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**LIABILITY OF PLAN ADMINISTRATORS AND
ADVISORS FOR IMPRUDENT INVESTMENT
PRACTICES:
RECENT STATUTORY AND CLASS ACTION
DEVELOPMENTS IN QUÉBEC**

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January 31, 2007

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I. OVERVIEW

The administration of the defined benefit pension plans still in force in Québec and in particular, the adoption of sound investment policies and practices, is a multi-disciplinary exercise requiring the interventions of the fund sponsor, the plan administrators, their actuaries, investment advisors and accountants. All of these intervenants assume significant potential exposure and liability in Québec, given the inherent market and political risks associated with the failure to secure retirement income and in light of the distinctive and novel pension statutory regime in place in the Province.

The *Régie des rentes du Québec* (“**Régie**”), which oversees the regulation and compliance of pension plans pursuant to the *Supplemental Pension Plans Act*¹ (“**SPPA**”), also plays a role in verifying the conformity of these investment policies and practices and exceptionally, is vested with the powers and rights of a pension plan trustee when it assumes the provisional administration of a pension plan.

This paper therefore endeavours to identify the principal statutory duties incumbent on pension plan, administrators and advisors and their correlative potential liabilities in the context of the design and implementation of investment policies and practices. In this regard, the exculpatory effect of delegating authority to or relying on expert pension plan advisors is addressed at length, as well as the other defences available to pension plan administrators. The measures of control and supervision to which pension administrators are subject are also discussed. This review of the applicable Québec legislative

¹ R.S.Q. c. R-15.1.

framework is both timely and germane, given the passage of the controversial *Act to amend the Supplemental Pension Plans Act, particularly with respect to the funding and administration of pension plans*² (the “**Act to Amend**”), which was assented to by the Québec legislature on December 13, 2006.

Finally, the salient features of and a status update of the highly publicized Québec Superior Court cases of *Langlois v. Roy*³ and *Coutu v. Roy*⁴ (the “**Jeffrey Mine Cases**”) are addressed. Indeed, some of the recent amendments to the SPPA were at least in part inspired by the possible juridical ramifications of these two cases. Moreover, these cases raise threshold standing, delegation of power, reliance and investment policy ratification issues. These issues have yet to be adjudicated on the merits and could ultimately curtail the rights of plan participants to sue former pension plan administrators and/or their investment advisors, especially by way of class action relief.

² S.Q. 2006, c. 42.

³ *Langlois v. Roy* (January 23, 2006), St-François 450-06-000001-044, J.E. 2006-496 (C.S.).

⁴ *Coutu v. Roy* (January 23, 2006), St-François 450-06-000002-042 (C.S.).

II. LEGAL FRAMEWORK

The administration of Québec pension plans is judicially governed by federal and provincial tax laws⁵, the provisions of the SPPA and the general provisions of the *Civil Code of Québec* (“C.C.Q.”), particularly with regard to the interpretation of contracts (Articles 1425 and sub.) and trusts (Articles 1260 and sub.):

6. A pension plan is a contract under which retirement benefits are provided to the member, under given conditions and at a given age, the funding of which is ensured by contributions payable either by the employer only, or by both the employer and the member.

Every pension plan, with the exception of insured plans, shall have a pension fund into which, in particular, contributions and the income derived therefrom are paid. The pension fund shall constitute a trust patrimony appropriated mainly to the payment of the refunds and pension benefits to which the members and beneficiaries are entitled.⁶
(our emphasis)

The SPPA is a public order statute and as such allots *de minimis* rights to plan participants and, unless the terms of a plan are more advantageous to them than is stipulated in the SPPA, then any provision of a pension plan which is incompatible with the Act will be deemed null and void.⁷

⁵ *Income Tax Act*, R.C.S. 1985 (5th Supp.) c.1; *Taxation Act*, R.S.Q. c. I-3.

⁶ Art. 6 SPPA.

⁷ Art. 5 SPPA.

III. ROLE AND INDIRECT EXPOSURE OF THE PLAN SPONSOR

The plan sponsor, while responsible for the funding⁸ of an on-going pension plan, has no direct duties or obligations in respect of investment policy and practices once a pension committee is appointed to administer the plan.

The plan sponsor's potential exposure stems from its appointment of employer representatives to the plan's pension committee. Pension committee representatives of the plan sponsor usually out-number the representatives of active participants and retirees. These corporate representatives usually benefit from hold harmless and indemnification covenants from the sponsor. However, most sponsors only partially offset their potential exposure for errors and omissions of these representatives with fiduciary liability insurance coverage.

Moreover, the employer's representatives are sometimes more qualified in investment matters than the remaining members of the pension committee, owing to their experience as senior officers and managers of the sponsor. As such, they are exposed to possible allegations of disproportionate and overly persuasive authority with the participant and retiree representatives of a pension committee. As the Jeffrey Mine cases amply demonstrate, these members can also be the target of conflict of interest accusations

⁸ The SPPA imposes on plan sponsors the obligation to amortize unfunded actuarial liabilities of the plan and the Act to Amend further imposes on plan sponsor's the duty to fund a provision for adverse deviation. The adoption of this new provision was highly controversial, given that the possibility to recapture the sums necessary to fund this provision, in the event it is not required at termination, is entirely remote, given the SPPA's asymmetrical and "equitable" surplus entitlement procedure.

based on perceptions that they favoured the interests of the sponsor to the detriment of the participants and retirees.

IV. THE COMPOSITION, ROLE AND DUTIES OF PENSION COMMITTEES

A) The role of pension committees

The pension committee is the plan administrator (s. 147 SPPA) and acts “in the capacity of a trustee” (s. 150 SPPA). Article 1278 C.C.Q. sets forth the powers of a trustee as follows:

Art. 1278. A trustee has the control and the exclusive administration of the trust patrimony, and the titles relating to the property of which it is composed are drawn up in his name; he has the exercise of all the rights pertaining to the patrimony and may take any proper measure to secure its appropriation.

A trustee acts as the administrator of the property of others charged with full administration. (*our emphasis*)

The provisions contained in the *Civil Code of Québec* concerning the administration and liability of the trustee (Articles 1260 and sub.) and the administration of the property of others (Articles 1299 and sub.) are thus enforceable with regard to the administration and investment of pension funds by pension committees.

B) Composition of pension committees

When the SPPA was amended in January 1990, pension committee structure became mandatory and aimed to promote transparency and representativity, in the context of the financial administration of pension plans. Hence, all pension committees must be

comprised of at least one representative of the active participants, one representative of the non-active members and beneficiaries and one independent member:

147. Every pension plan shall, from its registration, be administered by a pension committee composed of at least one member, designated as and when provided in the pension plan, who is neither a party to the plan nor a third person to whom, under section 176, a loan may not be granted, and the following members:

1) one member designated by the active members at the meeting held pursuant to section 166 or, in the absence of such a designation, one plan member designated as and when provided in the plan; and

2) one member designated by the non-active members and beneficiaries at that meeting or, in the absence of such a designation, one plan member or beneficiary designated as and when provided in the plan.

