Dalhousie Law Journal

Volume 34 | Issue 1 Article 4

4-1-2011

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Recommended Citation
Elizabeth Shilton, "Employee Pension Rights and the False Promise of Trust Law" (2011) 34:1 Dal LJ 81.

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Employee Pension Rights and the False Promise of Trust Law

This article explores the jurisprudence of the Supreme Court of Canada on employment pension trusts. I argue that the Court's 1994 decision in Schmidt v. Air Products, *which embraced trust law as a tool for resolving pension surplus ownership disputes, held out the promise that courts would use fiduciary principles to shape pension rights for employees and protect those rights against employer self-interest. That promise has failed to bear much fruit. Since* Schmidt, *the Court has moved away from a conception of trust law as a fetter on employer power towards a flexible conception in which employer trust obligations are defined almost entirely by the terms of pension documents which those employers have themselves drafted. In the hands of Canadian courts, trust law has failed to operate as an independent source of rights for plan beneficiaries; instead, it has empowered employers to frame and administer plans in accordance with their own interests, even when those interests conflict with those of employee plan members. I argue that the common law offered the courts other choices; the choices they made reflect a commitment to employer pension control as fundamental to the survival of a voluntary employment pension system.*

Cet article examine la jurisprudence de la Cour suprême du Canada sur les caisses de retraite détenues en fiducie. Je prétends que l'arrêt rendu par la Cour en 1994 dans Schmidt c. Air Products Canada Ltd., *arrêt qui privilégiait les lois régissant les fiducies comme outil pour régler les différends concernant le droit au surplus accumulé dans les régimes de pension, faisait miroiter la promesse que les tribunaux se fonderaient sur les obligations fiduciaires pour définir les droits de pension des employés et pour protéger ces droits contre l'intérêt personnel des employeurs. Cette promesse s'est depuis révélée être une coquille vide. Depuis l'arrêt* Schmidt, *la Cour s'est éloignée d'une conception des lois sur les fiducies comme n'ayant aucune incidence sur les pouvoirs des employeurs pour privilégier une approche plus souple où les obligations fiduciaires des employeurs sont définies presque exclusivement par les modalités des documents sur les régimes de pension rédigés unilatéralement par ces derniers. Selon l'interprétation que leur ont donnée les tribunaux canadiens, les lois régissant les fiducies n'ont pas joué leur rôle comme source indépendante de droits pour les bénéficiaires des régimes de retraite; au lieu de cela, elles ont permis aux employeurs de structurer et d'administrer les régimes pour servir leurs propres intérêts, même lorsque ces intérêts sont en conflit avec les intérêts des employés membres des régimes. J'avance que la common law offrait d'autres possibilités aux tribunaux; les choix qu'ils ont faits reflètent un parti pris en faveur du contrôle par les employeurs des régimes de pension comme étant un élément essentiel pour la survie d'un régime de pension où les cotisations [des employés] seraient volontaires.*

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Introduction

In 1996, Eileen Gillese published a pioneering article entitled "Pension Plans and the Law of Trusts."[1] In her article, Gillese described pension law as a "very new field for lawyers," still in search of an analytical framework. She proposed trust law as the foundation for that framework. Trust law and equity, she argued, "contain the principles and approaches which can lead to a sensible and successful development of this new area of the law"[2]; we should adopt them as "our guides"[3] to a coherent framework for employment pension rights and obligations.

At the time, Gillese's advice seemed entirely realistic. Two years previously, the Supreme Court of Canada had decided *Schmidt v. Air Products*,[4] embracing trust law as a tool for resolving employer-employee disputes over ownership and control of surplus in employer-sponsored defined benefit (DB) pension plans.[5] A pension trust, the Court had opined, is a "classic" or "true" trust,[6] subject to "all applicable trust law principles."[7]

1. Eileen Gillese, "Pension Plans and the Law of Trusts" (1996) 75 CBR 221 at 223. When she wrote this article, Gillese was a law dean and chair of the Pension Commission of Ontario. She is now a Justice of the Ontario Court of Appeal.
2. *Ibid* at 224.
3. *Ibid* at 250.
4. *Schmidt v Air Products Canada Ltd,* [1994] 2 SCR 611, rev'g in part [1992] AJ no 315 (CA), aff'g [1990] AJ no 176 (QB).
5. The issues addressed in this paper relate primarily to employer-sponsored (i.e. employer-established and administered) DB plans. While many such plans are found in unionized workplaces, they frequently remain vulnerable to the unilateral employer control discussed in this paper: see Elizabeth J Shilton, *Gifts or Rights?: A Legal History of Employment Pension Plans in Canada* (SJD Thesis, University of Toronto, 2011) [unpublished], particularly chapter 3.
6. *Schmidt, supra* note 4 at para 52.
7. *Ibid* at para 58.

Trust law's promise of a firm anchorage for beneficiary interests in a sea of contract law otherwise controlled by all-powerful employers was greeted warmly by employees and their pension advocates.[8] Employers were much less enthusiastic; sharing the perception that *Schmidt* favoured employee interests, they embarked on a sustained legislative lobby against the application of trust law to pension plans which continues to this day.[9] It is now obvious, however, that *Schmidt* has done little to change the power dynamic within pension plans. *Schmidt*'s categorical injunction to apply trust principles to pension trusts has created much confusion for parties to the pension relationship, spawning extensive and expensive litigation.[10] Since *Schmidt*, however, employees bringing trust law-based challenges to employer control over pension plans have lost out consistently at the Supreme Court level.[11] For employee pension rights, the promise of trust law has proved to be a false one.

In this paper I argue that *Schmidt*, employee-friendly on the surface, in fact sowed the seeds for much less employee-friendly developments. On the narrow issue of surplus ownership, *Schmidt* placed some modest fetters on employer control. On the broader issues at the core of the case, however—issues about the meaning of the employment pension 'deal,' and the scope of the employer's power both to frame and amend that 'deal' in its own interests—*Schmidt's* approach to trust principles left ample room for the evolution of the Court's more recent jurisprudence, which enhances rather than restricts employer power over pension plans and pension funds. In Part I, I survey the practical and legal background to the problems posed by *Schmidt*. In Part II, I analyze in detail *Schmidt*'s majority judgment, and explore some of the conceptual and practical difficulties posed by its attempt to apply conventional trust rules to the employment pension context. In Part III, focusing on three of the Supreme Court of Canada's recent pension decisions, *Buschau v. Rogers Cablesystems*

8. See, for example, Ari Kaplan, *Pension Law* (Toronto: Irwin Law, 2006) at 91 and 554.

9. See, for example, *Back from the Brink: Securing the Future of Defined Benefit Plans*, online: <http://www.acpm.com/resources/7/pdf/ACFD2B.pdf>.

10. See Anthony Devir, "Fiduciary Obligations and Surplus Issues in Pension Plans: The Employers' Perspective" (1998-1999) 18 Est Tr & Pensions J 317 at 337-338, and Douglas Rienzo, "Trust Law and Access to Pension Surplus" (2005-2006) 25 Est Tr & Pensions J 14 at 28-29 for discussions of the legal problems posed by *Schmidt* for parties attempting to administer plans, and for some of the regulatory responses to *Schmidt*. See also Kaplan, *supra* note 8, C 10; subsequent jurisprudence has overtaken Kaplan's optimistic conclusion that *Schmidt* "settled" the law in this area (554, 566).

11. See cases cited at *infra* notes 12, 13 and 14. *Monsanto Canada Inc v Ontario (Superintendent of Financial Services)*, [2004] 3 SCR 152, arguably a victory for employees, was an exercise in statutory interpretation, not an application of trust law.

Ltd.;[12] *Nolan v. Kerry (Canada) Ltd.*;[13] and *Burke v. Hudson's Bay Co.*,[14] I examine the Court's increasing affirmation of the power of employers to manage employment pension plans in their own interests. I argue that our Supreme Court's current version of trust law fails to recognize and protect a role for employee interests. Courts, who share a responsibility with legislatures for distributive outcomes within employment pension plans, must be challenged to reframe issues of employment pension rights so as to recognize the employment context within which pension plans operate, and take employee interests into account.

I. *Trust law and employment pension plans: a brief history*

1. *Searching for a legal framework for employment pension rights*

Employment pension plans in Canada date back to the 19th century. From the outset, they have been initiated, designed and controlled almost exclusively by employers, their history part of the history of modern management practice. Throughout the 20th century, Canadian courts have struggled to rationalize these plans within the narrow categories known to the common law. Early courts characterized pensions as gifts from benevolent employers to old and faithful servants.[15] As late as 1951, Canadian courts still insisted that pension payments were "voluntary" and not part of an employee's compensation.[16] By the 1960s, Canadian courts, at least in part under the influence of collective bargaining legislation, had begun to recognize employee pension rights,[17] but continued to have problems defining them with precision. Judges referred to "the promise of a pension as a contractual obligation,"[18] but exactly what was promised was never specified. Appellate courts characterized pensions as "present

12. *Buschau v Rogers Cablesystems Ltd*, 2006 SCC 28, [2006] 1 SCR 973, rev'g 2004 BCCA 80 [*Buschau* 2004 BCCA] and 2004 BCCA 282 [*Buschau* 2004 BCCA No 2].
13. *Nolan v Kerry (Canada) Inc*, 2009 SCC 39, [2009] 2 SCR 678, aff'g (2007), 86 OR (3d) 1 (CA), rev'g (2006), 209 OAC 271 (Ont Sup Ct J) [*Kerry* 2006 ONSC], rev'g [2004] OFSCD no 192 [*Kerry* OFSCD No 1], and [2004] OFSCD no 193 [*Kerry* OFSCD No 2].
14. *Burke v Hudson's Bay Co*, 2010 SCC 34, [2010] 2 SCR 273, aff'g 2008 ONCA 394 [*Burke* ONCA], rev'g [2005] OTC 1076 (Ont Sup Ct J) [*Burke* ONSC].
15. See, for example, Murray Webb Latimer, *Industrial Pension Systems in the United States and Canada* (New York: Industrial Relations Counselors, 1932) at chapters XIV and XV.
16. See *Flintoft Estate v Canada (Minister of National Revenue)*, [1951] Ex CR 211. See also *Williamson v Ontario (Treasurer)*, [1941] OJ no 206 (HC); *McDougall v MNR*, [1949] 49 Ex CR 314; *Heirs of NT Cronk, represented by Barclays Trust Co of Canada v MNR*, [1949] 49 DTC 612 (Ex Ct Ca).
17. One of the first cases to recognize pensions as rights within the contract of employment was *Bardal v Globe & Mail Ltd* (1960), 24 DLR (2d) 140 (HC) at para 28.
18. *Otis Canada Inc v Ontario (Superintendent of Pensions)* (1991), 2 OR (3d) 737 (Gen Div) at para 44.

wages postponed or deferred,"[19] but the meaning of that highly ambiguous concept was never judicially explored.

