IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Imperial Oil Ltd. v. Atlantic Oil Workers Union, Local No. 1, 2004 NSSC 201

Date: 20040503
Docket: SH 131911
Registry: Halifax

Between:

Imperial Oil Limited & McColl-Frontenac Incorporated

Plaintiffs

v.

Atlantic Oil Workers Union, Local No. 1, and
The Individuals Listed in Schedule "A"

Defendants

DECISION

Judge:	The Honourable Justice John D. Murphy
Heard:	September 30th, October 1st, 2nd, November 6th, 2003 - Halifax, Nova Scotia
Written Decision:	October 8, 2004 ***(Oral decision rendered May 3, 2004)***
Counsel:	George MacDonald, Q.C.; Hugh Wright, for the Plaintiffs Ronald A. Pink, Q.C. and Bettina Quistgaard for the Defendants; J. Brian Church, Q.C., for Defendants (A. Campbell, G. Doggett, J. Mahon, J. McDonald) *R. Bucknam, E. Frizzell, E. Zwaan, R. Edward, G. Mathie, J. Flemming, P. Winters, Defendants in Person*

By the Court:

INTRODUCTION

[1] The Plaintiffs were owners and operators of an oil refinery at Eastern Passage, Nova Scotia, where the individual Defendants, some of whom were members of the Defendant Union, were employed. The Plaintiffs sponsored and administered a pension plan for employees at the refinery, and were also party to a contractual severance package with the individual Defendants and other employees.

[2] In this action, the Plaintiffs claim that, contrary to the arrangement by which employees received severance benefits, the Defendants improperly pursued a partial pension plan wind-up, resulting in some individual Defendants receiving enhanced pension benefits. The Plaintiffs claim that, because the Defendants breached contractual obligations, they are entitled to recover benefits paid to the Defendants under the severance package. The Plaintiffs also seek alternate relief based upon laws relating to restitution, constructive trust and unjust enrichment.

[3] The present Application is brought under **Civil Procedure Rule 25.01(1)(a)** for determination of questions of law based upon an Agreed Statement of Facts, which includes 57 supporting documents. (Subsequent references in these reasons to an A.S.F. # relate to a numbered paragraph in the text of the Agreed Statement, and references to a Doc.# relate to the supporting document found at that tab number in the Agreed Statement.)

AGREED STATEMENT OF FACTS

[4] The facts relevant to the questions posed, as set out in the Agreed Statement and highlighted during the submissions by the parties, may be summarized as follows:

The Severance Allowance Program

[5] In 1988 Texaco Canada, contemplating the sale of its shares by its American parent company, adopted a severance package for its employees. The program,

known as the Texaco Canada Severance Allowance Program ("TCSAP"), was available to eligible employees, including those working at a Refinery and Marine Terminal which the company then owned and operated in Dartmouth, Nova Scotia ("the Refinery"). Employees could avail themselves of TCSAP for twenty-four months after a "change in control" of the company. After adopting the TCSAP, Texaco advised its employees of the Program's major components by means of letters and bulletins posted in the workplace.

[6] The TCSAP was triggered by an employee's dismissal, unless it was for cause or by reason of death. The benefits provided by the program included a lump sum cash severance allowance and enhanced pension benefits provided through amendments to the pension plan.

[7] The purpose and general terms of TCSAP were explained at Articles II and III. Article II provided, among other things, that under the program:

> the Corporation will pay a severance allowance and will provide other benefits in full satisfaction of all claims of an Eligible Employee on Termination on account of salaries and wages, Merit Awards, pension entitlements and all other benefits of employment.

[8] Article III went on to state that an eligible employee terminated within twenty-four months of a change of control would be paid a severance allowance and might be entitled to other benefits. However, it also stated:

> [a]n eligible employee need not accept the benefits of this Program in the event of Termination. The terms of this Program are intended to have application only to Eligible Employees who accept the severance allowance and other benefits of this Program in full satisfaction of all claims against the Corporation.

[9] Article V addressed legislative requirements, specifying (at Paragraph V.A.) that payments under TCSAP would be in lieu of statutory payments:

> Payment in lieu of Statutory Payments
>
> The benefits provided under the Texaco Canada Severance Allowance Program are intended to be inclusive of, and not in addition to, any benefits or allowance prescribed by employment statutes and are to be in full payment of the Corporation's obligations under such legislation, including the individual notice and severance requirements.

[10] Employees could direct payment of the Severance Allowance as set out in Article V.B.:

> B. Payments to Retirement Savings Plan
>
> To the extent permitted by law, Eligible Employees will be given the option of directing payment of some or all of the severance allowance to their personal Registered Retirement Savings Plan, Registered Pension Plan or Deferred Profit Sharing Plan.