The active and former participants can also each elect a non-voting pension committee member, usually named an “observer” (s. 147.1 SPPA). These observers should not be held liable for the decisions of the pension committee, since they cannot vote and are not presumed to have solidarily endorsed the decisions of the committee (Sections 147.1 and 156 SPPA).

C) The investment duties incumbent on pension committee members

As mentioned earlier, the pension committee is charged with the full administration of the property of others (art. 1278 al. 2 C.C.Q.). A full administrative mandate entails not only the conservation of trust assets, but also the accrual and growth of the fund (art. 1301 and 1306 C.C.Q.).⁹ Given pension trust assets must necessarily accrue over the long term, the investment discretion of pension committee members is relatively wide.

⁹ M. Cantin Cumyn, *L'administration du bien d'autrui*, Cowansville, Yvon Blais, 2000 at 194.

1) The duty of care

The pension committee trustees are imposed a legal duty of care specifically defined at 151 of the SPPA:

151. The pension committee shall exercise the prudence, diligence and skill that a reasonable person would exercise in similar circumstances; it must also act with honesty and loyalty in the best interest of the members or beneficiaries.

The members of the pension committee shall use in the administration of the pension plan all relevant knowledge or skill that they possess or, by reason of their profession or business, ought to possess.

Some authors maintain that there is a distinction between this standard and the standard of care applicable in *common law* jurisdictions (which refers instead to a reasonable person who is administering his/her own property with prudence), but such opinions remain controversial.¹⁰ Be that as it may, the Québec standard of care includes both objective and subjective features. When adopting an investment policy or practices, a pension committee member's decision will be measured against those of an objective and reasonable person placed in similar circumstances. The levels of prudence and diligence required will be those attributable to such an objective and reasonable person. However, the standard incorporates a somewhat subjective feature by measuring a committee member's skills and knowledge based on the dictates of his/her own actual profession or experience.

¹⁰ *Ibid.* at 271, note 745.

Given this limitation, not every pension committee error or omission will amount to an actionable fault (or tort), as long as members with the same knowledge or skill placed in same circumstances would have made the same decision or omission.¹¹

2) The duty to act in the best and common interests of the plan participants and beneficiaries

The pension committee members must always exercise their powers and fulfill their duties “in the best interest of the members or beneficiaries” (s. 151). Consequently, they must necessarily avoid any conflicts of interest as prescribed by Section 158 of the SPPA:

158. No member of a pension committee may exercise his powers in his own interest or in the interest of a third person nor may he place himself in a situation of conflict between his personal interest and the duties of his office.

If the committee member is himself a member or a beneficiary of the plan, he shall exercise his powers in the common interest, considering his own interest to be the same as that of the other members or beneficiaries of the plan.¹² (*our emphasis*)

Any committee member with a conflicting interest must notify the committee without delay. The committee must keep a register of conflicts where every interest or right disclosed by committee members is recorded and can be examined by any interested person. (s. 159).

The practical difficulty with this provision is that it fails to take into account the fact that active and retired participants do not always or necessarily have the same investment

¹¹ Since the text of s. 151 is similar to s. 1309 C.C.Q., see the interpretation of J.B. Claxton, *Studies on the Quebec Law of Trust*, Toronto, Thomson Carswell, 2005 at 18.24 and sub.

¹² See also s. 1310-1311 and 1314 C.C.Q.

objectives. The interests of these respective groups may not always dovetail. Active members may be willing to accept greater investment risks in order to alleviate an employer's obligation to amortize unfunded liabilities and thereby promote the continuity and the longevity of a plan. Retirees on the other hand may have a much lower tolerance or aversion for investment risks and may not care a wit for the ongoing survival of their plan. Identifying a common interest in such circumstances can be daunting to say the least. The statutory committee structure implicitly recognizes these divergent interests by imposing separate representation for active and former plan participants, but imposes the pursuit of a common interest. The SPPA also fails to consider the obvious, namely that retirees were once active participants.¹³

3) The duty to adopt internal, operational and governance by-laws

The Act to Amend introduces a new provision which could no doubt serve as a point of reference for the identification of the duties of pension committee members. In effect, Section 151.2 of the SPPA which will come into force on December 13, 2007 reads as follows:

“151.2. The pension committee may adopt internal by-laws establishing its rules of operation and governance. The committee ensures that they are complied with and reviews them regularly.

The internal by-laws determine, in particular,

- (1) the duties and obligations of the committee members;

¹³ This incongruity should become palpable when considering the Act to Amend's new Section 146.3 which requires that actuarial surplus can only be used to augment benefits in a manner equitable to both active and non-active members. See also Québec, Committee on Social Affairs, *Journal des débats*, (November 23, 2006 from 17h to 18h and November 28, 2006, from 20h14 to 20h40). Online: <http://www.assnat.qc.ca/fra/37legislature2/commissions/cas/index.shtml> (Mrs. Courchesne, Minister of Employment and Social Solidarity).

- (2) the rules of ethics to which those persons are subject;
- (3) the rules governing the appointment of the chair, vice-chair and secretary;
- (4) the procedure for meetings and the frequency of meetings;
- (5) the measures to be taken to provide professional development to committee members;
- (6) the measures to be taken to ensure risk management;
- (7) internal controls;
- (8) the books and registers to be kept;
- (9) the rules to be followed when selecting, remunerating, supervising or evaluating delegates, representatives or service providers; and
- (10) the standards that apply to the services rendered by the committee, namely the standards on communicating with plan members and beneficiaries.

In the event of a discrepancy between the text of the pension plan and the text of the internal by-laws as regards the operation and governance of the committee, the latter prevails. However, in the case of the following subjects, the internal by-laws prevail only if the text of the pension plan expressly so provides:

- (1) the rules governing the appointment of the chair, vice-chair and secretary of the pension committee as well as their duties and obligations;
- (2) quorum and the granting of a casting vote at committee meetings; and
- (3) the proportion of committee members who must participate in a decision in order for it to be valid.” (*our emphasis*)

The adoption of rules or by-laws with respect to investment risk management measures and the appointment and supervision of professional experts necessarily enshrines both express and implied duties for pension administrators. In order to manage risk, pension committee members are not only bound to review whether the performance of the fund meets their investment policy benchmarks. They must further consider asset mix and diversification measures and/or recommendations. They must also assess how their investment managers fare *vis-à-vis* their peers and track their internal affairs (changes to compensation programs and key staff members, poor financial results, diminished

research budgets or capabilities, etc.), which could plague the future performance of these advisors. Given that pension committee participation is a charitable part-time endeavour, it is not surprising that most committees for mid to large funds retain professionals to monitor and supervise this activity.

4) The duty to adopt an investment policy

Unless the pension plan recognizes the power of the members to do so, only the pension committee and its delegates may decide how the assets of the plan are to be invested (s. 168 al. 1 SPPA). These investments must be made according to law and in conformity with the written investment policy to be established and adopted by the pension committee (s. 168 al. 2 and 169-170 SPPA).