The modern common law characterizes the employment relationship as a contract. Efforts to apply contract law to pension plans have nevertheless presented courts with on-going practical and conceptual challenges. Modern pension plans are typically not generated by conventional bilateral negotiation; they are drafted and established unilaterally by employers. The complex documents which constitute such plans are not normally supplied to employees, who may be unaware of their precise terms.[20] Plan texts typically reserve to employers a broad unilateral right to amend the plan, including the right to terminate it.[21] Employers make full use of these powers of amendment, with the result that many plans have complex histories reflecting both structural and substantive changes over time. Except as imagined by the law, pension plans do not reflect the "intention of the parties"; at best, they are 'contracts of adhesion,'[22] with the additional complication that because one party to the contract retains the unilateral right to change its terms, rights and obligations remain fluid even after contract formation.

The legal status of employment pension arrangements is further complicated by the relationship between pension plans and their funding instruments. Early pension plans were typically of the 'pay-as-you-go' variety, with benefits paid to retired employees out of operating funds. The Great Depression persuaded many employers that some form of 'pre-funding' for pension obligations made sound business sense. While smaller employers pre-funded through the purchase of annuities, larger

19. *Metropolitan Toronto Police Services Board v Ontario Municipal Employees Retirement Board* (1999), 45 OR (3d) 622 (CA) at para 21.

20. See Morley Gunderson & Andrew Luchak, "What do Employees Know about their Pension Plans?" (2004) 39 *Industrial Relations* 646. While regulatory statutes typically guarantee employees access to plan documents on request, they do not insist that employees be provided with copies: see, for example, see *Pension Benefits Act*, RSO 1990, c P.8 [PBA], ss 29-30 and RRO 1990, Reg 909, s 45.

21. A typical power of amendment is found in the 'Stearns Plan,' quoted in *Schmidt*, *supra* note 4 at Appendix A:

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

22. 'Contract of adhesion' is a term applied to standard-form contracts offered on a take-it-or-leave-it basis by parties in a stronger bargaining position: see Friedrich Kessler, "Contracts of Adhesion – Some Thoughts About Freedom of Contract" (1943) 43 Colum L Rev 629.

companies typically preferred to accumulate dedicated pools of cash from which periodic pensions could be paid. A popular 'off-the-shelf' vehicle provided by the financial services industry for such accumulation was the modern pension trust.[23]

Pension trusts were typically constituted by agreements between employers and trust companies. From at least the mid-1940s, the terms of these agreements were significantly influenced by the requirements of the income tax authorities. Concerned to ensure that pension funds were used to pay pensions, and not as tax-sheltered employer 'slush funds,' income tax rules required that to qualify for beneficial tax treatment, plans must provide that if they were discontinued, "all monies paid under the plan must vest absolutely in the employees concerned and any surplus not apportioned must be distributed by an equitable formula to provide increased benefits for those employees then covered."[24] Pension plans and template trust agreements met that requirement with a variable mix of provisions ensuring that the fund was for the exclusive benefit of the employees ('exclusive benefit' clauses), that contributions to the fund were irrevocable ('irrevocability' clauses), and that any surplus would be allocated to the plan beneficiaries on termination rather than returned to the employer ('non-reversion' clauses). The relationship between the pension plan and the funding agreement was typically cemented through such drafting techniques as incorporation by reference.[25]

The complex of intertwined documents and legal relationships constituting the employment pension plan gave rise to a host of difficult questions about the legal character of employee pension rights, including questions about the nexus between plan texts and funding instruments, the nature and extent of enforceable employer pension commitments and the power of employers to alter those commitments. The advent of regulatory statutes in the 1960s left many of these questions unresolved, and raised

23. Modern pension trusts have little legal continuity with older traditions of *noblesse oblige*, in which wealthy individuals established trusts to provide pensions for 'old retainers.' These early pension trusts were not associated with contractual obligations, and raised their own unique legal issues within the law of charitable trusts: see, for eg *Jones v T Eaton Co*, [1973] SCR 635.

24. *Statement of Principles and Rules respecting Pension Plans for the Purposes of The Income War Tax Act: Tax Ruling No. 2 (1946-47)* (Taxation Division, Ministry of National Revenue, undated) at para 14 (the *Blue Book*). For the status of mid-century tax rules, see generally William Latimer, "Pension Plans and Income Tax" in Laurence E Coward, ed, *Pensions in Canada: A Compendium of Fact and Opinion* (Don Mills, Ont: CCH Canadian Ltd, 1964) 103; and Robert M Clark, *Economic Security for the Aged in the United States and Canada: A Report Prepared for the Government of Canada* (Ottawa: Queen's Printer, 1960) at 45-54.

25. This linkage was required by the tax rules, which specified that pension plans and trusts "must together form the plan": see, for example, *Information Bulletin No. 14* (Department of Revenue, circa 1959) at para 15(a).

new ones about the relationship between plan documents and statutory provisions. As long as the value of pension funds did not exceed the value of the periodic benefits provided under the plans, these legal 'loose ends' posed few practical problems. When pension funds began substantially to exceed the amounts needed to pay for periodic benefits, however, Canadian courts were forced to confront many unresolved legal questions imbedded in the employment pension relationship.

2. *Pension surpluses*

Although pension funds were in widespread use since at least the 1940s, pension surpluses did not begin to emerge in Canada as a prominent legal issue until the 1980s, a result of changes both in the regulatory and the economic climate.[26] Prior to the advent of statutory regulation in the 1960s, pension funds were not required to meet solvency standards. Tax rules requiring actuaries to 'certify' plan contributions were aimed at limiting the amounts sheltered by pension funds, rather than at ensuring that these funds held enough to pay benefits.[27] First-generation regulatory statutes changed the rules, generally requiring that plans maintain assets sufficient to meet their liabilities. Since pension liabilities were future-looking, however, the value of both assets and liabilities were projections, based on actuarial assumptions about such factors as investment returns, inflation, and turnover among plan members. When events in the real world did not conform to projections, plans could fall either into deficit or into surplus.[28]

In the 1980s, a variety of economic events converged to produce significant deviations from projections on both asset and liability sides of many pension ledgers, sending numerous Canadian DB plans into surplus.[29] Employers hungry for capital began to search for ways to access these surpluses.[30] Their most visible strategy was outright withdrawal of surplus from the fund. Surplus withdrawal normally required regulatory approval, with legal rules and regulatory protocols varying across the country. Some jurisdictions required employers to establish legal ownership of

26. See Kaplan, *supra* note 8, c 10. At 606, Kaplan provides a detailed list of Canadian surplus ownership cases to 2004. Only two cases on his list pre-date 1980.

27. See, for example, *Blue Book, supra* note 24 at para 7 (Past Service Contributions).

28. See Frank Livsey & David A Short, "The Development of Funding Surpluses in Canadian Pension Plans" in *Task Force on Inflation Protection for Employment Pension Plans, Research Studies*, Vol I (Toronto: Queen's Printer, 1988) (*Task Force*).

29. This issue is canvassed in detail in the scholarly and professional literature of the era: see, for example, Gary Nachshen, "Access to Pension Fund Surpluses: The Great Debate" in *New Developments in Employment Law*, Meredith Memorial Lectures, Faculty of Law, McGill University 1988 (Yvon Blais: Cowansville, 1988) 60, and articles by Donovan Waters at 133, Ralph E Scane at 157, Raymond Koskie at 181 and Bernard Adell at 209, in *Task Force, supra* note 28.

30. See Nachshen, *ibid* at 61.

surplus prior to withdrawal.[31] Where plan documents allocated surplus to employees, many employers exercised their broad powers of amendment to redirect surplus to themselves. Canadian tax authorities gave impetus to such amendments, issuing new guidelines effective 1 January 1982 which capped amounts that could accumulate within pension funds and, in a reversal of prior policy, required monies above the cap to be returned to the *employer*.[32] When plan members challenged employer surplus withdrawals, they often found out in the course of litigation that employers had been employing less visible surplus 'extraction' strategies for years, taking "contribution holidays,"[33] and using plan surpluses to pay on-going plan expenses that employees had believed were being paid out of operating funds.[34]

At the root of the surplus ownership debate was a profound dissensus on some basic questions about the nature and scope of employment pension obligations, issues on which pension documents were often imprecise. Employees claimed pension funds as part of their contractual entitlement, while employers maintained that such funds were simply a convenient employer-owned mechanism for meeting benefit obligations. Both sides bolstered legal and interpretive arguments by focusing on the equities of their respective positions.[35] Employers maintained that pension obligations were limited to *benefits*; the *cost* of the benefits was irrelevant.[36] Under modern statutory rules, they argued, employers take the risk of deficits in a DB plan; it is only fair that they should be able to take the benefit of surpluses. Employees and their advocates countered that both the promise to pay future pensions and the funds set aside to do so were part and parcel of 'deferred wages,' earned by employees as concretely as their salaries. Employer contributions, they argued, are "foregone wages," entitling employees "to whatever those contributions have produced."[37] For

31. Both Nachshen (*ibid* at 67-70 and 81-85) and *Adell* (*supra* note 29 at 219-22) discuss the status of Canadian regulatory law on pension surpluses in the 1980s.
32. This tax history is discussed in *Schmidt*, *supra* note 4 at paras 34-37, 169 and 186. As the majority decision emphasizes, these guidelines were not law. The current registration requirement is found in Information Circular No 72-13R7.
33. In "Contribution Holidays" (1995-1996) 15 Est & Tr J 136 at 137, *supra* note 2, Eileen Gillese defines a 'contribution holiday' as a situation in which "in any one year...the sponsor's current service cost is funded partially or entirely from surplus existing in the pension fund." Where the surplus is large enough, employers may make no contributions for many years.
34. These 'internal' surplus withdrawal strategies typically did not require explicit regulatory approval. See Gillese, *ibid* at 159-60 for a review of various statutory rules.
35. This debate is canvassed in both Adell, *supra* note 29 at 234 and Nachshen, *supra* note 29 at 75-81. See also Kaplan, *supra* note 8 at 560-66.
36. Adell, *supra* note 29 at 235.
37. *Ibid.*

employee advocates, the trust nature of pension funds simply confirmed their essential character as the property of employees.[38] In response to the employer's 'risk' argument, they observed that pension deficits are not inevitable; employers control the funds, and can prevent deficits by prudent management.[39] In addition, employees too bear pension risks: both the risk of employer insolvency, and the risk that the same economic factors generating pension surpluses will fuel inflation, eroding the real value of promised benefits.

