordance with its terms and all amounts secured by the First KERP Charge have been paid. The Applicants now seek approval of a Second KERP and a corresponding KERP Charge to secure such payments, in the amount of \$527,500. The First KERP charge can be reduced accordingly.

58. As described earlier in this affidavit, the Applicants currently employ key employees (the "**Key Employees**") whose continued services are essential to the completion of the remaining wind-down matters, including, in particular, the transition and downsizing of financial and

administrative functions, the SERPs, the Term Sheet and Hardship Program, and the Pension Surplus.

59. The retention of the remaining Key Employees during these CCAA Proceedings is of vital importance to the Applicants. The Applicants, together with the assistance of the Monitor, have developed the Second KERP, which the Applicants are advised by the Monitor is comparable to other recent key employee retention plans that have been approved in Canada, in order to facilitate and encourage the continued participation of the Key Employees in the completion of outstanding wind-down matters.

60. On June 15, 2026, the Board of Directors of the Company, exercising its good faith business judgement, determined to approve the proposed Second KERP.

61. Pursuant to the terms of the Second KERP, each Key Employee will receive their Second KERP payment upon the earlier of:

- a) the completion of such Key Employee's assigned workstreams in connection with the financial transition and wind-down matters, Pension Surplus proceedings, the SERP-related matters, and/or the Term Sheet and Hardship Program, as applicable to each Key Employee; or
- b) such Key Employee's applicable outside date under the Second KERP, which outside dates range from August 31, 2026, to December 31, 2027, depending on the Key Employee, or earlier in the event a Key Employee is terminated without cause prior to their applicable outside date.

62. Among other things, the Second KERP provides for:

- a) five (5) Key Employees and an aggregate of approximately \$527,500 in potential Second KERP payments; and
- b) the forfeiture of a Key Employee's entitlement to their Second KERP payment if, among other things, they resign or their employment is terminated with just cause prior to the applicable Second KERP payment date.

63. A copy of an overview of the Second KERP, including the maximum aggregate amount payable thereunder, the identity of participating Key Employees, the general roles of each Key

Employee, and the percentages of the maximum amount that each Key Employee can receive under the Second KERP relative to their salary, will be included as a Confidential Appendix to the Monitor's Report filed in connection with this motion.

64. The Second KERP has been designed to incentivize the remaining Key Employees to continue their employment with the Company in order to facilitate an orderly wind-down of remaining matters and financial transition, maximize recoveries for stakeholders, and assist with the Term Sheet and Hardship Program matters, the SERP matters and SERP Trustee Motion, and the resolution of the Pension Surplus.

65. The Key Employees have distinct and critical roles that are necessary for the Applicants to conclude the remaining wind-down matters. In particular, the Key Employees possess specialized institutional knowledge that is essential to the administration and implementation of the Term Sheet and potential Hardship Program, the SERP-related matters before the Court, and the resolution of the Pension Surplus proceedings. The loss of any Key Employee at this stage of the CCAA Proceedings would be significantly detrimental to the Applicants' ability to bring these matters to a timely and orderly conclusion, and would result in the replacement of such individuals through more costly alternatives with less institutional knowledge.

66. If the proposed Second KERP is not approved, I believe it is likely that certain Key Employees will pursue other employment opportunities. Finding alternative, qualified individuals would be challenging, disruptive, costly, and time-consuming for the Applicants, particularly given the Key Employees' history and specialized knowledge of the financial and accounting systems utilized by HBC, the Term Sheet, SERPs and Pension Surplus, as well as their significant institutional knowledge of the Applicants' businesses.

67. The maximum aggregate amount payable under the Second KERP and to be secured by the Second KERP Charge is \$527,500, which will replace the First KERP Charge totalling \$3,000,000. Similar to the First KERP Charge, it is anticipated that the Second KERP Charge will rank behind the Administration Charge but ahead of all other Charges and Encumbrances.

68. The Applicants are seeking a sealing order with respect to the Confidential Appendix setting forth the details of the Second KERP, as such appendix contains sensitive and personal compensation information, the public disclosure of which I believe may cause harm to the Key Employees and could lead to disruption of the Applicants' remaining wind-down efforts. A sealing order will accordingly be required with respect to the identities of the Key Employees and the

amounts of their respective Second KERP payments. A sealing order was sought and granted by Justice Osborne in respect of the First KERP on a similar basis.

69. The Monitor is supportive of the proposed Second KERP and the Second KERP Charge. The FILO Agent and Pathlight were advised of the proposed Second KERP. The FILO Agent has signed off. No opposition was raised by Pathlight.

B. Approval of the Stay Extension

70. The Applicants are seeking to extend the Stay Period from June 30, 2026, to and including October 31, 2026. The extension of the Stay Period is necessary and appropriate in the circumstances to allow the Applicants to, among other things:

- a) assist in the sale of the remaining Art Collection to be sold online as part of the Art Collection Auction and reconciliation and distribution of proceeds;
- b) complete implementation of the Term Sheet;
- c) if financial conditions are met, seek to commence the application process for the Employee Hardship Program, as approved pursuant to the Hardship Programs Order;
- d) address the SERP Trustee Motion for directions, together with related HBC SERP matters;
- e) pursue Pension Surplus matters in consultation with the Monitor, the FILO Agent, Pathlight, the Independent Pension Administrator and representative counsel (once appointed);
- f) address Mr. Turpin's claims as part of his Proprietary Claims Motion;
- g) attend to matters involving the RioCan JV Receivership Proceedings with respect to certain remaining locations, including the closing of transactions involving the Calgary Real Property and the Vancouver Real Property;
- h) address FILO's make whole claims and calculations;

- i) attend to various CCAA administrative matters, including document and data retention matters; and
- j) continue to advance the maximization of the value of the Applicants' estate for the benefit of their stakeholders and winding-up the Applicants.