One of the central and paramount duties of a pension committee is its obligation to adopt and implement an investment policy. Section 170 of the SPPA provides that such investment policies must set forth the following minimum information:

170. Unless the Régie authorizes, on the conditions it fixes, that the investment policy be simplified, the policy must set out

- 1) the expected rate of return;
- 2) the degree of risk involved in the investment portfolio, particularly as regards price fluctuations;
- 3) liquidity requirements;
- 4) the proportion of assets that may be invested in debt securities and equity securities, respectively;
- 5) the permitted categories and sub-categories of investments;
- 6) investment portfolio diversification measures conducive to an overall reduction of the degree of risk;

- 7) rules and a time schedule applicable to the valuation of the investment portfolio and to the monitoring of the management of the investment portfolio and those applicable to the review of the investment policy.

The investment policy must also include the following rules unless they are already set forth in the plan contract *per se*:

- 1) rules regarding the solvency of borrowers and the security required for granting loans out of the assets, in particular the lending of securities and hypothecary loans;
- 2) rules applicable to the exercise of the voting rights attached to the securities forming part of the assets;
- 3) the basis for the valuation of investments that are not traded on an organized market;
- 4) rules applicable to the use of futures contracts, options, share purchase warrants or share rights or other financial instruments;
- 5) rules regarding the loans that may be raised by the pension committee.

Any committee whose investment policy fails to adequately address these mandatory subjects can easily be targeted for litigation during a down cycle. The investment policy must be tailored to the type and characteristics of the plan and its financial obligations. Pension committee members are therefore bound to adopt pension investment policies which are suitable for and take into account the nature of the plan, its level of funding, its maturity and temporal investment horizon. As well, since the financial portrait and membership of a plan can quickly evolve, pension committees must periodically review their investment policies to ensure they remain well suited to fund the plan and are still apt to fulfill the performance benchmarks stipulated therein. The degree of risk and liquidity requirements may vary depending on changes in membership data and benefit structure and the possibility of an involuntary plan termination.

5) The duty to comply with mandatory investment practices and prohibitions

Sections 171 to 178 of the SPPA expressly enumerate a non-exhaustive list of investment duties, mandatory practices and prohibitions which must necessarily be adhered to by pension committee members:

- the assets of the fund may only serve to secure the obligations of the plan (s. 171 al. 2);
- the pension committee must endeavour to establish a diversified portfolio, unless it is reasonable to act otherwise in the circumstances (s. 171.1 ; see also art. 1340 C.C.Q.);
- the assets may not be invested, directly or indirectly, in securities controlled by the employer in a proportion greater than 10 % of their book value (s. 172);
- except in the case of securities traded on an organized market, the assets cannot be invested in securities issued by a legal person to whom a loan is prohibited under Sections 176 and 177 (s. 174);
- the assets shall not be invested, directly or indirectly, in shares carrying more than 30 % of the voting rights attached to the shares of a legal person, except for shares referred to in Section 998 of the *Taxation Act* (R.S.Q. c. I-3) (s. 175); and
- no loan out of the assets of the pension plan may be granted to the person or group enumerated in Section 176, except under the circumstances prescribed by Section 177 (see also s. 178).

The pension committee also has the responsibility to ensure investments remain lawful, even in cases of *force majeure*:

179. If, as a result of an unforeseen or uncontrollable event, the assets of the pension plan cease to be invested according to law, the pension committee shall, within a reasonable time after it has knowledge of the event, take every step necessary to regularize the situation.

6) The implicit duty to review all plan and financial documentation

The Act to Amend introduced a new provision at Section 151.3 which reads as follows:

151.3. The secretary of the pension committee or any other person appointed by the committee provides the committee members with the documents and information needed to administer the pension plan.

Committee members have access to all information on the plan and may obtain a copy of any document. However, they may not have access to personal information unless it is required in the performance of their duties. (*our emphasis*)

Mandatory access to all pension plan documentation necessarily entails the correlative duty to review same. All committee members must be familiar with these documents and periodically review same when appropriate. For instance, age/maturity and benefit modification data compiled by the plan actuaries can have an impact on the investment objectives of the committee and may warrant the review and/or modification of the investment policy.

7) The duty to inform and render an account

Various provisions¹⁴ of the SPPA compel plan trustees to inform participants, retirees and the Régie of the financial posture of the plan and to render an account of their administration of the pension fund. These provisions aim to provide participants and retirees with the opportunity (1) to repudiate, ratify or confirm the actions of the pension committee and (2) for the Régie to ensure the compliance of the pension plan.

The mandatory annual meeting of the trustees and the participants and retirees of pension plan is the principal venue allotted to the pension committees to fulfill their duty to inform:

166. Within six months after the end of each fiscal year of the plan, or within such additional period as may be granted by the Régie, the pension committee shall, by written notice, call each member and beneficiary and the employer to a meeting held to

1) allow the members, the beneficiaries and the employer to be informed of the amendments made to the plan, the entries recorded in the register kept pursuant to section 159 and the financial position of the plan;

2) enable the group formed of active members, on the one hand, and the group formed of non-active members and beneficiaries, on the other hand, to decide whether or not to designate a pension committee member under section 147 or 147.1 and, if the decision is affirmative, to proceed with the designation either in the manner proposed by the committee or, if none is proposed or if the group refuses the manner proposed, in a manner, determined by the group, which allows the designation to be made at that meeting;

¹⁴ See also s. 111-115 of the SPPA which provide that the members may have access to information with regards to their rights and obligations under the plan. See also Sections 57 to 59 of the *Regulation Respecting Supplemental Pension Plans, (R.R.Q. R-15.1, r.1)*, which enumerate the information to be provided to plan participants and retirees in their annual statements and Section 60 of the Regulation which entitles plan participants to review and obtain copies of the investment policy and other key plan documents including the delegation of power or contracts entered into with the service providers of the plan.

3) if no special meeting was called pursuant to section 166.1, enable the group formed of active members not referred to in subparagraphs 1 and 2 of the first paragraph of section 146.5, on the one hand, and the group formed of non-active members and beneficiaries, on the other hand, to vote on a proposal to amend the pension plan, made by the employer under section 146.5.

A decision relating to a matter mentioned in subparagraph 2 or 3 of the first paragraph shall be made, for each group, by a majority of the votes cast by its members.

The subjects determined by regulation must, in addition, appear on the agenda of the meeting.

The pension committee shall, in addition, render an account of its administration at that meeting. *(our emphasis)*

The annual meeting first allows the opportunity for the members, active or non-active, and the beneficiaries to address the appointment of their committee representatives. They can elect new representatives, repudiate and replace or maintain their prior representatives. The pension committees must also report on and provide copies of the audited financial statements of the Plan Fund. They must further report on the funding of the plan and the results of the actuarial valuations, both on an ongoing and solvency (or termination) basis. Finally, committee members must report on the appointment, performance and/or replacement of their investment advisors, having regard to the benchmark objectives set forth in the Investment Policy.

The annual meeting is also the main forum to address and report on plan amendments and the entries recorded in the register regarding conflicts of interest.