Canadian courts in the pre-*Schmidt* era picked no clear winner in the surplus debate. In the absence of statutory rules or unambiguous documents, courts came to differing resolutions,[40] with outcomes fairly evenly divided.[41] Some courts took pension funds at face value: if they were trust funds, and the employees were the beneficiaries, surplus belonged to the employees. Others saw surplus as falling outside the original pension trust 'envelope'; they took a "resulting trust" approach,[42] holding that surplus should be returned to the 'settlor.' They reached no clear conclusion, however, as to who the 'settlor' *was* in the pension context; some courts saw the employer as the settlor, while others, at least in contributory plans, saw employers and employees as *joint* settlors who should share the surplus. Challenges to contribution holidays had equally indeterminate outcomes, with Canadian courts generally holding that the employer's right to take contribution holidays depended on the specific wording of the plan.[43] Case law from other common-law jurisdictions with

38. For a discussion of the flaws in both these sets of arguments, see James Wooten, *Arguments about Asymmetry of Risks and Rewards and Deferred Wages in Pension Plans* (Ontario Expert Commission on Pensions, 2007).

39. Adell, *supra* note 29 at 234.

40. The caselaw is exhaustively reviewed in the studies cited in *supra* note 29. The caselaw on the contribution holiday issue is discussed in Gillese, "Contribution Holidays," *supra* note 33.

41. Kaplan's list of surplus ownership cases (*supra* note 26) gives an edge to employers, with 15 pre-*Schmidt* victories going to employees and 20 to employers. The list does not include contribution holiday cases.

42. "[A] resulting trust arises whenever legal or equitable title to property is in one party's name, but that party, because he is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner, or to the person who *did* give value for it": Donovan WM Waters, Mark Gillen & Lionel Smith, *Waters' Law of Trusts in Canada*, 3d ed (Toronto: Thomson Carswell, 2005) (*Waters*) at 362.

43. See *CUPE Local 1000 v Ontario Hydro* (1989), 58 DLR (4th) 552 (Ont CA); *Askin v Ontario Hospital Association* (1991), 2 OR (3d) 641 (CA).

similar employment pension systems provided Canadian courts with no clear conceptual guidance.[44]

II. Schmidt *and the tensions within trust law*

In *Schmidt*,[45] the first pension surplus case to reach the Supreme Court of Canada, the Court was invited to rationalize this chaotic legal picture. *Schmidt* raised two issues: who was entitled to surplus when the pension plan was terminated (the "surplus entitlement" issue), and whether the employer could lawfully draw on surplus while the plan was on-going to fund its contribution obligations (the "contribution holiday" issue). Together, these issues offered an opportunity to explore the nature and content of the pension 'deal' within the context of the employment contract, and to address the normative/distributive consequences of permitting employers to use reserved amendment powers to unilaterally remake pension deals in their own interests. Instead, the Court opted for an abstract and technical approach. On the surplus entitlement issue, the Court divided. Led by Cory J., the majority held that surplus claims must be decided on a case-by-case basis; it awarded part of the surplus to the employer, and part to one sub-group of employees. In separate reasons, the two dissenting judges would have given the entire surplus to the employer, but for different reasons. McLachlin J. (as she then was) grounded her decision in part on 'resulting trust' principles, while Sopinka J. based his on the breadth of the employer's power of amendment.[46] The Court then unanimously validated the employer's contribution holidays, for reasons which arguably contradict much of the majority analysis on the surplus entitlement issue. The result is a judgment which evades the conceptual conundrums behind the surplus problem, fails to resolve the distributive conflict at the core of the dispute, and offers a very unstable foundation in principle for the legal rules it instructs Canadian courts to follow in resolving surplus questions in future.

The *Schmidt* dispute focused on the Air Products Pension Plan, a DB plan formed by the merger of two predecessor plans, the Catalytic Plan and the Stearns Plan.[47] After shutting down its operations and terminating

44. Both UK and US courts frequently (although not invariably) awarded pension surplus to employers; UK courts used resulting trust principles, while US courts reached the same result by giving a broad interpretation to employer amendment clauses within pension plans. The gist of the US and UK caselaw is summarized by Cory J in *Schmidt, supra* note 4 at paras 188-89; see also Nachshen, *supra* note 29 at 74.

45. *Supra* note 4.

46. The analysis below focuses on the majority decision.

47. Catalytic Enterprises Ltd and Stearns-Rogers Canada Ltd were the corporate predecessors of Air Products Canada Ltd: see *Schmidt, supra* note 4 at para 9.

its plan with a substantial surplus, Air Products went to court seeking a judicial declaration that it was entitled to that surplus, relying on the language of its current plan text, which clearly sustained its claim.[48] The employees asserted their own claim to the terminal surplus. For good measure, they also challenged various contribution holidays taken by the company from 1985 to 1988 which had come to light after the wind-up of the plan. They acknowledged that the plan's current provisions, the result of recent plan amendments, gave the employer ownership and control of surplus. They argued, however, that those provisions were not authorized under the employer's general power to amend the plan; since the entire pension fund had been established as a trust fund for the employees' benefit, the employer's attempt to reclaim the surplus was in breach of trust.

Cory J., writing for the majority, outlines a two-step procedure for addressing the surplus entitlement issue. The first step requires a determination of "whether the pension fund is impressed with a trust," and whether the surplus is included in that trust.[49] That question must be answered by applying "the ordinary principles of trust law": "[a] trust will exist whenever there has been an express or implied declaration of trust and an alienation of trust property to a trustee to be held for specified beneficiaries."[50] If a trust is found, Cory J. tells us, it is a "classic" or "true trust,"[51] subject to "all applicable trust principles" and "governed by equity"; "to the extent that applicable equitable principles conflict with plan provisions, equity must prevail."[52] If there is no trust, the disposition of the fund is governed strictly by contract principles.[53] Once the appropriate set of legal principles has been identified, the analysis moves to the second step: the application of those principles to plan documents to determine whose claims should prevail. As Cory J. sees it, trust and contract modes of analysis yield different conclusions on the scope to be given to the employer's general power of amendment. If surplus funds are held in trust for the employees, a plan amendment giving the employer ownership of those funds is a revocation of trust. Trust law *presumes* that settlors do not intend to revoke trusts. Accordingly, general powers of amendment will not be interpreted to authorize revocation; revocation will only be permitted if the original plan documents reserved an express power of

48. Appendix A to Cory J's decision, *ibid.*
49. *Ibid* at para 90.
50. *Ibid.*
51. *Ibid* at para 52.
52. *Ibid* at para 92.
53. *Ibid* at para 91.

revocation. If there is no trust, by contrast, no issue of the revocation of the trust arises. Accordingly, on contract principles, a general power of amendment will sustain an amendment giving the employer ownership of surplus.[54]

To determine whether the funds at issue are "impressed" with a trust, Cory J. carefully parses the founding documents of the two predecessor plans. With respect to the original Catalytic plan, he concludes that a trust was indeed created, and that the surplus was included in the trust.[55] With respect to the Stearns plan, however, he comes to the opposite conclusion. He bases this crucial distinction on two differences between the founding plans.[56] The first is a difference between the plans' initial funding arrangements. The original 1959 Catalytic plan was funded by trust agreement and subject to an express declaration of trust. The 1970 Stearns Plan, by contrast, was funded under a group annuity contract which contained no express declaration of trust. Cory J. insists that he is not dismissing the trust claims of the Stearns employees on this formal ground alone; as he reminds us, a trust may be *implied* as well as *express*.[57] The absence of a declaration of trust is nevertheless a critical element in his reasoning; he construes its omission in the Stearns documents as "a deliberate decision to avoid the use of a trust."[58]

Second, he points to the manner in which the plans address the distribution of the fund on termination. Both plans generally contemplated that the funds were held for the "exclusive benefit" of the employees, and that they could not be "diverted" to any other purpose.[59] In addition, however, the Catalytic plan contained a specific 'non-reversion' clause, providing that "[i]n the event of termination, the Company cannot recover any sums paid to the date thereof."[60] The Stearns plan contained no such non-reversion clause; drafted a decade later than the Catalytic plan, it expressly contemplated the possibility of surplus, and provided that any balance remaining in the fund after pension benefits were accounted for would, "subject to the approval of the Minister of National Revenue and the Superintendent of Pensions, be returned to the Company or may be used for the benefit of Participants, in such equitable manner as the

54. *Ibid* at paras 59, 66-68.
55. *Ibid* at para 102.
56. *Ibid* at para 120.
57. *Ibid* at paras 120, 122.
58. *Ibid* at para 126.
59. *Ibid* at para 103. For the precise Stearns language, see note 21.
60. *Ibid* at para 106. While this language did not expressly refer to surplus, Cory J nevertheless found it broad enough to encompass the entire fund. Ironically, the original Catalytic plan was a defined contribution plan, and therefore incapable of generating a surplus.

Company may at its discretion determine."[61] Since the Catalytic surplus was "impressed" with a trust, the rights of the Catalytic employees fell to be determined on trust principles. The employer could not, therefore, rely on its general power of amendment; since the plan contained no express authority to revoke the trust, the provisions of the Air Products Plan giving the employer ownership of surplus were invalid against the Catalytic employees. For the Stearns employees, however, contract law applied; the terms of the current plan giving the employer ownership of surplus were valid against them.