71. As described above, the Applicants have acted and are continuing to act in good faith and with due diligence in these CCAA Proceedings. I understand that the Monitor will be filing an updated cash flow statement prepared by the Applicants and reviewed by the Monitor (the "**Ninth Cash Flow Forecast**") with its Sixteenth Report, and that the Ninth Cash Flow Forecast will demonstrate that the Applicants have sufficient liquidity to operate through the proposed extension to the Stay Period.

72. I do not believe that the proposed extension of the Stay Period will materially prejudice any of the Applicants' stakeholders. Further, I understand that the Monitor supports the proposed extension of the Stay Period and will be providing further details with respect to the appropriateness of the requested extension of the Stay Period in its Sixteenth Report.

73. For the reasons set out above, I believe that it is in the best interests of the Applicants and their stakeholders that this Court grant the relief requested in accordance with the terms of the Stay Extension and Second KERP Order.

74. I swear this affidavit in support of the Applicants' motion seeking approval of the Stay Extension and Second KERP Order and for no other or improper purpose.

<p>SWORN remotely via videoconference, by Thomas Obersteiner, stated as being located in the City of New York, in the State of New York, before me at the City of Toronto, in Province of Ontario, this 18th day of June, 2026, in accordance with O. Reg 431/20, Administering Oath or Declaration Remotely.</p> <p>Signed by: <i>Brittney Ketwaroo</i></p> <hr/> <p>Commissioner for Taking Affidavits, etc. Brittney Ketwaroo LSO #89781</p>	<p>Signed by: <i>Thomas Obersteiner</i></p> <hr/> <p>Thomas Obersteiner</p>
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**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**AFFIDAVIT OF THOMAS OBERSTEINER
(Sworn June 18, 2026)**

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Lawyers for the Applicants

TAB 4

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE)
)
MADAM JUSTICE KIMMEL) FRIDAY, THE 26TH DAY
) OF JUNE, 2026

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
1242939 B.C. UNLIMITED LIABILITY COMPANY, 1241423 B.C. LTD., 1330096 B.C.
LTD., 1330094 B.C. LTD., 1330092 B.C. UNLIMITED LIABILITY COMPANY, 1329608
B.C. UNLIMITED LIABILITY COMPANY, 2745263 ONTARIO INC., 2745270 ONTARIO
INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC.**

PENSION PLAN REPRESENTATIVE COUNSEL ORDER

THIS MOTION, made by 1242939 B.C. Unlimited Liability Company (the "**Company**"), 1242939 B.C. Unlimited Liability Company, 1241423 B.C. Ltd., 1330096 B.C. Ltd., 1330094 B.C. Ltd., 1330092 B.C. Unlimited Liability Company, 1329608 B.C. Unlimited Liability Company, 2745263 Ontario Inc., 2745270 Ontario Inc., Snospmis Limited, 2472596 Ontario Inc. and 2472598 Ontario Inc. (collectively, the "**Applicants**"), was heard on June 26, 2026 at 330 University Avenue, Toronto, Ontario and via videoconference.

ON READING the affidavit of Thomas Obersteiner sworn June 18, 2026 (the "**Obersteiner Affidavit**") in connection with the appointment of Pension Plan Representative Counsel (as defined below) and a mediator, the Sixteenth report of the Monitor, dated June [●], 2026, (the "**Sixteenth Report**"), and on hearing the submissions of counsel to the Applicants, counsel to the Monitor, counsel to the plaintiffs in *Scott and Sutherland. v. Telus Health Canada Inc. and RBC Investor Services Trust*, Court File No. CV-25-00745191-00CP (the "**Dumai Uncertified Class Action Application**"), and such other parties as listed on the Counsel Slip, with no one else appearing although duly served as appears from the affidavit of service of Brittney Ketwaroo sworn June [●], 2026.

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Motion Record of the Applicants is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

DEFINED TERMS

2. **THIS COURT ORDERS** that capitalized terms used within this Order and not expressly defined herein shall have the meanings set forth in the Obersteiner Affidavit.