[11] Article VI was a release provision:

> VI. Release of Corporation and Payment of Severance Allowance
>
> In return for the severance allowance, Eligible Employees (except those covered by a collective labour agreement) will be required to sign a Release in favour of the Corporation, wherein employees agree not to take legal action against the Corporation. The severance allowance will be paid in a lump sum within 2 weeks of the Termination or within two weeks of receiving from the Terminating Employee a release in a form satisfactory to the corporation, whichever is later.

[12] TCSAP required amendments to the Ontario-registered Texaco Canada employee pension plan, which had been non-contributory since 1972. Any liability or deficit would be covered by the sponsor and administrator.

The Sale To Imperial Oil

[13] Early in 1989, Imperial Oil purchased all shares of Texaco Canada, which became a wholly-owned subsidiary of Imperial in April of that year. The Dartmouth Refinery was included in Imperial's acquisition of Texaco Canada, as was the TCSAP obligation. Imperial agreed to retain the Program until February 23, 1991 and committed to offer employment to all Texaco Canada employees.

[14] The Director, Investigation and Research under the *Competition Act* subsequently investigated Imperial's acquisition of Texaco Canada. While this investigation was under way, Imperial gave an undertaking to the Director to hold separate and apart the Texaco Canada operations.

The Defendants

[15] The Individual Defendants were employees of Texaco Canada when it became a subsidiary of Imperial. They worked at the Refinery and in the marketing department. They remained Texaco Canada employees until October 14, 1990, when Imperial sold the Refinery to Ultramar Canada.

[16] The Individual Defendants include groups of unionized and non-unionized employees. The unionized employees were represented by the Defendant, Atlantic Oil Workers Union, Local No. 1 (the "Union"). The terms and conditions of the employment of unionized workers were governed by a succession of collective agreements, and the employees paid monthly union dues. Many of the non-unionized refinery and marketing employees were represented by the Atlantic Refinery and Marketing Employees' Association ("ARMEA"), to which they paid dues. All of the individual Defendants were members of the Pension Plan.

[17] Around 1989, the Union and ARMEA formed the Atlantic Region Employees Coalition ("the Coalition") in order to work together concerning issues arising out of the sale of Texaco Canada, including pension surplus and *Competition Act* matters.

Events After The Sale To Imperial

[18] In or about July 1989, Imperial changed the name of the former Texaco Canada operation to McColl-Frontenac Inc., which continued as the sponsor and administrator of the pension plan. After Imperial undertook to hold the Atlantic Canadian Texaco Canada operations separate and apart, the Coalition made efforts, including representations to the Competition Tribunal, to prevent divestiture of the Atlantic Canada operations. In addition, former Texaco Canada employees and the associations began to raise questions about their employment prospects, the terms and operation of the TCSAP, and the identity of possible purchasers. Their primary area of concern was pension benefits, including the use and ownership of the pension plan surplus. Imperial began to produce "question and answer" documents for the employees' information.

[19] In November 1989 Imperial and McColl-Frontenac announced that their employee benefits programs would merge, effective January 1, 1990. On that date, McColl-Frontenac employees – except those in Atlantic Canada who were

included in the "hold separate and apart" order – moved to the Imperial payroll. Anticipating the sale of former Texaco Canada assets, Imperial forwarded TCSAP Administrative Guidelines to managers on November 22, 1989, and also sent employees a letter describing the key provisions of the TCSAP. The Administrative Guidelines contained a summary of key TCSAP provisions, which included the following statement:

> Payments provided under the TCSAP are intended to be inclusive of, and not in addition to, any obligations the Company may have to terminating employees under common law or employment statues. In order to collect a TCSAP payment, any resigning employee (except those represented by a certified trade union) must sign a Release, which releases the company from all claims, demands, damages or actions arising out of the separation. (See Appendix D)

The requirement to sign releases was subsequently extended to unionized employees.

[20] McColl-Frontenac employees in Atlantic Canada became concerned with how the pension plan and its funds would be divided as between employees remaining in the Imperial/McColl-Frontenac plan and those held separate and apart. On November 23, 1989, the Coalition set out its concerns in a letter to the Superintendent of Pensions for Ontario. It sought to prevent Imperial from absorbing the Texaco Canada pension plan until the employees in Atlantic Canada were satisfied that they had been treated fairly.

Pension Issues

[21] On December 13, 1989, counsel for the Coalition wrote to the Ontario Superintendent of Pensions expressing the Coalition's concerns regarding the pension plan, its surplus and its partial wind-up. The Coalition's counsel also wrote to the Superintendent of Pensions for Nova Scotia, stating that the Coalition was contemplating legal action with respect to the surplus.