After thus dividing the spoils on the surplus entitlement issue, Cory J. moves on to the contribution holiday issue. As the employees had framed their case, there was no meaningful legal distinction between the two issues; if the pension fund was a trust fund to be used for their benefit, the employer was equally in breach of trust whether it used that fund to make contributions while the plan was on-going, or appropriated its surplus on termination. The Alberta courts had taken the same view, sustaining both claims for the Catalytic employees, and rejecting both for the Stearns employees.[62] Cory J. however, sees no parallel between the two issues. Writing this time for the full court, he does not follow the two-step analysis he mandated for the surplus entitlement issue. He sees the contribution holiday issue entirely as an exercise in contract interpretation; indeed, he emphasizes that the Court's analytic approach on the contribution holiday issue is identical regardless of the presence of any trust.[63] He forgoes the historical analysis he pursued on the surplus entitlement issue, focusing only on the plan documents under which the contribution holiday was taken.[64] The terms of that plan required the employer to contribute only the "amounts...necessary to provide the retirement benefits accruing to Members during the current year."[65] The evidence established that pursuant to standard actuarial practice, a determination of the "amounts necessary" would take account of surplus; in any year where the existing surplus was large enough, no additional amount would be "necessary" to fund the benefits, and no contribution would be required. As the court sees it, the contribution holiday is essentially a 'zero sum' transaction; since

61. Article 14.3 of the 1970 Stearns Plan, see *ibid* at Appendix A.
62. *Supra* note 4.
63. *Ibid* at para 95.
64. *Ibid* at paras 84-85, 113. Because Cory J did not explain his methodology here, the question of whether an employer could amend a trust-funded plan to allow itself to take contribution holidays or to pay plan expenses where such power had not originally been provided remained open: see Kaplan, *supra* note 8 at 461-66. That issue has now been decided in favour of employer flexibility by *Kerry*: see discussion at Part III(b), below.
65. *Ibid* at para 114.

no money leaves the fund, a contribution holiday does not "reduce the corpus of the fund."[66] Accordingly, despite acknowledging that "employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence,"[67] Cory J. does not see contribution holidays as raising any trust concerns. He dismisses the claim for both groups of employees.

Schmidt's abstract approach places very heavy weight on relatively minor differences in the wording of the original plan documents, almost entirely ignoring the employment context in which the plans originate. In construing the documents, lip service is paid to the "intention of the parties." The differences on which Cory J. focuses are unlikely, however, to reflect material differences in the intention of the employer about the rights of the employees; it is much more probable that they reflect the evolution of income tax rules, choices of insurance instruments over pooled funds for cash-flow reasons, and differences in 'template' documents offered by financial service institutions. It is even less likely that they reflect differences in the intentions of the *other* party to the employment contract: the employees. The court shows very little interest in the practical understandings of the *employees* about the nature and content of the pension contract. The Stearns employees led evidence that two years after the plan was established, the company issued a brochure to employees advising that "it is the Company's intention the surplus will be distributed in an equitable manner to the employees active in the Plan at the date of termination."[68] This is precisely the kind of contextual evidence used routinely in labour arbitrations (and even in trial courts) to flesh out the meaning and content of ambiguous employment undertakings; Cory J. dismisses it as a mere expression of "intention" rather than an undertaking by the company.[69]

This is not to say that Cory J. shows no solicitude for the employees. Faced with a conflict in the authorities on the issue of whether or not a general power of amendment is capacious enough to authorize an amendment revoking the trust in whole or in part, Cory J. chooses the line of authority most favourable to the interests of plan beneficiaries; a general power of amendment will *not* be presumed to permit revocation.[70]

66. *Ibid* at para 86.
67. *Ibid* at para 89.
68. *Ibid* at para 29. The company's intention to allocate surplus to the employees was further repeated in a 1982 consolidation of the plan, which was never registered: *ibid* at Appendix A.
69. *Ibid* at paras 137-40. The contextual evidence was equivocal; the point is not that this evidence clearly established a bilateral contractual obligation, but that the court is not interested in making the kind of fact-based inquiry that would have been necessary to establish the content of individual employment pension contracts.
70. Sopinka J, dissenting, follows the alternative line of authority: *ibid* at paras 165-72.

One factor in his choice is the fact that, in contrast to more conventional trust situations, employees have given consideration for their pensions.[71] In addition, where he finds a trust existing, he takes a decidedly generous view of the nature of the trust property. On the basis of very general language, he finds surplus included in the trust. In addition, he finds "impressed" with a trust not only contributions made while the plan documents contained a declaration of trust, but also contributions made after the documents were amended. Conventional trust principles protect the trust nature of prior contributions (and the income from those contributions).[72] These principles do not, however, lead inexorably to the conclusion that the employer could not revoke its declaration of trust with respect to *new* contributions.[73] Cory J.'s holding that the employer could not amend its declaration of trust with respect to *future* contributions is a radical step into unmapped territory;[74] in effect he is holding that *the contribution obligation itself* is "impressed with a trust," binding the company not only to its past actions, but also to commitments made for the future.[75]

These employee-positive elements of the decision are significantly undermined, however, by other elements that are much less so. I have already suggested that Cory J.'s distinction between the rights of the Catalytic and Stearns employees on the surplus entitlement issue fails to take account of the perspective of the employees, the other contracting 'party' whose intentions theoretically inform the Court's analysis. He is led to make a distinction between the two sets of rights based on a technical and abstract approach to plan documents drafted unilaterally by the employer. This abstraction is even more evident in Cory J.'s conclusion that the contribution holiday issue raises no trust issues. While he freely acknowledges that "employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence,"[76] he sees that interest as placing no particular constraints on the employer's right to draw on surplus within an on-going plan, since that surplus exists only on paper (i.e. is merely "actuarial"); it does not become "actual" until the plan is wound

71. *Ibid* at para 66.

72. Waters, *supra* note 42 at 1266-1286. The conventional trust remedy of "tracing" is always available to track property that was "impressed with a trust" and can still be located.

73. The employer's contribution obligation is essentially a covenant to transfer property into trust. The important issues of whether such covenants are contractual or trust covenants, whether they are enforceable, and by whom, have long been controversial among trust lawyers: see *Waters*, *ibid* at 182-91. None of this controversy is discussed or referred to in *Schmidt*.

74. This is arguably the gist of Sopinka J's dissent, although he does not refer to future contributions.

75. The argument that the contribution obligation is itself a trust obligation was made by the employees to the Court of Appeal in *Kerry* in support of their argument on the DB contribution holiday issue; the court rejected the argument as inconsistent with *Schmidt*: *Kerry*, *supra* note 13 at para 123.

76. *Ibid* at para 89.

up.[77] As the basis for a conclusion that the contribution holiday does not raise trust issues, this glib distinction between "actuarial" and "actual" surplus is unpersuasive; while it captures the ephemeral nature of surplus in an on-going plan, it tells us nothing about whether the employer should be able to access that surplus for contribution holidays. In her dissent, McLachlin J. points forcefully to this contradiction in Cory J.'s reasoning: "if...the fund in equity belongs to the employees in some notional sense, how can the employer usurp that interest by using the surplus to discharge its ongoing funding responsibility?"[78] Gillese likewise finds Cory J.'s position contradictory. In "Contribution Holidays," a companion article to "Pension Plans and the Law of Trusts," she argues that there is no basis in trust principles for Cory J.'s conclusion that contribution holidays do not breach the trust; on the contrary, such practices encroach directly on the trust, and are a revocation of trust just as surely as appropriation of surplus on plan termination.[79]

Cory J.'s disposition of the contribution holiday issue manifests clear reluctance to impose fetters on employer control of pension plans while the plan is on-going. This reluctance to interfere with employer control is also reflected in his brisk rejection of the proposition that employers may have fiduciary duties in the context of pension plans irrespective of whether or not they are formally constituted as trusts. The Stearns employees based their claim to surplus in part on the argument that their original plan gave the employer nothing more than *discretion* to determine how surplus should be dealt with. They argued that the employer was a fiduciary; since fiduciaries cannot lawfully prefer their own interests over the interests of those to whom they owe fiduciary duties, the employer would have been compelled to exercise its discretion in their favour, and therefore they should be treated as if they had an ownership interest.[80] This argument—that employer pension conduct has fiduciary dimensions extending beyond the boundaries of formal trusts—has important potential for insulating employee contract rights from the reach of employer powers of plan amendment. Cory J. evades the issue, interpreting the plan language as giving the employees merely a "potential interest" which

77. *Ibid* at paras 4, 89.
78. *Ibid* at para 191. McLachlin J resolves the contradiction, of course, in favour of the employer's right to surplus at both stages.
79. Gillese, "Contribution Holidays," *supra* note 33 at 145. Ultimately, Gillese defends Cory J's decision despite its contradictions, rationalizing its inconsistencies by arguing that within on-going plans, pension issues should be governed by contract rather than trust principles at 164.
80. *Schmidt, supra* note 4 at para 140. This argument undoubtedly over-reaches, since the language of the plan explicitly contemplated the possibility that the employer might appropriate the surplus to itself.

was vulnerable to the general amending power.[81] His refusal to engage with the fiduciary argument has been an open invitation to employers to argue that in exercising powers of plan amendment, they owe no fiduciary duties to plan members, and they have done so with considerable success in subsequent cases.[82]

The Court's broad tolerance of employer flexibility while plans are on-going is linked to concern about the potential consequences to the employment pension system if employer control is fettered within on-going plans. In *Schmidt*, the company made the *in terrorem* argument that if employers are not permitted to take contribution holidays, they will engage in systemic underfunding of their plans. While Cory J. himself expresses some scepticism about this argument,[83] McLachlin J.'s dissenting opinion bluntly acknowledges the practical hazards of judicial interference with the power of employers to organize their pension affairs as they see fit; if they cannot have their own way, they will systematically underfund their plans, switch from DB to defined contribution (DC) plans, or decline to provide pensions altogether. "Employees," she argues, "no longer assured of a specific pension and required to assume the risk of insufficient funding themselves, would be the losers."[84] The importance of management sovereignty as a *sine qua non* of a voluntary system is a theme that will emerge more clearly in subsequent decisions.

It is likewise linked to a tension within trust law itself. Trust law has always strained to accommodate two contradictory ideas. The first is the idea that trust law has a moral dimension: that it inhabits a world more communal and ethical than the market, a paternalistic world in which courts protect the weak against the powerful. This idea reflects the roots of trust law in courts of equity, which traditionally enforced moral and fiduciary commitments not recognized by common law courts, and imposed standards of 'utmost' fidelity on those who control trust property. The second is the idea of trust law as merely 'facilitative': a species of private law, like contract law, in which the primary rights and obligations of the parties to the trust relationship are constituted outside the courts, and the role of the courts is simply to interpret and give effect to essentially

81. *Ibid* at paras 45, 120, 126, 129.