PENSION PLAN REPRESENTATIVE COUNSEL

3. **THIS COURT ORDERS** that the following parties (collectively, the “**Pension Plan Representative Counsel**”) are hereby appointed as representative counsel to represent the interests of each person included in the Hudson’s Bay Company Pension Plan (the “**Pension Plan**”) wind-up effective September 1, 2025, pursuant to the wind-up order issued by FSRA on October 20, 2025, and the reasons set out in the Notice of Intended Decision issued by FSRA on September 8, 2025, including (a) Pension Plan members whose employment was terminated between March 7, 2025 and August 31, 2025; (b) any person claiming (or who may hereafter claim or purport to claim) an interest under or on behalf of such person; and (c) any individual who had been a member of the Pension Plan or predecessor plans, claiming an entitlement to the Pension Surplus (collectively, the “**Represented Pension Plan Members**”), in: (x) these CCAA Proceedings, solely with respect to potential entitlements of the Represented Pension Plan Members to surplus funds after all Pension Plan wind-up liabilities (including related expenses) have been paid or settled (the “**Pension Surplus**”); (y) the Dumai Uncertified Class Action Application; or (z) any proceeding under the *Bankruptcy and Insolvency Act* or under any other act or in any other proceeding, including with respect to the insolvency of the Applicants, or in any other application or complaint to any regulatory authority which concerns Pension Surplus matters (collectively, the “**Pension Surplus Proceedings**”). For any Represented Pension Plan Members falling within subcategory (c) above who seek to claim an entitlement to the Pension Surplus, the Pension Plan Representative Counsel shall work collaboratively with the Independent Pension

Administrator to address any preliminary or threshold issues prior to pursuing such claims. If such issues cannot be resolved, an application can be made to the Court for a determination.

Represented Pension Plan Members	Pension Plan Representative Counsel
Persons with defined benefit entitlements under the Pension Plan which arose from accruals under the defined benefit provisions of the Dumai Plan prior to January 1, 2002, solely with respect to such entitlements (in their capacity as such, the “Dumai Group”). ¹	Koskie Minsky LLP (“Koskie Minsky”)
Persons with entitlements under either or both of the defined benefit provision and defined contribution provision under the Pension Plan (other than the Dumai Group)	Ursel Phillips Fellows Hopkinson LLP (“Ursel Phillips”)

4. **THIS COURT ORDERS** that the Pension Plan Representative Counsel are hereby appointed as representative counsel with the exclusive authority to represent the applicable Represented Pension Plan Members, with respect to:

- a) representing their respective Represented Pension Plan Members in the Pension Surplus Proceedings regarding claims or matters relating to the Pension Surplus;
- b) communicating with the Applicants, the Monitor, the Independent Pension Administrator, FSRA, other Pension Plan Representative Counsel or other stakeholders in respect of future motions and orders to be sought in the Pension Surplus Proceedings;

¹ The definition of “Dumai Group” remains subject to further review and consideration by the parties.

- c) identifying any sub-group(s) of the Represented Plan Members that Pension Plan Representative Counsel may deem appropriate or necessary having regard to the interests of any such sub-group;
- d) participating on behalf of their respective Represented Pension Plan Members, including any subgroup of the Represented Pension Plan Members, with the negotiation, mediation, settlement or compromise of any of their rights, entitlements or claims to the Pension Surplus and taking any necessary related steps in connection therewith;
- e) entering into a settlement agreement on behalf of the Represented Pension Plan Members including any sub-group of the Represented Pension Plan Members regarding the settlement or compromise of any of their rights, entitlements or claims to Pension Surplus, and taking any other steps required to give effect to such settlement agreement; and
- f) advising Represented Pension Plan Members in relation to the Pension Surplus Proceedings and in respect of any rights in relation to the Pension Surplus

(collectively, the “**Pension Plan Purpose**”).

For greater certainty, the Pension Plan Purpose shall not include: (a) assisting with any matters which were the subject matter of the Employee Representative Counsel Order granted May 5, 2025; (b) the ability to reduce or compromise any person’s accrued pension benefit entitlements under the Pension Plan other than in respect of the Pension Surplus; or (c) matters regarding the Pension Plan and benefits thereunder that do not relate to the Pension Surplus (which matters will continue to be handled by the Independent Pension Administrator).

5. **THIS COURT ORDERS** that both Koskie Minsky LLP and Ursel Phillips Fellows Hopkinson LLP shall be entitled, but not required, to commence the process of identifying 3 and 7 Represented Pension Plan Members respectively, to be appointed as Court-appointed representatives for their respective Represented Pension Plan Members (each such committee of representatives hereinafter, both jointly and severally referred to as a “**Pension**

Plan Members Committee”). Each Pension Plan Members Committee shall, upon appointment: (a) advise its respective Pension Plan Representative Counsel on behalf of all their respective Represented Pension Plan Members (excluding the Opt-Out Individuals (as hereinafter defined)), if any, in the Pension Surplus Proceedings; (b) act in the overall best interests of such Represented Pension Plan Members; and (c) advise, and where appropriate, instruct the respective Pension Plan Representative Counsel; in each case, solely for the Pension Plan Purpose. Each Pension Plan Representative Counsel may rely upon the advice, information and instructions received from its respective Pension Plan Members Committee in carrying out its mandate without further communications with or instructions from its respective Represented Pension Plan Members, except as may be ordered by this Court.

6. **THIS COURT ORDERS** that, with the exception of the Opt-Out Individuals: (a) each Pension Plan Representative Counsel shall represent all of its respective Represented Pension Plan Members with respect to the Pension Surplus and Pension Plan Purpose in accordance with paragraph 4; (b) the respective Represented Pension Plan Members shall be bound by the actions of their respective Pension Plan Representative Counsel in relation to the Pension Surplus and Pension Plan Purpose; and (c) Each Pension Plan Representative Counsel shall be entitled, on the advice of its respective Pension Plan Members Committee, to advocate on behalf of its respective Represented Pension Plan Members for the Pension Plan Purpose and to settle or compromise any rights, entitlements or claims of such Represented Pension Plan Members as they relate to the Pension Surplus, including entering into any settlement agreement, and shall have such other powers as outlined in paragraph 4 herein.