[22] On February 6, 1990, the Competition Tribunal, by consent order, directed Imperial to divest itself of its Texaco Canada assets in Atlantic Canada. The Coalition and the employees continued to express their concerns about the handling of the pension. On March 8, 1990, J.L. McLeod, General Manager, Operations, for McColl-Frontenac, addressed in an open letter to all

McColl-Frontenac employees some employee concerns, including the fate of the Pension Plan and the surplus in the event of McColl-Frontenac being sold.

[23] McColl-Frontenac and the Union entered a new collective agreement beginning May 1, 1990, to be effective until April 30, 1992. On May 4 and 5, 1990, McColl-Frontenac representatives presented employees with the TCSAP offer, including the Release.

[24] As of June 20, 1990, Imperial and McColl-Frontenac entered a partnership, carrying on business as Imperial Oil. The McColl-Frontenac operations in Atlantic Canada were still held separate and apart.

[25] Employees under the age of 50 were concerned about low commuted values of the pensions presented by McColl-Frontenac. The Coalition had two actuarial reports prepared, which were supplied to McColl-Frontenac and Imperial in July 1990. Mr. McLeod indicated that the company did not intend a partial wind-up of the Pension Plan. The ongoing status of the Plan, he wrote on July 23, 1990, would depend upon the purchaser's pension plan. Imperial assigned counsellors to assist employees in making TCSAP and pension calculations.

[26] The Union and McColl-Frontenac agreed to replace the job security and severance provisions of the Collective Agreement with the TCSAP for members of the bargaining unit who did not remain with Imperial or its affiliates. The resulting letter of understanding dated August 3, 1990, became part of Appendix VI of the Collective Agreement. It stated, among other things, that TCSAP payments made in 1990 and 1991 to such members of the bargaining unit "constitutes full satisfaction of any and all obligations of the Company pursuant to Article 12.07 [Job security] and Article 12.09 [Severance Pay] of the Collective Agreement..."

[27] On August 10, 1990, the McColl-Frontenac Directors, by resolution, amended the TCSAP to require employees covered by a collective agreement to sign a release in order to receive TCSAP. Shortly after that, Mr. McLeod announced the purchase of McColl-Frontenac operations in Nova Scotia (including the Dartmouth Refinery) by Ultramar Canada Inc. Imperial announced that all active McColl-Frontenac employees at the affected facilities would be offered employment by Ultramar. It also announced that all regular

McColl-Frontenac employees who were on the payroll on February 23, 1989, and on the closing date of the purchase, would receive a TCSAP severance payment.

[28] On September 24, 1990, the Coalition's counsel wrote to Mr. McLeod concerning the Release form provided by Imperial, to say that because of difficulties involving the process of determining the employees' entitlement to pension, pensionable earnings and pension assets, and the possibility of legal action in pursuit of rights under the Imperial and Texaco pension plans, he could not "recommend they sign the Release as it is now worded." He proposed that the release contain "an exemption for possible claims under the Pension Plan against McColl-Frontenac and Imperial Oil" and provided suggested wording. On October 12, 1990, Mr. McLeod responded that the company would only provide TCSAP benefits when the release was signed by an employee, and that "[i]f an employee does not sign the TCSAP release or brings a legal action against the company, then according to the provisions of TCSAP, such employee will have disentitled himself or herself from receiving TCSAP benefits." Meanwhile, on October 1, 1990, the Coalition requested a partial wind-up of the Pension Plan.

[29] McColl-Frontenac informed its employees that their employment with that company would terminate effective upon the October 14, 1990 sale of its operations to Ultramar Canada. The advice was accompanied by a Statement of Separation Benefits. In response to correspondence from ARMEA, Imperial indicated on October 25 that pension eligibility would be determined according to TCSAP and the Pension Plan, and that the severance payment would only be paid when the TCSAP release was signed. The Superintendent of Pensions for Nova Scotia ("Superintendent") ordered "a partial wind-up of the Pension Plan in respect of the Nova Scotia Plan members affected by the sale to Ultramar Canada as of October 14, 1990." He advised the Ontario Superintendent of Pensions of this action on November 14, 1990.

[30] The majority of employees signed TCSAP releases after receiving legal advice and returned them to Imperial after the partial wind-up order was issued on November 14, 1990. All of the individual Defendants signed releases. On November 19, the Union indicated to Imperial that most employees with long service regarded the commuted values of their pensions as very low. The Union also wrote that, because all employees received TCSAP regardless of age or years of service, it was not a substitute for pension benefits.