82. Gillese points out that the contribution holiday issue also raises a fiduciary issue; she argues that contribution holidays violate the fiduciary rule that trust assets must be managed for the sole benefit of the beneficiaries: "Contribution Holidays," *supra* note 33 at 145. Her argument appears to be confined to the Catalytic employees.

83. *Schmidt, supra* note 4 at 45.

84. *Ibid* at para 184.

private arrangements.[85] In his widely cited article, "The Contractarian Basis of the Law of Trusts," John Langbein argues that "virtually all trust law is default law—rules that the parties can reject. The rules of trust law apply only when the trust instrument does not supply contrary terms."[86] According to this idea of trust law, settlors set the boundaries of their own trust obligations. Courts do not determine what those obligations *should* be, but simply what they *are*. Their role is one of enforcement. Both ideas are reflected in the canon of 'trust principles'; some principles are indefeasible,[87] while others are mere presumptions, defeasible by language in the trust documents to the contrary.[88]

Cory J.'s decision clearly reflects this tension. The employee-friendly aspects of his decision largely reflect the paternalistic and protective posture of equity courts toward their 'wards.' His language reflects a fundamentalist posture towards the structure of trusts, which he sees as having certain "fundamental characteristics." One such characteristic is the transfer of property rights;[89] it would be "inconsistent with the fundamental concept of a trust" for a settlor to remain in control of trust property once the trust is constituted.[90] This fundamentalist conception competes directly with the notion that settlors are free to make their trust transfers defeasible, a proposition which, however distasteful, Cory J. acknowledges as equally entrenched in trust law. He reconciles these competing ideas by recognizing the right of a settlor to 'take back' a trust transfer, but demands that the authority to do so must be made explicit in the trust's originating documents.

While both ideas of trust law inform the judgment in *Schmidt,* it was only the first of these ideas—the fundamentalist idea—that held out real promise to employees and their advocates that trust law would operate as an independent source of legal protection for employee pension rights. That idea has not prevailed, and after closely reading *Schmidt*, we should not be surprised that it has not. The seeds of its destruction are implicit in Cory J.'s approach to reconciliation. If employers can over-ride the most "fundamental" characteristics of a trust simply by inserting explicit

85. See Gregory S Alexander, "The Transformation of Trusts as a Legal Category, 1800-1914" (1987) 5 Law & Hist Rev 303. Alexander refers to these two ideas of trust law as "regulative" and "facilitative": *ibid* at 344.

86. John H Langbein, "The Contractarian Basis of the Law of Trusts" (1995-96) 105 Yale LR 625.

87. John H Langbein, "Mandatory Rules in the Law of Trusts" (2003-2004) 98 Nw ULR 1105.

88. Trust presumptions are also very fluid, as we see in *Schmidt* itself; the three judgments reflect a smorgasbord of approaches to 'default' rules for interpreting the scope of a general power of amendment in a pension plan.

89. *Schmidt, supra* note 4 at para 65.

90. *Ibid* at para 66.

wording, then it is employers, rather than the courts, who will ultimately define the scope and content of trust commitments. Unconstrained by core ethical imperatives, the secret to employer control of pension rights lies solely in the drafting. As we shall see, it is that facilitative view of trust law that has carried the day in the Supreme Court's pension jurisprudence.

III. *Pension trust law meets the 21st century*

1. Buschau v. Rogers Cablesystems Ltd.[91]

In subsequent pension litigation in Canada, employees challenging employer amendments relied heavily on *Schmidt*'s broad holding that pension trusts were "classic trusts," subject to "all applicable trust principles." They soon discovered, however, that the tensions and contradictions within the *Schmidt* approach offered employers a blueprint for arranging their pension affairs to ensure that any surplus allocated to employees by the plan documents was depleted prior to plan termination. *Schmidt*'s shortcomings, from an employee perspective, are clearly reflected in *Buschau v. Rogers Cablesystems Ltd. (Buschau)*, the first test to reach the highest court of the *Schmidt* dictum that a pension trust is subject to "all applicable trust law principles."

Buschau involved a novel issue: an attempt by pension plan members to invoke the rule in *Saunders v. Vautier* (the Rule) to terminate their pension trust. The Rule permits trust beneficiaries to band together unanimously to ask a court to collapse a trust and distribute the trust property, regardless of the settlor's intention. Despite its anomalous character, the Rule is a time-honoured "trust principle," well accepted by Canadian courts as one of a very few truly indefeasible trust principles,[92] and the *Buschau* plaintiffs were in distinguished company in their belief that it had relevance to their situation. In "Pensions and the Law of Trusts," Gillese observed that the application of the Rule to pensions trusts "appears to be consistent with its application in the field of trusts generally."[93] More pertinent to the *Buschau* case, the employees had been encouraged in their claim by the British Columbia Court of Appeal, which in the course of related breach of trust litigation against Rogers, had given them express permission to bring a Rule-based application.[94]

91. *Buschau, supra* note 12.

92. *Waters, supra* note 42 at 1175-1194. The Rule has fared less well in other jurisdictions. In the US, for example, it has been substantially modified by common law courts: see Gregory S Alexander, "The Dead Hand and the Law of Trust" (1984-85) Stanford LR 1189 at 1200-04.

93. *Supra* note 1 at 242. Gillese cited Ontario regulatory precedent.

94. *Buschau v Rogers Cablesystems Inc*, 2001 BCCA 16 at paras 68, 73, 195 DLR (4th) 257, leave to appeal refused, [2001] SCCA No 107, [*Buschau* 2001 BCCA].

To assess where *Buschau* fits within the evolution of Canadian pension trust doctrine, it is important to understand something of the lengthy sequence of litigation that brought the case before the Supreme Court. In the background was a complex set of corporate restructurings and plan consolidations. The plan in question, first established in 1974 by Premier Communications Ltd. (PCI), contained an explicit 'non-reversion' clause providing that any surplus assets on termination would be distributed among plan members.[95] In 1980 PCI was purchased by Rogers, together with its pension plan. By 1983, the plan had begun to accumulate significant surplus, a surplus Rogers was determined to use for its own purposes.[96] Over the next decade, Rogers commenced a series of stratagems to facilitate access to the surplus: it closed the plan to new members, took contribution holidays, withdrew surplus, replaced non-cooperative actuaries and trustees, "restated" (i.e. substantially amended) the plan to provide retroactive authority for its conduct,[97] and ultimately merged the plan with other Rogers plans that were in deficit, producing a merged fund with an overall surplus. The merged plan, like the "restated" plan, expressly gave Rogers ownership of surplus on termination, as well as permission to withdraw surplus while the plan was on-going.

In 1995, after the Supreme Court issued its *Schmidt* decision, the PCI members decided to fight back, initiating litigation to preserve their trust claim to the by-then very considerable plan surplus.[98] They sought to challenge the company's 1985 withdrawal of surplus, the contribution holidays and the elimination of their surplus rights. Prior to the commencement of the trial, Rogers acknowledged that the 1985 surplus withdrawal was in breach of trust; those funds were eventually repaid.[99] On the contribution holiday issue, both trial and appeal courts found the plan language indistinguishable from *Schmidt* and dismissed the employee claim.[100] With respect to the main issue, however (the elimination of their surplus rights on termination) the PCI members were successful; the courts held that the PCI fund had been "impressed with a trust" for the benefit of PCI members, and that this trust survived both

95. *Ibid* at para 7.

96. *Buschau, supra* note 12 at paras 5-6. The company strategy is described more fully in *Buschau* 2004 BCCA, *supra* note 12 at para 85.

97. Rogers had already made piecemeal changes to the plan language to this effect, going back as far as 1981: *Buschau* 2001 BCCA, *supra* note 94 at para 7.

98. By 2002 the plan had only 112 members, and a surplus which had started out in 1980 at approximately $800,000 had grown to $11 million: *Buschau, supra* note 12 at paras 1-2, 5.

99. *Buschau* 2001 BCCA, *supra* note 94 at paras 23-24, 37.

100. While the contribution holiday was arguably contrary to federal regulations in effect prior to 1987, the Court found that part of the claim statute-barred: *ibid* at para 36.

the plan amendments and the merger. The PCI members had given notice that if they were successful in establishing their trust rights, they would seek to terminate the trust by invoking the Rule. The Court of Appeal held that "the right of the members to invoke *Saunders v. Vautier*...remains unaffected by the merger."[101] Their subsequent application to apply the Rule proceeded successfully through the British Columbia courts.[102] On further appeal, however, their claim was dismissed by a Supreme Court of Canada unanimously of the view that the Rule was inapplicable to the modern pension trust.

The Supreme Court offers a variety of reasons for finding the Rule inapplicable to trusts in the employment pension context. First among them is its inconsistency with the regulatory scheme, a reason which alone would have provided solid ground on which to base the Court's decision. The Court goes on, however, to denounce the Rule not simply for its inconsistency with the regulatory scheme, but also for its inconsistency with employer pension objectives. Deschamps J., writing the Court's main judgment, emphasizes the employer's business interest in an on-going pension plan. Compared to that interest, she characterizes the interest of any individual beneficiary as "ephemeral," "passive" and "limited."[103] "[E]mployers establish plans because it is in their interest to do so. Under normal circumstances," she admonishes, "they have the right not to have their management decisions disturbed."[104] Common law trust rules like the rule in *Saunders v. Vautier* must give way because they "allow no room for the settlor's interest."[105] In his concurring judgment, Bastarache J. shows even more deference to employer rights and interests, stressing the voluntary nature of the employment pension system: "the unique role of the employer in respect of the pension plan and the pension Trust cannot be ignored; and the terms of the contract at the root of the Trust cannot be circumvented."[106] The plaintiff's attempt to invoke the rule in *Saunders v. Vautier* is, in his view, "a very significant derogation from an employer's right to voluntarily choose to offer or continue a pension plan," tilting the "fair and delicate balance between employer and employee interests" so far towards employees as to pose a threat to the survival of the system.[107]

101. *Ibid* at para 68.
102. *Buschau* 2004 BCCA, *supra* note 12.
103. *Buschau, supra* note 12 at para 34.
104. *Ibid* at para 30.
105. *Ibid.* The settlor is assumed to be the employer.
106. *Ibid* at para 94.
107. *Ibid* at para 97.