Finally, the Annual Report, which all pension committees file with the Régie, must include an audited financial report (statement of plan assets, renewal and expenditures for the fiscal year just ended (Section 161 SPPA)).

D) Pension Committee Delegation of Powers to Plan Actuaries and Investment Advisors

Article 1278 C.C.Q. stipulates that the trustee has “the control and the exclusive administration of the trust patrimony” and that “the titles relating to the property of which it is composed are drawn up in his name.” However, Section 152 of the SPPA provides that the pension committee may delegate all or part of its powers, or may be represented by a third person for a specific act. This power to delegate and/or appoint agents can be subject to limitations or prohibitions contained in the pension plan. The delegatee may also sub-delegate, but only to the extent permitted in the original delegation (s. 152).

Committee resolutions confirming such delegations should be clear and detailed to avoid controversy and exposure. As a rule of thumb, if the committee is fully relying on experts to implement or monitor investment, accounting or actuarial activity, it should fully delegate to them the power to exercise such activity. Unlike Article 1337 C.C.Q., Section 152 of the SPPA does not prohibit pension committees from delegating matters which fall within their exclusion discretion.¹⁵ This tends to suggest, in our view, that there are no delegation limits of substantive authority. Notwithstanding such an unfettered right to delegate powers, a committee does not abdicate its exclusive control of the trust fund patrimony given its power to revoke such delegations. In effect, Section 155 also provides that the pension committee shall re-examine the delegations of powers to decide if they should be maintained or revoked within 30 days after a member

¹⁵ *Supra*, note 13 (November 28, 2006 at 21h50) (Mrs. Courchesne, Minister of Employment and Social Solidarity).

having the right to vote takes office. A minimum level of monitoring and discretion must necessarily be exercised.¹⁶ While a committee may delegate the preparation of an investment policy and rely on expert advice to determine whether any amendments thereto become necessary, it must still reserve the right to ultimately approve or modify same, albeit based on the advisor's recommendations.

V. THE LIABILITY OF PENSION COMMITTEE MEMBERS AND THEIR DELEGATEES, SERVICE PROVIDERS AND EXPERTS

A) The absence of solidary liability between pension committees and the delegated professionals

When the SPPA was substantially reformed in 1990, Section 154 read as follows :

154. The pension committee shall not be liable for any act or omission of the person or body to whom or which it has delegated powers unless

- (1) it knew or should have known that he or it did not possess the required skill;
- (2) it was not empowered to make a valid delegation of such powers;
- (3) it consented to, or ratified, such acts or missions.

In 1994, this statutory limitation of liability was narrowed even further by amendment.

Sections 153 and 154 of the SPPA established the liability of pension committee members, in a delegated framework as follows:

153. The person or body exercising delegated powers shall assume the same obligations and incur the same liability as those the pension

¹⁶ *Supra* note 11, at 8.18 to 8.21.

committee or one of its members would have had to assume or have incurred if the powers had been exercised by the pension committee.

154. The pension committee is accountable for the person to whom it has delegated powers if, among other things, it was not authorized to do so; if it was so authorized, it is accountable only for the care with which it selected the delegatee and gave him instructions. (*our emphasis*)

These provisions clearly confirmed that pension committee members were not solidarily liable for the errors, omissions or negligence of the professionals to whom they delegate their powers. This delegation of powers to professionals invariably absolved pension committee members of any such solidary liability given the legislator's use of the conditional terms "would have had to assume or have incurred if the powers had been exercised by the pension committee." Moreover, the penultimate sentence of Section 154 clearly provided that a pension committee which was authorized to transfer its powers, was only accountable for the care with which it selected the delegatee and the clarity and sufficiency of its instructions. Such a conclusion was also indirectly buttressed by Section 156 of the SPPA which holds that :

156. Every member of the pension committee is presumed to have approved any decision made by the other members. He shall be solidarily liable therefor with the other members unless he expresses his dissent without delay.

As no solidarity rule was further adopted between pension committee members and delegates, such a transfer of powers necessarily had an exculpatory function. Indeed, Article 1525 C.C.Q. provides that solidary liability cannot be presumed and must be established by statute or contract.

Section 180 of the SPPA only appeared to suggest an opposite conclusion by expressly providing that pension committee members who approved unlawful investments were by

that sole fact solidarily liable for any loss resulting therefrom. Indeed, when the selection of plan fund investments is delegated to an advisor, no committee pre-approval is obtained for specific investments, such that this Section does not create accountability for delegated investment activity. Moreover, this Section, in any event, included a caveat which absolved pension committee members of any liability if they acted within their powers and relied on the advice of professionals. Thus, pension committee members can only be held liable for the errors or negligence of their delegates if they had no authority to effectively delegate or if they did not take proper care in selecting and providing instructions to their delegated professional advisors.

Given the SPPA's evident bias for participant equity, it is reasonable to conclude that legislative intent effectively sought to absolve pension committee members for any liability stemming from the exercise of lawfully delegated powers. The legislature must have envisaged that some pension committee members would neither possess the professional training nor the substantive and practical knowledge necessary to perform the actuarial, accounting or investment functions which are imperative to the sound management of a pension plan - that they would necessarily rely on the advice and decisions of professionals who did. Imposing statutory liability on pension committee members for the asset mix, diversification, risk management and/or funding errors or omissions of professionals, who benefited from such knowledge and were in a position to avoid the resulting trust losses, defied common sense. Such liability would have dissuaded volunteer and representative participation in these new pension committees and the transparency policy objectives of the 1990 reform.

Regrettably, it is the Régie itself which introduced ambiguity where none was warranted. In its SPPA Annotations and Comments compendium, it offered that pension committee members remained liable for their delegates' faults, errors or omissions if they consented to or ratified same. The Régie based this liability on the committee's general fiduciary duty to act in the best interests of the participants and beneficiaries. It arrived at this opinion notwithstanding that it recognized that Section 154 had been amended to remove language which provided for committee liability based on such consent and ratification.¹⁷

To the best of our knowledge, there are no reported precedents on this issue. In the *Black v. Place Bonaventure inc.*¹⁸ case, the class petitioner argued that the custodian who was delegated the management of the Place Bonaventure pension fund was solidarily liable with the plan administrators for the payment of augmented benefits not authorized under the Plan. The enhanced benefits were paid to nine management employees pursuant to a plan amendment which purportedly had not been lawfully adopted, as no notice thereof was provided to retirees. The custodian argued that no such solidarity was possible given the terms of Sections 153 and 154 of the SPPA. It further argued that the Place Bonaventure pension committee had retained any and all authority over plan amendments, including those which were the object of dispute. The class petition was

¹⁷ Québec, Régie des Rentes, *Loi sur les régimes complémentaires de retraite : annotations et commentaires*, t. I, Québec, Publications du Québec, 2006, at 153-1 to 154-4.

¹⁸ *Black v. Place Bonaventure inc.*, (August 13, 2004), Montréal 500-09-013311-030, J.E. 2004-1695 (C.A.).

dismissed on other grounds, such that no decision on the impact of Sections 153 and 154 of the SPPA was rendered.