[31] Imperial subsequently announced, on December 17 1990, that it would contest the partial wind-up order and stated that the benefits paid under TCSAP were "more than adequate to satisfy in full all employee claims on account of salaries and wages, pension entitlements and all other benefits of employment." Imperial also held back certain pension payments. The Union protested this position and the hold-backs.

[32] In February 1991, the Superintendent withdrew the partial wind-up request on the condition (as expressed in a letter to his Ontario counterpart) that "the benefit entitlements under the Pension Plan for Nova Scotia members affected by the sale ... to Ultramar not be less than what the members would have received had a partial wind-up taken place as of October 14, 1990." After the partial wind-up order was withdrawn, and executed releases received, Imperial paid out TCSAP pension benefits, between approximately March 25 and November 30, 1991.

[33] Imperial did not extend partial wind-up benefits to eligible members of the Pension Plan. At the direction of the Nova Scotia Finance Minister, the Superintendent issued a proposed partial wind-up order on October 17, 1991. Imperial objected to the proposed partial wind-up, and the matter went before the Superintendent for hearing in April 1992. The Superintendent found, in a decision released on December 8, 1992, that the requirements of ss. 74(1)(d) and (e) of the *Pension Benefits Act* ("**PBA**") were met. He ordered a partial wind-up of the Pension Plan for McColl-Frontenac employees, effective October 14, 1990 (the "Wind-up Order"), which triggered an entitlement under the **PBA** for about 77 employees to receive partial wind-up (or "grow-in") pension benefits under section 79 of the **PBA**. Not all of the individual Defendants received benefits pursuant to the Wind-up Order.

[34] Imperial appealed the Wind-up Order to the Supreme Court of Nova Scotia. The appeal was dismissed: **Imperial Oil Limited v. Nova Scotia (Superintendent of Pensions)** (1994), 131 N.S.R. (2d) 321 (S.C.). A further appeal by Imperial to the Nova Scotia Court of Appeal was also dismissed, (1995), 142 N.S.R. (2d) 26 (C.A.), and Imperial's application for leave to appeal to the Supreme Court of Canada was denied, [1995] S.C.C.A. No. 356. Imperial did not raise the Release as a defence during the proceedings before the Superintendent or during any of the appeals.

INFORMATION APPARENT FROM THE FACTS AS STATED

[35] The facts presented demonstrate the following:

(a) The value of the TCSAP payment and partial wind-up benefit (if any) which was paid to each Individual Defendant. These amounts are set out in Doc.#57;

(b) The only persons who received a benefit under the partial wind-up of the Pension Plan in addition to the payments which they obtained under TCSAP were approximately 79 employees under age 50 ("Employees U-50"). They received "grow-in" benefits from the partial wind-up which were not available to them under TCSAP. TCSAP payments to employees age 50 to 55 included amounts equivalent to "grow-in benefits"in excess of their entitlement under partial wind-up of the pension plan. Employees 55 years of age and over received immediate pension under TCSAP greater than any entitlement under the **PBA**.

(c) Each Employee U-50 could direct that all or part of the TCSAP severance payment be used to acquire additional benefits under the Pension Plan. TCSAP Article IV.B.5 provided as follows:

> An Eligible Employee whose service is terminated will have the option of foregoing all or part of the severance allowance dollars in exchange for additional pension benefits under the Corporation's Pension Plan. The additional pension benefits will increase the member's basic pension under the plan, but in no event shall the total pension under the Plan exceed the maximum pension prescribed by Revenue Canada. The amount of additional pension that may be obtained in lieu of the severance allowance dollars the employee is foregoing, will be

> determined using conversion tables prepared by the Pension Plan actuary.

Pension Plan Amendment #12, dated January 15, 1990 (Doc.#2), paragraph 4 incorporated the TCSAP pension exchange option as follows:

> Upon application any Member of the Plan whose services are terminated in circumstances amounting to Termination within two years of a Change in Control shall, having duly elected before he resigns, be granted an SSSP [Special Supplementary Pension Benefit] in the amount elected, calculated according to tables provided by the Company's actuary at the time of Constructive Dismissal. The supplementary pension shall be in addition to the Member's normal pension...

Additional provisions in Amendment #12 address the effect of electing to exchange severance allowance for additional pension benefits.