These judicial observations place in high relief the conflict between employer and employee interests on pension issues. They also provide an unambiguous signal that where these interests clash, the court will—paternalistically, of course, and in the employees' own *better* interest—take up the side of the employer. The *Buschau* court repeats *Schmidt*'s holding that pension trusts are "classic trusts," and subject to "all applicable trust law principles."[108] The emphasis is now, however, on the qualifications in Cory J.'s phraseology—only *applicable* trust principles will be brought to bear. While continuing to pay lip service to trust primacy, the Court is edging away from *Schmidt*'s holding that the terms of the trust take precedence over the terms of the plan.[109] It now describes the plan and the trust as "indissociable,"[110] subtly but unequivocally undermining *Schmidt*'s notion that trust law operates as a source for employee pension rights independent of employer control over the pension plan. We have clearly left the land of *Schmidt*, in which trust law still has a stable ethical dimension; pension trusts now inhabit a world in which Rogers' trust-depleting stratagems are understood to be a "rational business decision."[111]

2. Nolan v. Kerry (Canada) Ltd.[112]

Without repudiating *Schmidt*'s holding that pension funds may endow employees with trust rights, *Buschau* enhances the power of employers to prevent trust rights from being triggered. From the employer perspective, *Buschau* signalled the Court's willingness to take "a more reasonable approach" on trust issues than it had done in *Schmidt*.[113] Three years later, in *Nolan v. Kerry (Canada) Ltd.*, the Court sanctioned a further expansion of the pension powers of employers to amend trust-based plans without trust consequences. The case involved a DB plan established in 1954 by the Canadian Doughnut Company Ltd. For some thirty years, the employer had contributed annually and paid plan-related expenses.[114] In the mid-1980s, when the plan began to accumulate significant surplus,

108. *Buschau, supra* note 12 at para 61.
109. *Ibid* at para 95.
110. *Ibid* at para 29.
111. *Ibid* at paras 102-103. Bastarache J does not specifically endorse this characterization of the employer's conduct, but he clearly sympathetizes with it. So, apparently, did the Superintendent of Financial Institutions, who subsequently made an order permitting Rogers to dissolve the 1992 plan merger and reopen the PCI plan to new members more than twenty-five years after it had initially closed it: see *Buschau v Rogers Communications Inc*, [2009] SCCA no 457.
112. *Kerry, supra* note 13.
113. Barbara Austin & Paul Dimitriadis, "Not All Trust Law Principles Apply To Pension Trusts: The Supreme Court Of Canada Decision in *Buschau v Rogers Communications Inc*" (2006-07) 26 Est Tr & Pensions J 217 at 217.
114. *Kerry, supra* note 13 at paras 3-6.

the employer began to take contribution holidays and to pay expenses out of the pension fund, amending the plan to facilitate these transactions. In 1994, the company was bought by Kerry (Canada), which continued both these strategies. Effective 2000, Kerry amended the plan to alter the benefit structure significantly. The amended plan was a 'two-tier' plan, including the old DB plan (now closed to new employees), and a new DC component for new employees and current employees who chose to convert their DB benefits. With the announcement of the new plan, Kerry also announced its intention to use the DB surplus not just to continue its contribution holidays with respect to DB benefits, but also to fund its DC contribution obligations.

Current employees opposed the registration of the new plan, challenging both the use of DB surplus to fund defined contributions (the DC contribution holiday issue), and the payment of plan and trust expenses out of the pension fund (the plan expenses issue).[115] Relying on *Schmidt,* they argued that their fund, including surplus, was "impressed" with a trust, limiting it to uses "for the exclusive benefit" of plan beneficiaries; the challenged practices put trust funds to uses that benefited the *employer*, not the *employees*.[116] The employer, relying equally on *Schmidt*, argued that both its payment of plan expenses and its proposed contribution holidays raised no trust issues. The employees vigorously challenged the analogy with the DB contribution holidays addressed in *Schmidt*, pointing out that both the payment of plan expenses and the DC contribution holidays unequivocally involved a departure of monies from the DB pension fund, and therefore encroached on the "corpus of the fund."

The case went first before the Ontario Financial Services Tribunal.[117] The Tribunal made relatively short work of the plan expenses issue. It was not persuaded that either the plan text or trust principles limited the power of the employer to pay expenses from the fund, as long as those expenses were reasonably incurred in the operation of the plan and the fund.[118] It had considerably more trouble, however, validating the DC contribution holiday under conventional trust analysis. As we have seen, the plan which the employer sought to register was structured as a two-part plan, acknowledging two separate funding agreements, one for the

115. There were additional issues, including a contribution holiday in relation to the DB benefits which was disposed of in accordance with the *Schmidt* decision; those issues will not be discussed here.

116. The Tribunal agreed with this interpretation of the plan documents: *Kerry* OFSCD No 1, *supra* note 13 at paras 13-14.

117. *Kerry* OFSCD No 1 and 2, *supra* note 13.

118. *Kerry* OFSCD No 1, *ibid* at paras 24-28.

DB fund and one for the individual DC accounts, with different financial service providers. Only the first was a trust agreement; the second was an insurance policy. The "contribution holiday" for the DC plan required that monies be transferred from the trust fund to the insurer for deposit into individual employee accounts. The Tribunal was persuaded that these mechanics constituted a breach of trust, since the exercise involved removing monies from the trust fund. Remarkably, however, the Tribunal saw this breach of trust as a mere technical impediment, which could be readily cured by a set of retroactive amendments making the DC members "beneficiaries of the trust in respect of the Fund (in which case it would seem to follow that the insurance policy that is the funding vehicle for [the DC benefits] should be held by the trustee)."[119] With such amendments in place, the Tribunal saw no fundamental difference between the type of contribution holiday which the *Schmidt* court had found to be valid, and the contribution holiday at issue in this case; in both situations, the employer would simply be moving monies around under the trust umbrella.

The Supreme Court of Canada unanimously upheld the Tribunal decision on the plan expenses issue. While Rothstein J., writing for the full Court, acknowledges that the plan did not expressly authorize the payment of the expenses at issue, he holds that an employer need not find authority to pay expenses within the four corners of the plan documents; it has *implied* authority to pay expenses from the fund, and an amendment to authorize such payments expressly effects no substantive change. He rejects out of hand the employee argument that the expenses amendment violates the "exclusive benefit" clause. The term "exclusive benefit," in his view, simply cannot "be construed to mean that *no one but the employees* can benefit from the use of the trust funds."[120] Pension plans, he notes, are designed to provide substantial benefits to *employers*, who use them for "attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, increasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily."[121] As Rothstein J. sees it, since the plan provides benefits for the employees, and its expenses must be paid in order for the plan to continue, an amendment which permits those expenses to be paid out of the fund is "to the exclusive benefit of the employees, within the

119. *Kerry* OFSCD No 2, *supra* note 13 at paras 32-34, 41.
120. *Kerry, supra* note 13 at para 53 [emphasis added].
121. *Ibid* at para 54.

meaning of [the plan]."[122] He does not advert to the obvious fact that in the case before him, the employees had benefitted *more* from the employer's thirty-year practice of paying expenses from outside the fund. Nor does he advert to the ample evidence of representations made by the employer over the years to the employees that, in addition to making contributions, it was paying the plan expenses.[123] Like Cory J. in *Schmidt*, he appears to see such contextual evidence as irrelevant to the meaning of the plan documents.

On the DC contribution holiday issue, the majority of the Court finds nothing to criticize in the Tribunal's approach. The employees had grounded their argument on basic trust principles, arguing that since the fund had been accumulated to support the DB plan, it was a trust for the benefit of DB plan members. Under the new arrangement, the employer was now depleting that trust fund to meet very different obligations in an essentially different plan. The majority, however, was much less interested in the principles than it was in the *mechanics* behind the arrangement. Like the Tribunal, it took the view that if both DB and DC members are made beneficiaries of a single trust, the trust law problem vanishes.[124]

This solution, of course, simply begs the question before the Court: the question of whether the employer's proposal to draw on the trust fund to make its DC contributions is consistent with the trust restrictions governing the use of these funds. When Rothstein J. speaks of retroactive amendments to the 2000 Plan to ensure that the two funding instruments can become the property of "one trust in which all DB and DC members are beneficiaries,"[125] his language suggests that this trust exists in some concrete form outside the court; all that is necessary is to bring the DC members under its aegis. In fact, if there ever was a concrete 'trust,'[126] the plan's history has erased it. The trust agreement from the 1950s which created the *Schmidt*-based trust rights on which the Kerry employees rely is no longer in effect. The plan documents currently include a new 2000 trust agreement for the DB members, with a different financial service provider. This document cannot be "the trust" contemplated by the

122. *Ibid* at para 55.
123. The Tribunal had rejected this evidence as at most "the description of a practice...and not as an undertaking": *Kerry* OFSCD no. 1, *supra* note 13 at para 23.
124. *Ibid* at para 84.
125. *Kerry, supra* note 13 at para 84. At times, Rothstein J appears to be under the erroneous impression that an 'umbrella' pension trust already exists somewhere; in his recital of the facts, he observes that "[t]he Trust Fund was constituted in two separate funding vehicles, with two separate trustees": *ibid* at para 7.
126. A trust is traditionally defined either as a relationship entailing certain rights and duties, or simply as a set of obligations: *Waters*, supra note 42 at 4-5; arguably, a trust is always an abstraction.

Rothstein decision, however, since it does not, on its face, protect the trust rights created by the earlier agreement.[127] In reality, the trust at issue here is simply a set of legal obligations, originally created by a trust agreement drafted in the 1950s, but now "impressed" upon funds held under quite different practical arrangements. The rights flowing from those obligations are a judicial construct, existing only to the extent that the Court is willing to define and protect them. In permitting the employer to expropriate DB surplus for use in funding DC benefits, the majority is doing much more than correcting a minor flaw in the mechanics of the employer's arrangements. It is defining the limits of its willingness to sanction employee trust claims on pension funds when those claims conflict with the business objectives of employers. Those limits have shifted considerably since *Schmidt*.