7. **THIS COURT ORDERS** that the Applicants and the Independent Pension Administrator, as applicable, shall provide Pension Plan Representative Counsel, the Applicants, each Pension Plan Members Committee and their respective advisors, subject to confidentiality arrangements acceptable to the Applicants, the Monitor, and the Independent Pension Administrator without charge to such parties, the following information, documents, calculations, and data (the “**Information**”) to be used solely for the Pension Plan Purpose in the Pension Surplus Proceedings:

- (a) the names, last known addresses and last known telephone numbers and e-mail addresses (if any) of the Represented Pension Plan Members for whom

such Pension Plan Representative Counsel has been appointed (excluding Opt-Out Individuals, if any, who have opted out prior to delivery of the Information); and

- (b) upon request of Pension Plan Representative Counsel or Applicants, as applicable, such non-privileged documents, calculations, and data as may be reasonably relevant to matters relating to the issues affecting the Represented Pension Plan Members in the Pension Surplus Proceedings;

and that in providing all such Information, the Applicants and/or its agents and the Independent Pension Administrator are not required to obtain express consent from such Represented Pension Plan Members authorizing disclosure of the Information for the Pension Plan Purpose in the Pension Surplus Proceedings and, further, in accordance with the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5. (Federal), the *Personal Information Protection Act*, S.B.C. 2003, c. 63 (British Columbia), the *Personal Information Protection Act*, S.A. 2003, c. P-6.5. (Alberta) and *An Act respecting the protection of personal information in the private sector*, R.S.Q., c. P-39.1. (Québec), this Order shall be sufficient to authorize the disclosure of the Information for the Pension Plan Purpose, without the knowledge or consent of the individual Represented Pension Plan Members, including such information as an individual Represented Pension Plan Member would be entitled to seek under the *Pension Benefits Act* R.S.O. 1990, c. P.8.

8. **THIS COURT ORDERS** that notice of the appointment of Pension Plan Representative Counsel shall be provided by: (a) the Independent Pension Administrator delivering a letter on behalf of the respective Pension Plan Representative Counsel (including the opt out procedure and the Opt-Out Notice pursuant to paragraph 9 below) to their respective Represented Pension Plan Members explaining the terms of such appointment to the extent the Represented Pension Plan Member's contact information already exists in the Applicants' or Independent Pension Administrator's books and records, or is valid,; and (b) the posting of notice of such appointment on the Monitor's website and on the respective Pension Plan Representative Counsel's website. Such notice shall be sufficient for providing notice to Represented Pension Plan Members.

9. **THIS COURT ORDERS** that any individual Represented Pension Plan Member who does not wish to be represented in the Pension Surplus Proceedings by their respective Pension Plan Representative Counsel in relation to the Pension Surplus shall, within thirty 30 days of the date of the letter pursuant to paragraph 8 above, notify the Monitor, in writing that such Represented Pension Plan Member is opting out of representation by the respective Pension Plan Representative Counsel by delivering to the Monitor an opt-out notice in the form attached as Schedule “A” hereto (each an “**Opt-Out Notice**”), and shall thereafter not be bound by the actions of such Pension Plan Representative Counsel and shall represent themselves or be represented by any counsel that such Represented Pension Plan Member may retain exclusively at their own expense in these CCAA Proceedings (any such Represented Pension Plan Member who delivers an Opt-Out Notice in compliance with the terms hereof, an “**Opt-Out Individual**”). The Monitor shall deliver copies of all Opt-Out Notices received to counsel to the Applicants, the applicable Pension Plan Representative Counsel and counsel to the Independent Pension Administrator as soon as reasonably practicable.

10. **THIS COURT ORDERS** that each Pension Plan Representative Counsel shall be given notice of all motions in the Pension Surplus Proceedings and that it shall be entitled to represent the Represented Pension Plan Members on whose behalf it is hereby appointed in all such proceedings to the extent related to the Pension Surplus.

FEE STRUCTURE

11. **THIS COURT ORDERS** that Ursel Phillips shall be paid its reasonable and documented fees and disbursements, including reasonable and documented fees for such actuarial, financial and other advisors as Ursel Phillips may retain as reasonably necessary in connection with its role as Pension Plan Representative Counsel in relation to the Pension Plan Purpose, in accordance with the terms of the engagement letter between the Independent Pension Administrator and Ursel Phillips and fee arrangements thereunder as agreed to by the Company, the Monitor, the Independent Pension Administrator, and Ursel Phillips or as have been ordered by this Court.