(d) Analysis of the partial wind-up report (Doc.#56) and the chart of TCSAP and partial wind-up benefits paid (Doc.#57) shows that each of the Employees U-50 could have elected to apply TCSAP benefits to increase their pension benefits above the level which resulted from the partial Pension Plan wind-up, without foregoing any other severance benefit to which they were entitled at law, and without exceeding the maximum pension prescribed by Revenue Canada. The commuted value of the Employees U-50 TCSAP severance payment which could be used to purchase a pension benefit under TCSAP exceeds the **PBA** "grow-in" benefit. Employees U-50 had a choice - if they elected to apply TCSAP payment as a pension benefit, their financial position would have been better than if they had chosen to forego TCSAP and obtain "grow-in" under partial wind-up of the pension plan together with any other statutory

benefits available to them. Each Employee U-50 could have elected to apply TCSAP so that TCSAP benefits paid would exceed what the employee was entitled to receive pursuant to a combination of all severance and other benefits available under applicable legislation together with "grow-in" benefits received under the partial Pension Plan wind-up.

(e) At all relevant times, the Plaintiffs and the Defendants were aware of the opposing positions adopted by other parties and the risks associated with their actions. Prior to disbursement of TCSAP benefits and execution of Releases, the parties knew that they held different views with respect to whether benefits pursuant to partial wind-up under the **PBA** were recoverable in addition to TCSAP. This is apparent from employees' counsel's September 24th, 1990 letter to McColl-Frontenac concerning the form of Release (A.S.F., para.45 and Doc.#22), and the reply dated October 12th (A.S.F., para.47 and Doc.#24). Plaintiffs advised Defendants that they were unwilling to include a clause in release documentation allowing employees obtaining TCSAP benefits to pursue any "other cause of action pertaining to the Pension Plan." Throughout their dealings, Defendants were aware that Plaintiffs took the position that employee acceptance of TCSAP benefits and execution of Release would eliminate a claim for pension benefit beyond what TCSAP provided, and the Plaintiffs knew that the employees claimed entitlement to Pension Plan wind-up benefits in addition to TCSAP payments.

(f) Although the funds in the Pension Plan were "trust funds", the plan was non-contributory, and ultimately the Plaintiffs would receive any distributed surplus or excess funds not payable to employees.

[36] The questions of law set out in Schedule 'A' to the Order dated April 3, 2003 will be addressed individually, but not in the order listed.

JURISDICTION

Question #5: Does the Court have jurisdiction to entertain the action as against the employees covered by the collective agreement?

[37] The Court has jurisdiction to hear the action as against the employees covered by the collective agreement.

[38] The exact number of Defendants who were union members is not stated, but the proportion is significant. It appears to be at least one-third.

[39] I do not accept the Defendants' contention that the dispute involving the Union and unionized employees arises from the collective agreement (the "Agreement"), so that pursuant to the **Trade Union Act**, R.S.N.S. 1989, c.475, and by contract its resolution is within the exclusive jurisdiction of a labour arbitrator.

[40] The jurisdiction of an arbitrator under the Agreement is not exclusive. Articles 14.02 and 14.16, dealing with employee and management complaints, respectively, provide that parties may seek redress through arbitration. Such non-mandatory reference to arbitration is not inconsistent with the **Trade Union Act**, which provides as follows in s.42(1):

> Every collective agreement shall contain a provision for final settlement without work stoppage, by arbitration or otherwise, of all differences between the parties... *[emphasis added]*

The words "or otherwise" render the Nova Scotia legislation less restrictive than the mandatory arbitration clause in s.45(1) of the Ontario **Labour Relations Act**, which has been held to grant exclusive jurisdiction to arbitrators. (See **Weber v. Ontario Hydro** (1995), 2 S.C.R. 929)

[41] Recent case law supports construing Nova Scotia legislation and the Agreement to allow the parties to pursue recourse to court as an alternate

resolution mechanism in appropriate circumstances. (See **Pleau v. Canada** (1999), Carswell N.S. 406 (N.S.C.A.))

[42] In deciding whether an issue falls within the exclusive jurisdiction of an arbitrator, Courts determine whether the "essential character" of the dispute arises from the "interpretation, application, administration or violation of the collective agreement." (See **Weber**, *supra*, and **Regina Police Association Inc. v. Regina (City) Board of Police Commissioners**, [2000] 1 S.C.R. 360)

[43] In **Pleau**, *supra*, after emphasizing that a court must first determine whether the dispute resolution process established by the legislation and collective agreement is non-exclusive, the Court of Appeal provided the following direction in paragraph 51:

> Second, *the nature of the dispute* and its relation to the rights and obligations created by the overall scheme of the legislation and the collective agreement should be considered. In essence, this involves a determination of how closely the dispute in question resembles the sorts of matters which are, in substance, addressed by the legislation and collective agreement. What is required is an assessment of the "essential character" of the dispute, the extent to which it is, in substance, regulated by the legislative and contractual scheme and the extent to which the court's assumption of jurisdiction would be consistent or inconsistent with that scheme.