Lebel J., joined by Fish J. in a vigorous dissent, is not taken in by the "single trust" metaphor. The hallmark of the law of trust, Lebel J. points out, is "the protection of the beneficiaries, who are entitled to have the trust property administered in their best interest."[128] One of its purposes is to "provide[]...an added layer of protection"[129] for plan beneficiaries. In Lebel J.'s view, it is simply perverse to characterize the DC contribution holiday as for the "exclusive benefit" of the employees: "it is hard to see how the DC contribution holidays benefit anyone but Kerry, who is relieved of its contribution obligations to the DC plan."[130] For him, Kerry's new plan is essentially two plans, not one plan;[131] he can therefore find no meaningful distinction between the employer's initial strategy and the Tribunal's proposed remedy. In both cases, monies move from the fund supporting the DB plan—the original trust fund—to DC individual accounts. Viewed functionally and not simply through the abstract lens of plan draftsmanship, the employer's DC contribution holiday strategy involves "an encroachment on irrevocable trust funds,"[132] stripping monies from the fund supporting the DB benefits for purposes unrelated to those benefits. This reality does not change simply by describing it differently; as Lebel J. put it, "[i]t would make a mockery of the significant

127. *Kerry* OFSCD no 2, *supra* note 13 at paras 2-4. The new trust agreement was silent on ("did not repeat") the non-diversion rights which had constituted the trust over surplus in the old agreement; the Tribunal found itself unable to remedy this deficiency, but took comfort in the fact that the new agreement did not expressly abrogate those rights: *Kerry* OFSCD no. 1, *supra* note 13 at paras 33-34.
128. *Ibid* at para 186.
129. *Ibid* at para 191.
130. *Ibid* at para 184.
131. "DB plans and DC plans are not cut from the same cloth"; they "carry a different set of risks and rewards": *ibid* at para 159.
132. *Ibid* at para 144.

protections afforded to trust funds" if the DC members could be made trust beneficiaries "by the mere stroke of a pen."[133]

Like *Schmidt*, *Kerry* confronted the Court with a direct clash between employee trust claims and the employer's broad power of plan amendment. In *Schmidt*, the Court reconciled that clash by 'reading down' the employer's power of amendment where trust rights are at issue. In *Kerry*, however, the Court takes the opposite tack, 'reading down' the trust rights and broadening the range of the power of amendment. Lebel J.'s view of trust law as a robust barrier protecting vulnerable plan beneficiaries against employer self-interest loses out to Rothstein's much more attenuated view of "exclusive benefit" and to his highly plastic view of the nature of the trust envelope.

3. Burke v. Hudson's Bay Co.

In *Buschau* and *Kerry*, the Supreme Court set a *post-Schmidt* course which gives employers broad power to deploy trust funds within on-going plans and corrrespondingly narrow duties to exercise their powers in the best interests of plan beneficiaries. The Court's most recent decision, *Burke v. Hudson's Bay Co.*,[134] confirms and extends that trajectory. The case involved a claim by a group of former employees of the Northern Stores Division of the Hudson's Bay Company (the Bay), a division whose long and unique history was reflected in its continuing label as the "fur trade division."[135] These employees, along with other Bay employees, were members of a DB plan established by the company in 1961. In 1987, after a severe downturn in the retail industry, the Bay sold the Northern Stores Division, with the pension liabilities of active employees included in the transaction. As part of the sale, the Bay transferred from its pension fund assets equivalent in value to the employee pension benefits.[136] Although the plan was in surplus at the time of the sale, no surplus was included.[137] The affected employees challenged the company's decision not to transfer any of the surplus. Their principal argument was that they had a trust claim to the surplus, based both on the language of the plan and on the employers' practice and representations to plan members over the years. In the alternative they argued, based on *Schmidt*'s dictum that "employee beneficiaries have an equitable interest in the total assets of the fund

133. *Ibid* at para 179.
134. *Supra* note 14.
135. *Burke* ONSC, *supra* note 14 at para 30.
136. The plan was registered in Ontario, where this type of transaction is governed by ss 80-81 of the *PBA*.
137. The agreement of purchase and sale provided for a price adjustment if the Bay were at any time ordered to make a surplus transfer: see *Burke*, ONSC, *supra* note 14 at para 130.

while it is in existence,"[138] that regardless of who owned the surplus, the employer had a fiduciary obligation to treat all plan beneficiaries with an "even hand," entitling them to have a share of the surplus transferred. By the time the case reached the Supreme Court of Canada, it was this fiduciary argument that was at the centre of the appeal.[139]

To understand the significance of the Court's decision on the fiduciary issue, it is important to understand how prior Canadian courts and tribunals had characterized fiduciary obligations in the pension context. The common law imposes fiduciary duties in situations in which one party to whom another is peculiarly vulnerable has discretion or power which can be unilaterally exercised so as to affect that other party's legal or practical interests.[140] Employers who administer pension plans appear to fit this fiduciary mould, and most pension regulatory statutes in Canada impose fiduciary duties on employers in their administrative roles.[141] In addition to plan administration, however, employers perform numerous additional functions—establishing and amending plans and trust agreements, making decisions about benefit and contribution levels and the payment of expenses, negotiating merger and asset transfer agreements—that also arguably meet the common law fiduciary test. Courts and tribunals have been hesitant, however, to impose fiduciary fetters on employers furthering their business interests within pension plans; as the Ontario Pension Commission bluntly put it, if employer powers of amendment were judged by fiduciary standards, "of what use would a power of amendment be?"[142]

To reconcile fiduciary rules with the perceived need to provide employers with flexibility, adjudicators have conveniently developed a 'two hats' doctrine, which distinguishes between employers acting as plan administrators and employers acting in other capacities (e.g. in conducting their employment relations). The 'two hats' doctrine saddles employers with fiduciary responsibilities only when acting as administrators, leaving

138. *Schmidt, supra* note 4 at para 89.
139. The *Burke* litigation commenced in 1993, with employees claiming ownership of surplus, and challenging both contribution holidays and plan expense payments. As the case proceeded through the courts, the employees dropped the contribution holiday issue, proceeding to the Supreme Court on the plan expenses and the surplus ownership issues, as well as the fiduciary argument. They lost on all counts based on the Supreme Court's interpretation of complex provisions in their plan documents. This discussion focuses on the fiduciary issue.
140. See *Frame v Smith*, [1987] 2 SCR 99 at para 60 per Wilson J (dissenting). The *Frame* test was invoked in *Burke, supra* note 14 at para 39.
141. Under pension legislation, "administrators" are those responsible for plan governance. There is considerable variation in how the statutes deal with fiduciary duties: see, for example, *Pension Benefits Standards Act, 1985*, RSC 1985, c 32 (2d Supp) s 8(3); *PBA*, ss 19, 22; *Pension Benefits Standards Act*, RSBC 1996, c 352, s 8(5), (6); *Supplemental Pension Plans Act*, RSQ, c R-17, s 150.
142. *Imperial Oil v Ontario (Superintendent of Pensions)* (1997), 18 CCPB 198 at para 33.

them free when wearing other 'hats' to make decisions which may injure the interests of employee beneficiaries.[143] The 'two hats' doctrine places a significant premium on how employer conduct is categorized. For this reason, the Bay argued vigorously in *Burke* that its decision to refuse to transfer any surplus to the successor employer's plan was not made in its capacity as plan administrator, and was therefore not subject to fiduciary standards.[144]

The Supreme Court, in a unanimous decision penned by Rothstein J., holds that the transfer decision *was* an administrator's decision and therefore attracted fiduciary analysis.[145] The Court nevertheless exonerates the employer of any breach of trust. Rothstein J.'s analysis focuses closely on the plan text. He acknowledges that the pension fund at issue is a trust fund that "must be administered according to trust principles"; indeed, the parties before him had conceded as much.[146] For him, however, the key issue is not the *nature* of the rights at issue—whether they are trust or contract rights—but the *content* of the rights, which he sees as defined solely by the plan documents, and which can therefore be determined only on a construction of those documents.[147] The Court's intense focus on the plan text is not easy to reconcile with the *Schmidt* holding that "to the extent that applicable equitable principles conflict with plan provisions, equity must prevail."[148] The *Buschau* Court had already taken a step back from trust pre-eminence by emphasizing the integrated nature of the plan text and the funding documents. The *Burke* Court steps back even further; it accords primacy to the pension plan over the trust agreement on the ground that the plan itself—a contract—makes *itself* the dominant document.[149] *Schmidt*'s holding that trust documents prevail over contract provisions as a matter of *trust principle* appears no longer to be good law.

143. The first explicit Canadian reference to the 'two hats' doctrine appears in *Imperial Oil, ibid.* While the case was decided in the context of the statutory fiduciary obligation in Ontario, Canadian courts in a variety of jurisdictions have applied a common law version of the doctrine: see, for example, *OMERS Sponsors Corporation v OMERS Administrative Corporation*, [2008] OJ no 425 (Sup Ct J); *Lloyd v Imperial Oil*, 2008 ABQB 379, [2008] 9 WWR 502; *Sutherland v Hudson's Bay Co*, [2007] OJ no 2979 at paras 310-16 (Sup Ct J); *Lieberman v Business Development Bank of Canada*, 2009 BCSC 1312 at paras 75-90, [2009] BCJ no 1938; and *Association provinciale des retraités d'Hydro-Québec c Hydro-Québec*, 2005 QCCA 304, [2005] QJ no 1644; *Indalex Limited (Re)*, 2011 ONCA 265, leave to appeal to the SCC granted, 2011 CanLII 77231.

144. See factum of the respondent at para 109, online: <http://www.scc-csc.gc.ca/factums-memoires/32789/FM020_Respondent_Governor-and-Company-of-Adventurers-of-England-Trading-into-Hudson's-Bay.pdf>.

145. *Burke, supra* note 14 at paras 41, 85.

146. *Ibid* at para 49.

147. E.g. *ibid* at paras 88-89.

148. *Schmidt, supra* note 4 para 92.

149. *Burke, supra* note 14 at para 79.