The University of Montréal¹⁹ case, which involves alleged pension trust losses stemming from unlawful investments, could very well tackle this issue, but the class certification motion which was heard in November 2006 is still under advisement.

Legislative intent was further frustrated by practical reality. Firstly, in some plans, the committee members overlooked the legal distinctions between a delegation of power and a services agreement or mandate (agency), thus opening pension committee members to allegations of solidary liability. Some plans still contained ratification and consent provisions for delegated activity notwithstanding the 1994 amendment to Section 154 of the SPPA. In some cases, the plan text provided for the solidary liability of the pension committees and their delegates, notwithstanding the SPPA did not. It is perhaps not out of pure happenstance that these plan texts were sometimes crafted by plan advisors.

Secondly, the contracts entered into with delegates must necessarily reflect this transfer of duty and liability. However, large institutional investment advisers have in the main successfully imposed the execution of their standard form services agreements. The terms of these agreements generally preclude any acceptance of delegated authority and correlative assumption of liability. Moreover, such agreements often include provisions

¹⁹ *Syndicat général de professeurs et professeures de l'Université de Montréal v. Goudreau*, Montréal 500-06-000294-054 (S.C.).

excluding the liability of the service provider, save in instances of gross negligence and/or fraud.

In short, actuarial and investment firms at least on occasion refused to endorse or accept any such delegation of powers from the pension committee, thereby leaving pension committee volunteers liable for decisions which they could not themselves properly assess or make without relying on these professionals.

The 2004 to 2005 adjudication of the motions for leave to institute class action proceedings against the former committee members of the Jeffrey Mine pension plans, also significantly highlighted the need to address these issues, given the preliminary and contractual grounds of contestation asserted by the Respondent investment advisors and actuaries. Remarkably, the Régie was a passive party to these proceedings.

B) The 2006 Act to Amend and Good Faith Reliance on Delegates, Service Providers and Other Experts

It is against this background, that the Act to Amend recently introduced a series of new provisions and amendments, which should significantly attenuate the potential liability of pension committee members who, in good faith, rely on the advice of their actuaries, investment advisors and accountants, but have not attempted and/or succeeded to formally and contractually delegate their administrative powers to them.

In effect, the Act to Amend adopts a new provision at Section 151.1, which introduces a presumption of prudence when the pension committee acts in good faith on the basis of an expert's opinion:

151.1 The pension committee is presumed to have acted with prudence where it acted in good faith on the basis of an expert's opinion.

The Parliamentary Debates of the Committee on Social Affairs²⁰ preceding the adoption of the Act to Amend suggest that the term "expert" is to be given a wide interpretation and can include anyone with relevant expertise, irrespective of whether this activity is regulated by a professional corporation or other regulatory body. This presumption is evidently an amendment to the standard of care set forth at Section 151 SPPA. The standard is presumed to have been met once pension committee members establish they relied in good faith on the advice/opinion of experts. This presumption is rebuttable based on basic rules of canonical construction. It remains to be seen, however, whether the courts will limit the scope of the rebuttable evidence which can be advanced by plaintiffs. Will they only be permitted to prove that pension committee members were not acting in good faith and did not rely on experts, or will the courts further permit plaintiffs to argue that pension committee members were nevertheless negligent even if they relied in good faith on the advice of experts?

In our view, if pension committee members are held solidarily liable for investment policies and practices notwithstanding they relied in good faith on expert advice, then the

²⁰ *Supra* note 13 (November 28, 2006 from 21h30 to 21h50) (Mrs. Courchesne, Minister of Employment and Social Solidarity; Mrs. Beaudoin and Mr. Reid).

presumption would become entirely futile. Generally speaking, statutory presumptions are legislated to alleviate a plaintiff's burden of proof. Here, the burden to establish pension committee liability also rests with the plaintiffs, but the presumption is intended to benefit committee members. If plaintiffs are given the opportunity to establish solidary negligence notwithstanding the good faith reliance of pension committee members, the presumption would offer no tangible benefit to committee members since plaintiffs have the burden of proving such negligence in any event. In our opinion, this provision was instead intended to transfer exclusive liability from the pension committee to the experts, whom they relied on in good faith, whether or not they ratifies their decisions or formally delegated their powers to them. This is somewhat supported by the statements made by the Minister's comments during the parliamentary debates preceding the Act to Amend.²¹ Moreover, further amendments to the SPPA also indirectly corroborate this legislative intent.

Indeed, Sections 153 and 154 of the SPPA were also amended as follows:

153. The person or body exercising delegated powers shall assume the same obligations and incur the same liability as those the pension committee or one of its members would have had to assume or have incurred if the powers had been exercised by the pension committee. The same applies to service providers and representatives who exercise a discretionary power belonging to the committee.

154. The pension committee is accountable for the person to whom it has delegated powers if, among other things, it was not authorized to do so; if it was so authorized, it is accountable only for the care with which it selected the delegatee and gave him instructions. Service providers and representatives who exercise a discretionary power belonging to the pension committee are considered to be delegatees. [Amendments identified by our emphasis.]

²¹ *Ibid.* note 13.

Hence, whether or not a service provider or agent agreed to a delegation of powers, it will be deemed (“considered”) to have done so and assumed the committee’s liability when it exercises a discretionary power of the committee. This further presumption is irrefutable in our view. The transfer of liability to service providers and agents is no longer contingent on a formal written delegation, but rather on a factual finding, namely, whether the provider or agent exercises a discretionary power of the committee. This transfer of liability will also take place irrespective of the terms and limitations of the service or agency agreements.

In effect, Sections 154.1 to 154.4 were also added to the SPPA and read as follows:

“154.1. The pension committee selects and hires the delegates, representatives and service providers.

154.2. Delegates, representatives and service providers must submit reports on their work to the pension committee.

Delegates, representatives and service providers must report to the pension committee in writing any situation noted in the normal course of their duties that might adversely affect the financial interests of the pension fund and that requires correction.

If the pension committee fails to take immediate corrective measures, the delegatee, representative or service provider must send a copy of the report to the Régie.

A person who, acting in good faith, sends a report to the committee or the Régie under the second or third paragraph may not be held liable.

154.3. Delegates, representatives and service providers must provide the pension committee with the documents and information they receive from government authorities and that call into question the conformity of the plan or its administration with this Act.

154.4. Delegates, representatives and service providers may not exclude or limit their liability. Any clause to that effect is null.

Any clause to that effect in a contract terminated or in effect on 13 December 2006 is null if it is abusive.

The abusive nature of such a clause is assessed, with the necessary modifications, with reference to the articles of the Civil Code on consumer contracts and contracts of adhesion.” (*our emphasis*)

Indeed, the above prohibition to limit or exclude liability had immediate effect as of December 13, 2006, and applies to all delegation, service provider or agency agreements entered into after that date. As for contracts entered into or terminated before December 13, 2006, the possibility of establishing the reasonableness of the limitation or exclusion of liability provision remains, at least in theory. However, one need not be prescient to foretell that most, if not all, such exculpatory provisions will be deemed abusive, given the contractual bargaining position enjoyed by institutional actuarial and investment firms and their possible implicit attempts to circumvent the legal consequences of Section 153 and 154 of the SPPA.²²

These new provisions also create a statutory duty to report incumbent on service providers, agents and delegates. This duty includes the obligation to disclose in writing any circumstances which might adversely affect the financial interests of the fund. Failing immediate action by the committee, these delegates, service providers and agents must then send their reports to the Régie.