[44] The essential character of the present dispute does not arise from the collective bargaining process, or from the interpretation, application, administration or violation of a collective agreement. Rather, it relates to the interpretation of individual TCSAP contracts involving all the Defendants, the terms of which were subsequently incorporated into the Agreement with respect to some Defendants. The origin of this claim is similar to the dispute considered in **Goudie v. Ottawa**, [2003] S.C.J. No.12, in which the Supreme Court found that because the issue arose from a pre-contractual agreement, it was outside the ambit of the collective agreement and within the Court's jurisdiction. The "essential character" of the present dispute does not involve interpretation or application of the Agreement, it arises from interpretation of TCSAP and Releases executed by the Defendants - these were documents with genesis outside the Agreement, which were subsequently adopted and incorporated or referenced in the Agreement, which contains provisos that disputes may be referred to arbitration.

[45] The Plaintiffs maintain that the Agreement did not incorporate TCSAP, but only a letter of understanding dated August 3, 1990 whereby the parties agreed to the impact of TCSAP upon their ongoing relations under the Agreement. I recognize the argument, but do not decide the issue on the basis of that distinction, as I view the essential character of the dispute to be outside the Agreement in any event.

[46] This case is distinguishable from others in which the court's jurisdiction has been rejected. It involves common law issues of contract, not contemplated or intended to be regulated by the **Trade Union Act**, and the court's jurisdiction should not be ousted. (See **Armour Group Ltd. v. C.J.A., Local 83**, [2000] Carswell N.S. 249(S.C.)) The Defendants argue that the TCSAP Release contract is illegal and violates the **PBA**. Arbitrators would not have jurisdiction to address issues involving the alleged illegality of contracts. The claim also raises equitable considerations including application of unjust enrichment principles, outside the ambit of matters covered by collective agreements.

[47] The Pension Plan in this case is not incorporated in the Agreement, and it is uncertain whether resolution of pension issues can fall within an arbitrator's jurisdiction. Although there is conflicting authority, **Boheimer v. Centra Gas Manitoba Inc.** (2000), Carswell Man. 228 (Q.B.), suggests that the Court should retain jurisdiction if the pension dispute does not arise from the collective agreement.

[48] There is also a possibility, as expressed by the Plaintiffs, that even if the Court deferred to arbitration concerning the claim against union members, those employees could still become involved as third parties in a court action brought by the Plaintiffs against non-union Defendants who might seek to invoke joint and several liability principles.

[49] As jurisdiction given to an arbitrator under the Agreement is not exclusive, it would be inappropriate to prohibit the Court from addressing the present dispute as it affects the unionized Defendants, when it has exclusive jurisdiction to adjudicate the dispute as it concerns other Defendants, the non-union employees. The **Judicature Act**, R.S.N.S. 1989, c.24 directs that a multiplicity of proceedings dealing with precisely the same issue should be avoided. An arbitrator has no jurisdiction under the Agreement to address the claims against non-union

members, and to deal with non-union members and union members in different fora could lead to conflicting results, and injustice.

[50] The essential character of the dispute is not interpretation of a collective agreement, but of TCSAP and the Release, and the Plaintiffs seek remedies arising from breach of contract by non-union members and unjust enrichment, which an arbitrator has no jurisdiction to award.

[51] The integrity of the collective bargaining process and respect for arbitration provisions in collective agreements are very important, but in my view they do not override the need to avoid multiple and perhaps conflicting decisions on the same issue, a matter which goes to the integrity of the judicial system as a whole.

[52] Application of the factors enumerated in **Pleau** suggests that the Court should exercise jurisdiction with respect to disputes involving all Defendants in this case, and a multiplicity of legal proceedings should be avoided.

RES JUDICATA (ESTOPPEL)

Question #2: **Should the Plaintiffs' claim be dismissed as *res judicata* (including consideration of cause of action estoppel and issue estoppel)?**

[53] The Plaintiffs' claim should not be dismissed as *res judicata*.

[54] The rule of estoppel by *res judicata* directs that a dispute which has been judged with finality is not subject to re-litigation. The bar extends to the cause of action adjudicated (variously referred to as claim, cause of action or action estoppel) and also precludes re-litigation of the constituent issues or material facts necessarily embraced therein (issue estoppel). (See **Danyluk v. Ainsworth Technologies Inc.**, [2001] S.C.J. No.46 (S.C.C.) (Q.L.) at p.10) Cause of action estoppel arises when a question is raised which was determined, or which the parties had the opportunity to raise for determination, in a previous action. Issue estoppel involves a different question in a subsequent action, where a fundamental point or issue of fact forming a necessary ingredient of the subsequent action has been decided between the parties in the previous action. (See **Angle v. Minister of National Revenue** (1974), 47 D.L.R. (3d) 544 (S.C.C.) at pp555-557 and **Fenerty v. The City of Halifax** (1919-20), 50 D.L.R. 435 (N.S.)