The Bay, of course, had drafted the documents, and had taken care to limit employee rights strictly to the pension benefits provided by the plan, leaving the fate of the rest of the fund within the employer's control.[150] Accordingly, as the Court interpreted the plan, employee trust rights did not include the right to surplus, either on plan termination or while the plan was on-going.[151] From the employees' perspective, however, the fact that the employer owned the surplus did not dispose of the fiduciary argument. As they saw it, whatever the scope of their strict legal rights, the employer had an over-riding fiduciary duty of even-handedness mandating an equitable division of the surplus. Rothstein J. takes a purely documents-based approach to this argument as well. In his view, the duty of even-handedness applies only with respect to the *rights* of the employees under the plan: "[t]he duty of even-handedness must be anchored in the terms of the pension plan documentation."[152] Since the employees had no right to surplus, "there is no duty of even-handedness applicable to the surplus."[153] While he does not expressly distance the court from Cory J.'s dictum that "employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence,"[154] Rothstein J. limits its reach to situations in which employees can make out a trust claim to the entire fund, including surplus. Where employees have no such claim, the *Burke* court sees their "equitable interest" as limited only to that portion of the pension fund necessary to support payment of their benefits at any given time.[155] Under those circumstances, Rothstein J. views the company's refusal to transfer surplus as a "legitimate commercial transaction."[156]

The Court's conclusion—that employees who cannot make out a case for surplus ownership on plan termination cannot insist on a transfer of surplus on plan sale—is practical, if not inevitable; any surplus transfer in these circumstances would be a windfall to the new employer.[157] Nonetheless, the Court's reasoning is problematic. Equitable rules governing fiduciary duties have conventionally been conceptualized as *supplementing*, rather

150. *Ibid* at para 63. In reaching this conclusion, the Court, as it had done in *Schmidt* and *Kerry*, dismisses as irrelevant contextual evidence of past practice and representations to the employees that might have shed light on the 'real deal' between the employer and the employees.
151. *Ibid* at paras 31, 34 (plan expenses), 83 (surplus).
152. *Ibid* at para 85.
153. *Ibid.*
154. *Schmidt, supra* note 4 at para 89.
155. *Burke, supra* note 14 at paras 51-60.
156. *Ibid* at para 91. The Court expressly leaves open the question of whether employees with a Catalytic-type ownership interest in surplus would be entitled to have a portion of surplus transferred: *ibid* at para 96.
157. Recent Ontario amendments, however, require a share of any surplus to be included in an asset transfer: PBA, s 80 (13)§4 (not yet in force).

than replicating, legal rules with respect to beneficiary rights. They have been understood to fetter not just conduct that is unlawful for other reasons, but also conduct, such as abuse of discretion, that would not otherwise be legally objectionable. Waters observes that "[t]he duty to act impartially [i.e. the duty of even-handedness] is usually associated in practice with circumstances where the trustees have administrative powers which involve exercises of discretion".[158] To relieve fiduciaries of any duty of even-handedness in respect to *discretionary* decisions, as the *Burke* decision can be read to do, would be a very substantial derogation from fiduciary protections.

It is unlikely that the *Burke* Court means to effect so radical a change in the law. More likely, the Court means only to adopt the proposition articulated much more explicitly by the Court of Appeal: the proposition that the duty of even-handedness is a 'default' principle, which can be excluded by the terms of a particular trust instrument. While Gillese J.A., writing for the Court of Appeal, acknowledged the "fundamental trust principle...that beneficiaries of a trust are to be treated in an even-handed fashion—one group of beneficiaries is not to be preferred over another,"[159] she emphasized an important caveat to this general principle; the duty of even-handedness applies "*unless the trust instrument so decrees.*" In her view, by giving the Bay the right to use surplus as it saw fit, the trust instrument in question "displaces the even-handedness requirement in respect of Plan members."[160] When the Supreme Court observes, then, that "[t]he duty of even-handedness must be anchored in the terms of the pension plan documentation,"[161] it may only be reminding us that much 'trust principle' is 'default law,' yielding to the terms of the specific documents which constitute the trust. Since both the drafting and amending of trust documents is primarily controlled by employers, however, employees and their advocates can take little comfort from this gloss.

From an employee perspective, the good news is that the *Burke* decision does not explicitly embrace the 'two hats' doctrine, which relieves employers of fiduciary responsibilities except in their administrator's role.[162] The bad news, however, is that the decision may have rendered the

158. *Waters, supra* note 42 at 967.
159. *Burke* ONCA, *supra* note 14 at para 59 [emphasis in original].
160. *Ibid* at para 60.
161. *Burke, supra* note 14 at para 85.
162. In a case note in *Benefits Canada* (October 7, 2010), Gary Nachshen argues that although there is no reference to the doctrine in the court's decision, the Supreme Court "implicitly blessed the two hats doctrine" in its *Burke* decision. While I disagree, I see the outcome as even more damaging to employee interests than the 'two hats' doctrine. The Supreme Court will soon get another opportunity to consider the "two hats" doctrine, since it has granted leave to appeal in *Indalex*, *supra* note 143.

"two hats" doctrine obsolete by clearing the way for employers to set their own limits on the scope and content of their fiduciary duties even in their role as plan administrators. *Burke* suggests that regardless of what 'hat' the employer is wearing, there is no 'trust principle' sturdy enough to stand against plan language relieving the employer of fiduciary responsibilities that would otherwise flow from the common law. As the Supreme Court now sees it, trust law does not impede discretionary decisions made in furtherance of "legitimate commercial transactions," as long as such decisions are sanctioned by the plan documents.

Conclusion: trust law and pension law reform

Schmidt's core holding that employee pension rights are rooted in trust law as well as in contract law signalled that employer self-interest would not be allowed unfettered sway within employment pension plans. To paraphrase Lebel J. in *Kerry*, *Schmidt* promised that trust law would provide an "added layer of protection" for employee rights not available under the law of contract. In subsequent cases, however, the court has stripped trust law of any such protective capacity, in favour of a facilitative idea of trust law in which the boundaries of employee pension rights are effectively created and limited by the terms of the plan documents. Typically, those documents are controlled by employers, who use their power to promote their own interests. There is little evidence that Canada's Supreme Court sees this as a problem; on the contrary, the court has evidenced a clear preference for pension rules that minimize impediments to "rational business decisions" and "legitimate commercial transactions."

The jurisprudence has overtaken Gillese's optimistic prediction that trust law would provide "the principles and approaches which can lead to a sensible and successful development" of pension law.[163] Our Supreme Court's current version of trust law, which allows employers to write the pension script, fails to account adequately for the employee interest. The courts themselves have recognized that pension litigation outcomes are frequently arbitrary from the employee perspective. In *Schmidt* itself, Cory J. observed: "[i]t seems unfair that there should be a different result for these two groups of employees based only upon a finding that a trust was created in one case but not in the other."[164] Courts have preferred to attribute troublesome jurisprudence to the limitations of the common law, however, rather than taking responsibility for fixing it. Cory J. argued that "the courts are limited in their approach by the necessity of applying

163. Gillese, *supra* note 1 at 224.

164. *Schmidt, supra* note 4 at paras 39 and 150.

the sometimes inflexible principles of contract and trust law," and called for legislation to address the distributive issues which he clearly saw at the core of the *Schmidt* dispute.[165] Subsequent courts have echoed this *cri de coeur* to relieve them of the difficult burden of sorting out rights and obligations within employment pension plans.[166]

Courts should not be so quick to give themselves a pass on their performance in these pension cases. The analysis of the case law in this paper has identified numerous analytic nodes where courts applying the common law have made choices—choices not dictated by "the law," but by predispositions and values, and the weighing of those policy factors they identify as relevant and important. The indeterminate nature of the law itself is reflected in *Schmidt*, where the majority and two dissenting judges come to three different conclusions about how to reconcile pension commitments with general powers of plan amendment under the umbrella of trust law. It is likewise reflected in *Buschau*, where the Court rejects the application of a "classic trust principle" at least in part on the grounds that it would thwart employer pension objectives. It is clear in *Kerry,* where dissenting judges accuse the majority of making a "mockery" of trust principles by allowing breach of trust to be remedied by the retroactive "stroke of a pen." And it is clear again in *Burke*, where the Court permits an employer to use its power over plan drafting to erase its fiduciary duty to exercise discretion in an even-handed fashion. The outcomes in these cases are of the Court's own making.

The task of deploying the common law to make sense of employment pension rights and obligations is not an easy one. Employment pension plans do not fit neatly into pre-existing legal paradigms. The statutory context within which such plans function creates additional interpretive challenges. In unionized workplaces, collective bargaining adds a further layer of complexity. But simply turning the problem over to legislatures offers no ready solution. As Ari Kaplan points out, legislatures have shown considerable reluctance over the years to take up the hot potato of employee pension rights and grapple with the real equities.[167] In prior rounds of pension reform, governments have shown a propensity to dodge the distributive questions raised by these cases. Legislative activity to date in our current round of pension reform in Canada suggests that so far, governments are running true to form. Some jurisdictions have taken

165. *Ibid* at paras 39 and 150.

166. See, for example, *Burke* ONSC, *supra* note 14 at para 113.

167. Kaplan, *supra* note 8 at 553-54. Gillese made this point as well in "Pension Trusts," *supra* note 1 at 250.

recent modest steps to address the most visible aspect of the *Schmidt* legacy, its indeterminate resolution of the question of surplus ownership on plan termination. In doing so, however, they have largely settled for procedural reforms that establish administrative mechanisms for resolving ownership questions, avoiding the substantive distributive questions.[168]

Almost twenty years after *Schmidt*, we are still searching for a stable and coherent theory of employment pension rights. Clearly legislatures must be pressured to take on a more substantive role in shaping new frameworks for pension rights; they have tools that common law courts do not possess. But courts too have an indispensable role to play. Our Supreme Court's current version of trust law, a version which empowers rather than restrains employers in the pursuit of their self-interest, must be declared a failure. There are, however, common law paths which the courts have yet to explore. They must be challenged to find a contract law which accords employees genuine agency as contracting parties, or a re-imagined trust law which reclaims its normative fiduciary content, or some novel hybrid of the two that can lead to fairer distributive outcomes and increased retirement income security within the employment context within which pension plans operate.

168. For example, recent amendments to Ontario's PBA (new s 55.1 to the *PBA*), provide some clarification on contribution holidays, but expressly do not over-ride plan provisions. Likewise, new s 77.11(5) permits surplus withdrawal, but only if there is a surplus-sharing agreement. Surplus allocation issues arising out of plan wind-ups may now go to arbitration (77.12), but arbitration is not mandatory, and the amendment does not spell out what criteria are to be applied by the arbitrator in making a determination.