While “whistleblower” or “informant” provisions are always open to question in a democratic market, they should not in the instant case be too difficult to digest given the public policy objectives of the statute and the fact that the disclosure of these warnings to the state ensures “experts” prove they fulfilled their duties before avoiding any and all liability for committee inaction.

²² *Supra* note 13 (November 28, 2006 at 22h10) (Mrs. Courchesne, Minister of Employment and Social Solidarity).

Finally, Section 180 of the SPPA was also amended as follows to dovetail with the above provisions :

180. Every person who makes an investment otherwise than according to law is, by that sole fact and without further proof of wrongdoing, liable for any resulting loss.

The members of a pension committee who approved such an investment are, by that sole fact and without further proof of wrongdoing, solidarily liable for any resulting loss.

However, such persons incur no liability under this section if they acted [...] in good faith on the basis of an expert's opinion. [The amendment is indicated by our emphasis.]

In summary, these new provisions not only reaffirm prior legislative intent to absolve pension committee members of any solidary liability for delegated powers, but also reduce the threshold for this exoneration to factual good faith reliance irrespective of the terms of any contractual instruments effectively in place.

VI. THE POSSIBLE DEFENCES OF PENSION COMMITTEE MEMBERS AND THEIR EXPERTS

When faced with investment loss litigation launched by beneficiaries or replacement trustees, former pension committee members will be able to avail themselves of the following possible defences :

- absence of fault;
- good faith reliance and prudence;
- proper selection of experts and instructions;
- absence of damages;
- absence of causation

- *force majeure* and unforeseeability;
- ratification/waiver.

Most of these defences will also be available to pension committee experts. In assessing the extent of liability and/or damage awards made against pension committee members, the courts may consider and reduce same based on the fact that committee members act gratuitously (Article 1318 C.C.Q.).

Ratification defences can be invoked based on the mandatory statutory representative committee structure and the fulfilment of its duty to inform. Plan participants and beneficiaries do not appoint delegates and experts. Rather, they elect representatives to pension committees.

The appointment of voting and non-voting pension committee members ensures that active participants retirees and beneficiaries play an active role in and are full apprised of the funding levels and investments of the plan fund. Hence, this primordial function cannot be viewed or qualified as passive activity. Indeed, in the absence of fraud or omissions to comply with the elected committee membership structure, pension plan participants are not at liberty to invoke the ignorance of their own affairs or their reliance on the committee with respect to the investment policies and practices implemented to manage their pension fund. The mandatory representative structure put into place must invariably have legal consequences.

The active and non-active committee representatives are their agents and make decisions on their behalf. They are convened to meetings to be apprised of the investment policies

and practices of the committee and have direct and indirect access to all plan documentation. The purpose of this representativity and transparency is to permit them to act. They can repudiate their committee and their representatives. Their failure to manifest any interest in respect of this information and the management of their affairs must have legal consequences. To allow participants and retirees to sue for losses which are the results of decisions which they were or ought to have been aware of would amount to endorsing wilful blindness and ignorance.

VII. MEASURES OF SUPERVISION AND CONTROL

A) Supervision of the administration of the pension plan

Article 1287 C.C.Q. provides that the administration of a trust is subject to the supervision of:

- (1) the settlor [plan sponsor] or his heirs;
- (2) the beneficiaries [and members], even future beneficiaries; and
- (3) the persons or bodies designated by law.

The Régie clearly exercises some supervisory control of the administration of pension plans and trusts. The SPPA in effect grants numerous powers to the Régie relative to the oversight of the administration of pension plans. For instance: the Régie may authorize the simplification of the investment policy (s. 170); it may demand the annulment of any investment made in contravention of the law (s. 181) and it may assume the provisional

administration of the pension plan in cases where the conformity of the plan is in doubt (s. 183 and sub.).

B) Actions to repudiate and replace pension committees or compel them to perform their obligations

Article 1290 C.C.Q. provides that the settlor, the beneficiaries or any other interested person may take action against the trustee:

- (1) to compel him to perform his obligations;
- (2) to compel him to perform any act which is necessary in the interest of the trust;
- (3) to enjoin him to abstain from any action harmful to the trust;
- (4) to have him removed; or
- (5) to impugn any acts performed by the trustee in fraud of the trust patrimony or the rights of the beneficiary.

The trust instrument or pension plan cannot derogate this provision. Moreover, legislative intent appears to have been to restrict the standing of “any other interested person” to cases where there was an absence of settlor or beneficiary.²³

This provision is a necessary consequence of the trustee’s exclusive right to manage the trust patrimony (Article 1278 C.C.Q.). Plan participants and beneficiaries cannot

²³ Québec, Minister of Justice, *Commentaires du ministre de la Justice, Le Code Civil du Québec. Un mouvement de société*, t. I, Québec, Publications du Québec, 1993 at 769 (under Article 1290 C.C.Q.).

unilaterally take action in lieu of their pension committees. Moreover, since pension plan trustees cannot be expected to sue themselves, they must first resign or be removed, at the Annual Meeting or pursuant to Article 1290 C.C.Q., so as to appoint and permit a new trustee to do so. Plan beneficiaries can impugn plan trustees for their fraudulent conduct but they have no power to sue former trustees in order to recover trust assets.

C) Standing and legal actions in lieu of the pension committee

Article 1291 C.C.Q. is also a necessary consequence of the trustee's exclusive administration over trust assets and reads as follows :

1291. The court may authorize the settlor, the beneficiary or any other interested person to take legal action in the place and stead of the trustee when, without sufficient reason, he refuses or neglects to act or is prevented from acting. (*our emphasis*)

Thus, the settlor, the beneficiaries or any other interested person may take legal action to recover trust property in lieu of the trustee, but only when authorized to do so by the Court. Such approval can only be obtained when, without sufficient reason, the trustee refuses or neglects to act or is prevented from acting. Since the pension plan is a trust patrimony (s. 6 SPPA), neither the employer, nor the beneficiaries or the pension committee have any real right over these assets (art. 1261 C.C.Q.). It is instead the pension committee (i.e. the plan trustees), which has the control and the exclusive administration of the fund and who is entitled to act to preserve or recover trust property(art. 1278, 1301 and sub. C.C.Q.).

While a plan and trust are ongoing, the beneficiaries are entitled only to the payment of the benefits granted to them pursuant to the original trust indenture and plan (art. 1284 C.C.Q.).

Hence, if a plan trustee refuses or neglects to sue former committee members, service providers or agents, the beneficiaries will have no choice but to petition the Court for approval to sue in lieu of the trustee.