[55] Underlining the rule of estoppel by *res judicata* are two broad principles of public policy:

(1) there should be an end to litigation; and

(2) no individual should be sued more than once for the same cause. (See Sopinka, Lederman and Bryant**, The Law of Evidence in Canada**, (1999) at p.1068)

[56] There are three pre-conditions to the operation of *res judicata*:

(1) there must be a final judicial decision pronounced by a court of competent jurisdiction;

(2) the parties to the judicial decision or their privies must be the same persons as the parties to the proceedings in which the estoppel is raised or their privies; and

(3) the same question (cause of action or issue) must have been decided **(Danyluk**, *supra*, at p.11; **The Law of Evidence in Canada**, *supra*, at p.1070).

[57] Even if all three pre-conditions are met, there remains a discretion in the court whether to apply the equitable doctrine to achieve fairness in the circumstances of the case (**Danyluk**, *supra*, at p.19).

[58] In this case the Superintendent's decision (as reviewed by the Courts) was a final judicial pronouncement on a matter within his jurisdiction. Although the parties who appeared at the hearing before the Superintendent and on the appeals from his decision were not identified in exactly the same manner as the Plaintiffs and Defendants in this action, the interests of the same parties have been represented and advanced in all the proceedings. Requirements respecting decision finality and party identity do not preclude application of *res judicata* in this case.

[59] I have concluded, however, that the question to be decided in this case is not the same cause of action or issue determined in the proceeding before the Superintendent and addressed in appeals from his decision.

[60] The issue for determination by the Superintendent was whether the Pension Plan should be partially wound up in accordance with the provisions of the **PBA**, with the consequence that "grow-in" benefits would apply. He found that statutory requirements were met, and issued the Wind-up Order. Prior activity in both the Supreme Court and the Court of Appeal was confined to appellate review of determinations concerning issues which were considered by the Superintendent within his jurisdiction. The **PBA** provided for an appeal of the Wind-up Order, but the causes of actions or issues on appeal were confined to **PBA** matters which the Superintendent could address. The Supreme Court reviewed the Superintendent's decision to issue the Wind-up Order, and found it not to be patently unreasonable, and the Court of Appeal exercised a similar mandate. Interpretation and application of the **PBA** are neither the basis of the claim nor the main issues in the present action. This claim is concerned with the rights and obligations of the parties arising in the context of TCSAP and executed Releases. This Court is not now being asked, as was the Superintendent, to decide if the Wind-up Order should be issued, but rather to determine the relationship between TCSAP and the Defendants' pursuit of **PBA** benefits. The Superintendent's mandate and the focus of appeal deliberations was neither interpretation or application of TCSAP nor its implications respecting recovery of "grow-in" benefits following partial pension plan wind-up.

[61] The Defendants argue that the Superintendent and the Courts reviewing his decision were aware of and considered the Release, and therefore the case is now *res judicata*. I do not agree with that position. The Release, to the extent it was before prior decision makers, was incidental to the issue they addressed; indeed, ASF No. 88 says the Release was not raised as a defence to the partial wind-up in prior proceedings. The Release was referenced and considered by the Superintendent and by the Courts only as evidence as termination of employment. Those decision makers knew the employees received TCSAP and signed releases, but they did not examine or analyze the terms of TCSAP or the Release - that was not their issue.

[62] Even if there were a prior finding that recovery by the employees was not prohibited by signing the Release, that does not make this entire claim *res judicata*. The Plaintiffs' present action seeks relief based not only upon alleged breach of the release contract, but also claims recission, reimbursement of amounts paid under TCSAP, damages, restitution and application of remedies for unjust enrichment. *Res judicata* based upon issue estoppel does not preclude this Court addressing the present claim, which raises issues of fact and law involving TCSAP which go beyond matters the Superintendent had jurisdiction to address under the **PBA**. (See **Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund** (1999), Carswell N.S. 136 (C.A.) and **Lloyd v. Imperial Oil Limited** (1999), Carswell Alta. 1269, leave to appeal to S.C.C. refused 2000 Carswell Alta. 1229 (S.C.C.))

[63] Neither branch of the *res judicata* doctrine - cause of action estoppel or issue estoppel - assists the Defendants' in this case. TCSAP contract issues and availability of remedies such as unjust enrichment are not matters which should have been raised in prior proceedings, which began before the Superintendent whose jurisdiction was limited to the authority he received under the **PBA**. Accordingly, cause of action estoppel does not bar this Court from adjudicating the separate and distinct claims now presented, which are not inconsistent with determinations made in any prior proceeding. (See **Hoque v. Montreal Trust Co. of Canada**, [1997] N.S.J. No.430 (N.S.C.A.) (Q.L.))