12. **THIS COURT ORDERS** that Koskie Minsky shall be paid its fees and disbursements, including costs for such actuarial, financial and other advisors as Koskie Minsky may retain

as necessary in connection with its role as Pension Plan Representative Counsel in relation to the Pension Plan Purpose, from any judgment, order or settlement pursuant to the terms of the retainer agreement between Koskie Minsky LLP and John Scott and James Common dated June 6, 2025 under the Dumai Uncertified Class Action Application. The retainer agreement and the fees requested thereunder shall be brought before the Court by class counsel (Koskie Minsky LLP) for approval in accordance with sections 32 and 33 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

13. **THIS COURT ORDERS** that the Independent Pension Administrator is authorized to make interim payments to Ursel Phillips from the Pension Plan fund, pursuant to the terms of its retainer letter, for the purposes of paying reasonable and documented fees and disbursements as contemplated in paragraph 11 herein. In the event of any disagreement with respect to such fees and disbursements, such disagreement may be remitted to this Court for determination.

PENSION SURPLUS DOCUMENTS AND CONFIDENTIALITY

14. **THIS COURT ORDERS** that:

- a) the Pension Surplus Negotiations, including all communications among the Surplus Mediation Parties and all communications with the Court-Appointed Mediator, shall be conducted on a confidential and without prejudice basis;
- b) all documents created for or disclosed for the purpose of the Pension Surplus Negotiations, and all statements, discussions, submissions and offers made in the course of the Pension Surplus Negotiations by the Surplus Mediation Parties, their respective legal counsel or professional advisors, whether in direct negotiations or through the assistance of the Court-Appointed Mediator, shall be privileged and confidential;
- c) no document, statement, discussion, submission or offer described in paragraph 14 b) shall be disclosed to any third party, referred to in Court or used in any proceeding, including for the purpose of impeaching credibility or

establishing the meaning, validity, existence or terms of any settlement or alleged settlement arising from the Pension Surplus Negotiations;

- d) nothing in this paragraph 14 shall prevent a Surplus Mediation Party from producing, disclosing or relying on its own documents or information that existed prior to, or were created independently of, the Pension Surplus Negotiations and that would otherwise be producible, discoverable or admissible by that Surplus Mediation Party in any legal proceeding, provided that the Party does not disclose the fact that such document or information was disclosed, referenced or relied upon in the course of the Pension Surplus Negotiations; and
- e) for greater clarity, except on agreement of the Surplus Mediation Parties, this confidentiality obligation does not extend to any Pension Surplus sharing agreement entered into by the Surplus Mediation Parties. Further, and notwithstanding any such agreement by the Surplus Mediation Parties, the confidentiality obligations set out in this paragraph 14 shall not extend to the use of, reference to or litigation based upon a Pension Surplus sharing agreement reached for the purposes of enforcement of the agreement in the event of breach or alleged breach of the agreement.

15. **THIS COURT ORDERS** that the Surplus Mediation Parties shall be provided an opportunity to pursue negotiations prior to the assistance of a Mediator, for a period of 60 days from the date hereof (the “**Initial Period**”), with a further potential extension of an additional 45 days if approved by the Monitor, subject to further extension if agreed to by all Surplus Mediation Parties and consented to by the Monitor (the “**Extension Period**”), and the process during the Initial Period and the Extension Period being “the Pre-Mediation Negotiations”. If no settlement is entered into among the Surplus Mediation Parties by the later of the end of the Initial Period or, if applicable, the end of the Extension Period, the Monitor shall advise the Mediator that the Pre-Mediation Negotiations are completed, and thereafter the Mediator shall assist with the negotiations, as contemplated in the order appointing a Court-appointed mediator granted on June [26], 2026.

GENERAL

16. **THIS COURT ORDERS** that any notices required to be delivered hereunder to Pension Plan Members may be delivered by way of email or, where email is not available, by prepaid ordinary mail, courier, or personal delivery and in delivering any notice required hereunder to the Pension Plan Members, the Independent Pension Administrator and Pension Plan Representative Counsel shall be entitled to rely on the information set out in the books and records of the Applicants and to deliver such notice to Pension Plan Members at their respective addresses last shown on the records of the Applicants.

17. **THIS COURT ORDERS** that no action or proceeding may be commenced against any Pension Plan Representative Counsel, any Pension Plan Members Committee or the Independent Pension Administrator in respect of the performance of their duties under this Order without leave of this court on seven (7) days notice to the respective Pension Plan Representative Counsel, each Pension Plan Members Committee, the Applicants and the Monitor.

18. **THIS COURT ORDERS** that the Independent Pension Administrator shall incur no liability as a result of the performance of their duties under this Order, save and except for gross negligence and wilful misconduct on its part.

19. **THIS COURT ORDERS** that Pension Plan Representative Counsel is authorized to take all steps and do all acts necessary or desirable to carry out the terms of this Order, including dealing with any Court, regulatory body or other government ministry, department or agency, and to take all such steps as are necessary or incidental thereto. Pension Plan Representative Counsel, its agents, and the Pension Plan Members Committees shall have no liability as a result of the fulfilment of their duties in carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on their part.

20. **THIS COURT ORDERS** that the Pension Plan Representative Counsel, the Pension Plan Members Committees, the Applicants, the Independent Pension Administrator, or the Monitor shall be at liberty and are authorized at any time to apply to this Honourable Court for advice and directions in the discharge or variation of their powers and duties.

21. **THIS COURT ORDERS** the Dumai Uncertified Class Action Application is adjourned and no further steps shall be taken in the Dumai Uncertified Class Action Application pending further order of this Court.

22. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories.

SCHEDULE "A"

FORM OF REPRESENTED PENSION PLAN MEMBER OPT-OUT NOTICE

DUMAI DEFINED BENEFIT PENSION PLAN

TO: Alvarez & Marsal Canada Inc., in its capacity as Court-Appointed Monitor of the Applicants
Royal Bank Plaza, South Tower
200 Bay Street, Suite 2900
PO Box 22
Toronto, ON M5J 2J1

Attention: Alvarez & Marsal Canada Inc.
Email: HudsonsBay@alvarezandmarsal.com

I understand that by opting out of this representation, if I wish to assert entitlement to the Pension Surplus, then I would need to do so as an independent party. I understand that as an independent party, I would then be responsible for retaining my own legal counsel should I choose to do so, and that I would be personally liable for the costs of my own legal representation. I understand that by opting out of this representation, I and any legal counsel that I retain may not be permitted to participate in any settlement negotiations, mediations or similar negotiations or proceedings.

I understand that a copy of this Opt-Out Form will be provided to the Pension Plan Representative Counsel, to the Applicants, and the Independent Pension Administrator.

Witness	Signature
Name [please print] : _____	
Address _____	
Telephone _____	

Note: To opt out, this form must be completed and received at the above address on or before _____, 2026.

FORM OF REPRESENTED PENSION PLAN MEMBER OPT-OUT NOTICE

HBC PENSION PLAN – DEFINED BENEFIT AND DEFINED CONTRIBUTION (OTHER THAN DUMAI DEFINED BENEFIT PENSION PLAN)

TO: Alvarez & Marsal Canada Inc., in its capacity as Court-Appointed Monitor of the Applicants
Royal Bank Plaza, South Tower
200 Bay Street, Suite 2900
PO Box 22
Toronto, ON M5J 2J1

Attention: Alvarez & Marsal Canada Inc.
Email: HudsonsBay@alvarezandmarsal.com

I understand that by opting out of this representation, if I wish to assert entitlement to the Pension Surplus, then I would need to do so as an independent party. I understand that as an independent party, I would then be responsible for retaining my own legal counsel should I choose to do so, and that I would be personally liable for the costs of my own legal representation. I understand that by opting out of this representation, I and any legal counsel that I retain may not be permitted to participate in any settlement negotiations, mediations or similar negotiations or proceedings.

I understand that a copy of this Opt-Out Form will be provided to the Pension Plan Representative Counsel, to the Applicants, and the Independent Pension Administrator.

<hr/> Witness	<hr/> Signature
Name [please print]:	_____
Address	_____
Telephone	_____

Note: To opt out, this form must be completed and received at the above address on or before _____, 2026.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

PENSION PLAN REPRESENTATIVE COUNSEL ORDER

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Brittney Ketwaroo LSO#: 89781K
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Lawyers for the Applicants

TAB 5

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE MADAM)
)
JUSTICE KIMMEL) FRIDAY, THE 26TH
 DAY OF JUNE, 2026

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
1242939 B.C. UNLIMITED LIABILITY COMPANY, 1241423 B.C. LTD., 1330096 B.C. LTD.,
1330094 B.C. LTD., 1330092 B.C. UNLIMITED LIABILITY COMPANY, 1329608 B.C.
UNLIMITED LIABILITY COMPANY, 2745263 ONTARIO INC., 2745270 ONTARIO INC.,
SNOSPMIS LIMITED, 2472596 ONTARIO INC., AND 2472598 ONTARIO INC.**

**ORDER
(Appointing Court-Appointed Mediator)**

THIS MOTION, made by 1242939 B.C. Unlimited Liability Company (f/k/a Hudson's Bay Company ULC Compagnie De La Baie D'Hudson SRI), 1241423 B.C. Ltd., 1330096 B.C. Ltd., 1330094 B.C. Ltd., 1330092 B.C. Unlimited Liability Company, 1329608 B.C. Unlimited Liability Company, 2745263 Ontario Inc., 2745270 Ontario Inc., Snospmis Limited, 2472596 Ontario Inc., and 2472598 Ontario Inc. (collectively, the "**Applicants**") pursuant to the *Companies' Creditors Arrangement Act* was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Thomas Obersteiner sworn June 18, 2026 (the "**Obersteiner Affidavit**") in connection with the appointment of Pension Plan Representative Counsel and a mediator, and the exhibits attached thereto, the **[Sixteenth]** report of the Monitor, dated June **[●]**, 2026, (the "**[Sixteenth] Report**"), and on hearing the submissions of counsel to the Applicants, counsel to the Monitor, counsel to the plaintiffs in *Scott and Sutherland. v. Telus Health Canada Inc. and RBC Investor Services Trust*, Court File No. CV-25-00745191-00CP (the "**Dumai Uncertified Class Action Application**"), and such other parties as listed on the Counsel Slip, with no one else appearing although duly served as appears from the affidavit of service of Brittney Ketwaroo sworn June **[●]**, 2026.

DEFINED TERMS

1. **THIS COURT ORDERS** that capitalized terms used within this Order and not expressly defined herein shall have the meanings set forth in the Obersteiner Affidavit.