Needless to say, the Régie does not have the power to sue for damages and/or the recovery of trust assets unless it first assumes the provisional administration of a plan and the office of plan trustee.

VIII. JEFFREY MINE CASES

A) The Parties and Proceedings

On January 28, 2004, two Petitioners, ex-employees of Jeffrey Mine Inc. (“**Jeffrey Mine**”) and retired participants of the Salaried and Hourly Employees Pension Plans (the “**Plans**”), each filed a Motion for Authorization to Institute a Class Action before the Superior Court of Québec against various Respondents, including eight former members of the pension committees of the Plans, as well as the former actuaries, Buck Consultants Ltd. (“**Buck**”), and the investment advisors of the Plans, TAL Global Assets Management Inc. (“**TAL**”).

The Régie des Rentes was named as a *mise-en-cause* in the Motions, but no conclusions were sought against it. The Régie had been previously appointed the provisional administrator of both Plans when the committee members resigned from their positions in October 2002, following Jeffrey Mine's application under the *Companies' Creditors Arrangement Act*.²⁴

The eight ex-pension committee members were four active employees appointed by management, a third party member (notary) of both the committees, as well as three representatives respectively elected to the committees by the retirees, the active unionized participants and the active non-unionized participants.

B) The Submissions of the Parties

The Class Motions were heard jointly in June 2004 and the parties thereto made the following submissions.

1) The Petitioners' allegations

The Petitioners alleged that each of the pension committee members had a fiduciary duty to manage the Plan Funds in a prudent and diligent manner as would any reasonable person in similar circumstances. They were therefore compelled to administer the Plan Funds with honesty, loyalty and for the exclusive benefit as well as best and common interests of all participants and beneficiaries. In particular, one of these fiduciary obligations was to adopt and periodically review an investment policy for the fund of

²⁴ R.C.S. 1985, c. C-36.

each Plan. In adopting and reviewing such an investment policy, one of the crucial responsibilities of the pension committees was to ensure the conformity and suitability of this policy, having regard to the particular characteristics and liabilities of the Plans and the financial posture of the employer sponsor.

The Petitioners further affirmed that the committee members adopted revised investment policies in September 1999, which were manifestly imprudent and failed to take into account the characteristics of the Plans. In particular, the policies failed to consider the very high degree of maturity of the Plans, the partial insolvency of the Plans which had been assessed and disclosed by the Plans actuaries for over a decade and the significant short term probability that Jeffrey Mine would file for bankruptcy, thereby triggering the termination of the Plans and the liquidation of their fund. They invoked the Mine's dwindling asbestos sales, a European ban on such sales and loss of market share to competitive producer states such as Russia and China.

In short, the Motions invoked that the relatively important risk of termination and liquidation compelled the implementation of an even more conservative investment policy, which sought to shield the fund from the volatility of the markets and secure retiree income. Otherwise, the risk that a stock market downturn or crash would increase the liquidation deficit of the Plan Funds would be too great and could have catastrophic consequences on the participants benefits.

Instead, the Petitioners alleged that the committee members modified the investment policies of the Plans on September 2, 1999, raising both the target portfolio allocation and

maximum and minimum limits permitted for stock investments to manifestly unreasonable and imprudent levels (25% to 75% for stocks).

Furthermore, they alleged that a crucial and alternative subterranean mine project was abandoned by Jeffrey Mine in September 2001. As the continued asbestos reserves and survival of the mine hinged on this project, they argued that the committee members should have further reviewed their investment policy in order to adapt it to the quasi certain risk of the imminent closure of the mine and termination of the Plans. This action was all the more necessary when considering the employer's patent incapacity to fund the actuarial deficit identified in the 1999 Plans valuation and the eventual and additional funding shortfall for benefits.

Concurrently, it is alleged that the committee members also failed to fulfill their duty to supervise and review the performance of the investment manager TAL. In short, the pension committee failed to intervene even though TAL was investing far too heavily in the stock markets as of September 3, 1999.

Ultimately, the Petitioners claim that when Jeffrey Mine petitioned for relief under the *Companies' Creditors Arrangement Act* in October 2002, this resulted in termination deficits, which had a disastrous effect on the retirement income of the participants. The committee members are alleged to be partially responsible for this loss given their supposed failure to fulfill their fiduciary obligations.

As regards the Respondent TAL, the Petitioners alleged that it contravened its fiduciary obligations to invest the fund in reasonable and prudent manner for five principal reasons. First, TAL failed to act in the best interests of the plan participants because the investments it selected amounted to an unreasonable risk which was incompatible with the characteristics of the Plans, namely their maturity, probable temporal horizon and the precarious financial position of Jeffrey Mine. Secondly, TAL contravened the investment policies since the investments selected were not commensurate with the level of risk associated with the target portfolios. Thirdly, TAL adopted an aggressive market timing strategy which was expressly prohibited by the investment policy. Fourthly, TAL favoured the interests of the employer to the detriment of the participants. Finally, the Petitioners invoked that this excessive investment risk contradicted TAL's own representations regarding its supposed prudent and conservative management style.

As regards the Respondent Buck, it is important to note that the Petitioners invoked that the Plans actuaries triggered their professional liability in the context of the adoption of the revised investment policies of September 2, 1999, by committing the same faults *mutatis mutandis* as those specifically alleged against the ex-members of the pension committees in the Motions.

The Petitioners also invoked the former committee members were solidarily liable with TAL and Buck since they had consented to and ratified their recommendations and decisions.

Nevertheless, the Motion expressly recognized that the 36% Plan termination deficits and concurrent reduction of benefits was not entirely attributable to the faults of the Respondents and that a portion of these deficits would have been incurred in any event given the market meltdowns of 2000-2001.

2) The Submissions of the Respondents

The former committee members responded that the class action should not be authorized since the Motions failed to establish any colour or right (i.e. plausible cause of action) against them. They invoked that the representative and transparent pension committee structure in force since 1990, was intended to keep all the participants informed in respect of the administration of their Plans and to permit them to act and take the necessary measures to oppose and preclude any investment activity which was purportedly detrimental to their interests.

The former committee members invoked that the Petitioners and proposed members of the class were or ought to have been aware of the discussions leading to the decisions to modify the investment policies. No less than ten pension committee meetings addressed the possible amendment to the investment policies before its adoption. When the investment policies were approved, these decisions were immediately announced and further discussed at the Annual Meeting of October 24, 1999. This was also addressed at the subsequent annual meetings of October 2000 and 2001. Yet, no participant or retiree ever expressed any question, objection or dissent with respect to the modification of the investment policies.

Similarly, the partial insolvency of the Plans had been addressed at the annual and regular meetings of the committee since 1990. The asset mix allocation levels were also addressed at all annual and regular committee meetings since 1999. TAL's quarterly reports were available to any participant or retiree. Again, no dissent, disapproval, objection or repudiation was ever voiced by any participant or retiree. While the facts and risks giving rise to the proposed liability of ex-committee members were allegedly flagrant and disproportionate, no participant or retiree, including the Petitioners, ever raised these risks before they crystallized.

Simply put, the Respondent committee members invoked that the participants and retirees of each Plan had ratified their own representatives' decisions, through their acceptance, inaction or complacency. They were thus barred from suing their representatives.

At the certification hearing, TAL, Buck and the ex-committee members also jointly pointed out that the Motions should be dismissed due to the lack of standing and the inability to act of each Petitioner as well as the members of each proposed class.

They invoked that when the committee members had resigned from their positions following Jeffrey Mine's application for creditor protection, the Régie had been lawfully appointed as the provisional administrator of both Pension Plans. The Régie was therefore the sole trustee of these funds and the only party having the ability and standing to take legal action to recover trust assets. In effect, the proposed class actions requested that the damages claimed be paid to each Plan fund for redistribution by the Régie.

Therefore, the Respondents alleged that the Régie had the exclusive control and administration of the trusts.

They thus argued that neither of the Petitioners nor the beneficiaries of each proposed class had the required standing to institute an action against the Respondents, without first being authorized by the Court to act in the place and stead of the trustee, namely the Régie, in accordance with the conditions set forth at Article 1291 C.C.Q.

The Petitioners should therefore have first requested that the Régie take action against the pension committee members, TAL and Buck, failing which it could then have petitioned the Court for permission to do so. As the Motions contained no allegations to the effect that the Régie had refused, neglected or was prevented from acting, or that the Petitioners had obtained prior Court authorization to act on its behalf, the Respondents submitted that the Motions should be summarily dismissed against their clients.

The Superior Court was initially concerned with the weight of this standing argument and invited both the Petitioners and the Régie to enunciate their positions on this issue. The Petitioners filed additional briefs wherein they invoked that no leave under Article 1291 C.C.Q. was required. Such Court approval was only required if the trustee had exclusive rights of action against the third parties. Hence, they argued such approval was not necessary since the participants and beneficiaries had independent contractual and/or tort rights against the Respondents. The Régie also filed a brief where it supported the Petitioners' interpretation of these provisions. The Respondents countered that the exclusive right of action conferred on plan trustees and set forth at Article 1278 C.C.Q.

could not be dismembered in such a fashion without rendering the provision nugatory. In any event, the proposed class actions sought the recovery of trust assets and not post trust termination damages.

In the interval, the Petitioners wrote to the Régie to request that it act and/or clarify its reason for not doing so. The Régie confirmed in writing that it was prevented from acting because it did not have the financial means to do so (a provision of less than \$5,000 remained in the trust funds) and given the risks associated with litigating these claims.

The Petitioners thereafter amended their Motions for leave to institute class relief in order to allege the Régie's position and to also subsidiarily solicit Court approval to act in lieu thereof. Notwithstanding the Respondents' objection to this amendment, the Court ordered that the contestation of the Article 1291 C.C.Q. application for leave take place within the same file docket as opposed to a separate pre-conditional proceeding. The Respondents were in effect adamant to preserve their right to apply for leave to appeal the eventual Article 1291 C.C.Q. decision if need be. Indeed, in Québec, a judgment granting leave to institute a class action is not appealable. The Court noted the Respondents' reservations of rights and nevertheless allowed the amendment.

C) The Article 1291 C.C.Q. approval hearing

Following the deposition of the Régie Affiant and filing of written contestations, a further hearing was scheduled in June 2005 on the Article 1291 Court approval issue. At this

second hearing, the Respondents argued that the grounds invoked by the Régie were not veritable or serious reasons which prevented it from acting. Its failure to do so was instead the result of political cowardice. They subsidiarily argued that even if the Petitioners were granted leave to act in lieu of the Régie, then the proposed class action was not the necessary or appropriate procedure to do so. The Régie had no need to institute representative class relief since it could act and sue by ordinary action in its name alone, to revendicate trust property.

On January 23, 2006, the Court nevertheless authorized the Petitioners to institute both class actions. The Court concluded that the ratification arguments invoked by the former pension committee members were issues to be disputed on the merits. It further held that inasmuch as leave under Article 1291 C.C.Q. was required, it was granted since the Régie was prevented from acting. The Court also raised doubts as to whether an Article 1291 authorization amounted to a veritable judicial decision since the provision formed part of Book VI of the C.C.Q. dealing with non-contentious matters.

The Respondents thereafter sought leave to appeal only the Article 1291 C.C.Q. conclusions of these decisions. In June 2006, the Court of Appeal denied the Respondents such leave since the Article 1291 C.C.Q. orders were made in the context of a non-appealable decision authorizing class action relief. However, the Court of Appeal opened a door for the Respondents to revisit this issue once the class actions were served and underway.

On December 18, 2006 and January 9, 2007, the Respondents served and filed the said class actions. It will therefore be interesting to see how the case unfolds in respect to the Article 1291 C.C.Q. authorization and standing issue.

It will be interesting to see whether the Petitioners could appropriately launch class action relief if they stood in the shoes of the trustee. Also, since the actions were instituted after the Act to Amend came into force, the Court will have to determine if the new presumption of prudence applies to the case, and if so, to which extent it can be rebutted. A full adjudication of the effects of delegation and the ability to rely on experts is also to be envisaged. Finally, the ratification defence of the committee members will evidently be addressed as well.

IX. CONCLUSION

Québec's significant pro-labour lobby has been instrumental in securing sweeping and "progressive" amendments to the Province's supplemental pension plan legislation. At the heart of these rallying calls for change, is the ideological and political belief that pension funds belong exclusively to plan participants and retirees irrespective of the terms of the original plan and benefit promise. It is on the basis of this supposed and exclusive entitlement to pension funds that labour lobbied for greater transparency and a voice in the administration of defined benefit plans and trusts. As the beneficial owner of these assets, they adamantly maintained their entitlement to administer same.

Yet, when their pension committee representative and administrative powers were enshrined, these lobbyists and trade unions shirked their duties and entrusted these paramount rights to volunteer members and retirees who were eminently unqualified to fully acquit same. They deprived these volunteers of resources and know-how which are always readily available during parliamentary consultation committee hearings.

The denouement of the Jeffrey Mine pension plan terminations has tragic daily consequences for its former participants and retirees which no doubt merit our full empathy. The Québec courts will have to determine whether the actuaries and investment advisers fulfilled their professional duties. The courts will also have to assess whether the pension committees were lawfully entitled to fully rely on these professionals and were thus accordingly absolved of any liabilities for hiring and providing instructions to these professionals, as we maintain they should be. If the courts nevertheless deem the pension committees were not entitled to fully rely on these professionals, then it is to be hoped that they will not overlook that ownership invariably entails duties and not only privileges. In our view, the Jeffrey plan participants and retirees must ultimately bear any liability attributed to their anointed pension committee representatives given their silence, complacency and failure to scrutinize the management of their own affairs. To allow these participants and retirees to invoke the pension committee's supposed ratification of the decisions of the plan experts, then further permit them to escape the legal consequences of their own express and tacit ratifications, would amount to no more than a double and spurious standard which cannot be seriously entertained under the current legal framework.