2. **THIS COURT ORDERS** that the Surplus Mediation Parties (being the Company, the Monitor, the Independent Pension Administrator, Pension Plan Representative Counsel, the FILO Agent and Pathlight) shall be provided an opportunity to pursue negotiations prior to the assistance of a Mediator, for a period of 60 days from the date hereof, with a further potential extension of an additional 45 days if approved by the Monitor, subject to further extension if agreed to by all Surplus Mediation Parties the entire time period described here being “the Pre-mediation Time Period” and the process being “the Pre-Mediation Negotiations”. If no settlement is entered into among the Surplus Mediation Parties by the latest date agreed to in the Pre-Mediation Time Period, the Monitor shall advise the Mediator that the Pre-Mediation Negotiations are completed, and thereafter the Mediator shall commence its role as contemplated herein. For the Pre-Mediation Time Period, the Mediator may commence his preparation for the potential mediation.

COURT-APPOINTED MEDIATOR

3. **THIS COURT ORDERS** that the Honourable Geoffrey Morawetz of Morawetz Chambers Inc. is hereby appointed, as an officer of the Court and shall act as a neutral third-party mediator (the “**Court-Appointed Mediator**”) to assist the Surplus Mediation Parties with mediating the Pension Surplus Negotiations (as each such term is defined in the Pension Plan Representative Counsel Order), including entering into a Pension Surplus sharing agreement.

4. **THIS COURT ORDERS** that in carrying out his mandate, the Court-Appointed Mediator may, among other things:
 - a. Adopt processes, procedures and timelines which, in his discretion, he considers appropriate to facilitate the Pension Surplus Negotiations, including entering into a Pension Surplus sharing agreement;

 - b. Consult with the Surplus Mediation Parties and any other persons the Court-Appointed Mediator considers appropriate;

- c. Apply to this Court for advice and directions as, in his discretion, the Court-Appointed Mediator deems necessary.

5. **THIS COURT ORDERS** that the Monitor and its counsel, and the Applicants and their counsel shall provide the Court-Appointed Mediator with such assistance as the Court-Appointed Mediator reasonably requests.

6. **THIS COURT ORDERS** that the reasonable and documented fees and disbursements of the Court-Appointed Mediator (as reviewed by the Independent Pension Administrator) in relation to the Pension Surplus Negotiations, shall be paid in accordance with the terms of the engagement letter (the "**Engagement Letter**") between the Company, the Independent Pension Administrator and the Court-Appointed Mediator.

7. **THIS COURT ORDERS** that the Independent Pension Administrator is authorized to make interim payments to the Court-Appointed Mediator from the Pension Plan funds for the purposes of paying the reasonable and documented fees and disbursements as contemplated in paragraph 6 herein in accordance with the terms of the Engagement Letter.

8. **THIS COURT ORDERS** that the Court-Appointed Mediator is authorized to take all steps and to do all acts necessary or desirable to carry out the terms of this Order, including dealing with any Court, regulatory body or other government ministry, department or agency, and to take all such steps as are necessary or incidental thereto.

9. **THIS COURT ORDERS** that, in addition to the rights and protections afforded as an officer of this Court, the Court-Appointed Mediator shall incur no liability or obligation as a result of his appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on his part. Nothing in this Order shall derogate from the protections afforded a person pursuant to Section 142 of the *Courts of Justice Act* (Ontario).

10. **THIS COURT ORDERS** that:

- a. the Pension Surplus Negotiations, including all communications among the Surplus Mediation Parties and all communications with the Court-Appointed Mediator, shall be conducted on a confidential and without prejudice basis;
- b. all documents created for or disclosed for the purpose of the Pension Surplus Negotiations, and all statements, discussions, submissions and offers made in

the course of the Pension Surplus Negotiations by the Surplus Mediation Parties, their respective legal counsel or professional advisors, whether in direct negotiations or through the assistance of the Court-Appointed Mediator, shall be privileged and confidential;

- c. no document, statement, discussion, submission or offer described in paragraph 10(b) shall be disclosed to any third party, referred to in Court or used in any proceeding, including for the purpose of impeaching credibility or establishing the meaning, validity, existence or terms of any settlement or alleged settlement arising from the Pension Surplus Negotiations;
- d. nothing in this paragraph 10 shall prevent a Surplus Mediation Party from producing, disclosing or relying on its own documents or information that existed prior to, or were created independently of, the Pension Surplus Negotiations and that would otherwise be producible, discoverable or admissible by that Surplus Mediation Party in any legal proceeding, provided that the Party does not disclose the fact that such document or information was disclosed, referenced or relied upon in the course of the Pension Surplus Negotiations; and
- e. for greater clarity, except on agreement of the Surplus Mediation Parties, this confidentiality obligation does not extend to any Pension Surplus sharing agreement entered into by the Surplus Mediation Parties. Further, and notwithstanding any such agreement by the Surplus Mediation Parties, the confidentiality obligations set out in this paragraph 10 shall not extend to the use of, reference to or litigation based upon a Pension Surplus sharing agreement reached for the purposes of enforcement of the agreement in the event of breach or alleged breach of the agreement.

11. **THIS COURT ORDERS** that any notes, records, statements made, discussions had and recollections of the Court- Appointed Mediator in the course of the Pension Surplus Negotiations shall be confidential and without prejudice and protected from disclosure for all purposes in accordance with paragraph 10 above.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

ORDER

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Lawyers for the Applicants

TAB 6

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE MADAM
JUSTICE KIMMEL

)
)
)

FRIDAY, THE 26TH
DAY OF JUNE, 2026

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
1242939 B.C. UNLIMITED LIABILITY COMPANY, 1241423 B.C. LTD., 1330096 B.C. LTD.,
1330094 B.C. LTD., 1330092 B.C. UNLIMITED LIABILITY COMPANY, 1329608 B.C.
UNLIMITED LIABILITY COMPANY, 2745263 ONTARIO INC., 2745270 ONTARIO INC.,
SNOSPMIS LIMITED, 2472596 ONTARIO INC., AND 2472598 ONTARIO INC.**

**ORDER
(Stay Extension and Second KERP Order)**

THIS MOTION, made by the 1242939 B.C. Unlimited Liability Company (f/k/a Hudson's Bay Company ULC Compagnie De La Baie D'Hudson SRI), 1241423 B.C. Ltd., 1330096 B.C. Ltd., 1330094 B.C. Ltd., 1330092 B.C. Unlimited Liability Company, 1329608 B.C. Unlimited Liability Company, 2745263 Ontario Inc., 2745270 Ontario Inc., Snospmis Limited, 2472596 Ontario Inc., and 2472598 Ontario Inc. (collectively, the "**Applicants**") pursuant to the *Companies' Creditors Arrangement Act* for an order, among other things, (a) extending the Stay Period until and including October 31, 2026; (b) approving the Second KERP (as defined below) and the Second KERP Charge (as defined below); and (c) sealing the unredacted Second KERP pending further order of this Court, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Thomas Obersteiner sworn June 18, 2026 (the "**Obersteiner Affidavit**") in connection with approval of a Stay extension and Second KERP Charge, and the exhibits attached thereto, the **[Sixteenth]** report of the Monitor, dated June **[●]**, 2026, (the "**[Sixteenth] Report**"), and on hearing the submissions of counsel to the Applicants, counsel to the Monitor, and such other parties as listed on the Counsel Slip, with no one else appearing although duly served as appears from the affidavit of service of Brittney Ketwaroo sworn June **[●]**, 2026.

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that capitalized terms used in this Order and not otherwise defined herein shall have the meanings given to them in the Obersteiner Affidavit or the Amended and Restated Initial Order of this Court dated March 21, 2025 (the “**ARIO**”).

EXTENSION OF THE STAY PERIOD

3. **THIS COURT ORDERS** that the Stay Period is hereby extended until October 31, 2026, or such later date as this Court may order.

SECOND KEY EMPLOYEE RETENTION PLAN

4. **THIS COURT ORDERS** that the Second Key Employee Retention Plan (the “**Second KERP**”), as described in the Obersteiner Affidavit, an unredacted copy of which is attached as Confidential Appendix [●] to the [Sixteenth] Report, is hereby approved and the Applicants are authorized to make the payments contemplated thereunder in accordance with the terms and conditions of the Second KERP.
5. **THIS COURT ORDERS** that payments made by the Applicants pursuant to this Order do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.
6. **THIS COURT ORDERS** that the key employees referred to in the Second KERP (the “**Key Employees**”) shall be entitled to the benefit of and are hereby granted a charge on the Property of the Applicants (the “**Second KERP Charge**”), which charge shall not exceed the maximum amount of \$527,500, to secure any payments to the Key Employees under the Second KERP. The Second KERP Charge shall have the priority set out in paragraph 7 herein.
7. **THIS COURT ORDERS** that the First KERP having been satisfied, the First KERP Charge is terminated and shall have no further force or effect. The First KERP is replaced with the Second KERP, such that paragraph 49 of the ARIO shall be, and is hereby, amended to reference the Second KERP in accordance with the terms set out herein:

49. THIS COURT ORDERS that the priorities of the Administration Charge, the Second KERP Charge, the Directors' Charge, the DIP Charge, and the JV Rent Charge (collectively, the "**Charges**"), as among them, shall be as follows:

With respect to all Property other than the Loan Parties':

First - Administration Charge (to the maximum amount of \$2,800,000);

Second – Second KERP Charge (to the maximum amount of \$527,500);

Third – Directors' Charge (to the maximum amount of \$13,500,000);

Fourth – DIP Charge;

Fifth – JV Rent Charge; and

Sixth – Directors' Charge (to the maximum amount of \$35,700,000).

SEALING

8. **THIS COURT ORDERS** that Confidential Appendix [●] to the [Sixteenth] Report shall be and is hereby sealed, kept confidential, and shall not form part of the public record, pending further order of this Court.

GENERAL

9. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court to amend, vary or supplement this Order or for advice and directions in the discharge of their powers and duties hereunder.

10. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

11. **THIS COURT REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order, to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order,

to grant representative status to the Monitor in any foreign proceeding or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

12. **THIS COURT ORDERS** that this Order and all its provisions are effective as of 12:01 a.m. Prevailing Eastern Time on the date hereof.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**ORDER
(Returnable June 26, 2026)**

STIKEMAN ELLIOTT LLP
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Lawyers for the Applicants

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**MOTION RECORD
(Returnable June 26, 2026)**

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