[64] *Res judicata* based upon issue estoppel is not applicable in this case because there are significant issues arising from the TCSAP contract and the remedies sought by the Plaintiffs which were not raised, assumed, negatived, or expressly or implicitly decided in prior proceedings. The question out of which estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings; it is not sufficient if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. (See **Angle v. Minister of National Revenue** (1974), 47 D.L.R.(3d) 544 (S.C.C.) at p.555)

[65] The Court has discretion to determine whether to apply *res judicata*, even if the necessary prerequisites are present. I do not find here that all three prerequisites are present because the cause of action and issues are different. However, given the nature of the relief sought and the need for the Court to

consider the issues raised in the context of all dealings among the parties, even if the cause of action and issues in the two proceedings were more closely aligned, my exercise of discretion in this case would rule out applying the *res judicata* doctrine.

COLLATERAL ATTACK - FINALITY

Question #3: Should the Plaintiffs' claim be dismissed as either contrary to the rule against collateral attack or the principle of finality?

[66] The answer is no. The Plaintiffs' claim is neither contradictory to the rule against collateral attack nor the principle of finality.

[67] The rule against collateral attack has recently been described as follows by the Supreme Court of Canada in **Garland v. Consumers' Gas Co.**, [2004] S.C.J. No.21:

> The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:
>
> > It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

[68] The Supreme Court held in **Garland** that, based on a plain reading of the rule, the doctrine of collateral attack did not apply because the specific object of the appellant's action was not to invalidate or render inoperable an order of the

Ontario Energy Board. Similarly in this case, the doctrine of collateral attack does not apply, because the object of the Plaintiffs' action is not to invalidate or render inoperable the Wind-up Order.

[69] This action is not an attack directed against the Superintendent's finding that the **PBA** requirements for a partial wind-up and consequent "grow-in" payments were satisfied. The issue in this case relates to whether both those "grow- in" payments and TCSAP payments should be made in the circumstances. The Plaintiffs are not challenging the validity or the finality of the Superintendent's decision or trying to circumvent it - they are saying that they do not have to pay both benefits payable under that decision and full TCSAP benefits. The issue is not whether employees are entitled to what the Superintendent said was due to them; the issue is whether employees are entitled to both those payments and full TCSAP benefits.

[70] The decision whether to bar a claim on the basis of the rule against collateral attack is discretionary, requiring a court to balance the interest in finality against fairness to the parties. (See **Danyluk v. Ainsworth Technologies Inc.**, *supra*, at paragraph 21 and **Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund**, *supra*, at paragraphs 58-60) In my view it would be unfair to deny the Plaintiffs consideration of the issues raised in this action on the basis of the collateral attack doctrine.

[71] The present action is not an attack on the Superintendent's order - it is a claim to determine the relationship between that order and TCSAP contract benefits, or to interpret TCSAP and the Release in the context of the Wind-up Order.

PENSION BENEFITS ACT **- "EMPLOYMENT STATUTE"?**

[72] Before responding to the remaining questions, it is necessary to consider whether the **PBA** is an "employment statute" in the context of TCSAP, which provides as follows in paragraph V.A.:

> V. LEGISLATIVE REQUIREMENTS
>
> A. Payment in lieu of Statutory Payments

> The benefits provided under the Texaco Canada Severance Allowance Program are intended to be inclusive of, and not in addition to, any benefits or allowances prescribed by employment statutes and are to be in full payment of the Corporation's obligations under such legislation, including the individual notice and severance requirements. *(emphasis added)*

[73] The Plaintiffs suggest that the **PBA** is employment legislation as contemplated by TCSAP; the Defendants maintain that it is not.

[74] I have concluded that the **PBA** is an "employment statute."

[75] TCSAP does not contain or refer to any definition of "employment statutes." The term is not defined in the legal dictionaries or books containing interpretations of words and phrases which I have consulted .

[76] Section 4(1) of the **PBA** prescribes the statute's application as follows:

> This Act applies to every pension plan that is provided for persons employed in the province. *(emphasis added)*

[77] The text Employment Law in Canada by England and Christie, 3d. Edn., at *f*1.21 identifies the following as statutes which contribute to establishing the "floor of rights" in employment contracts:

> ...employment standards legislation, industrial standards legislation, pay equity legislation, occupational health and safety legislation, workers compensation legislation, pension benefits legislation and human rights legislation [*emphasis added*].

[78] The Supreme Court of Canada used somewhat similar language in the **Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324** (2003), 230 D.L.R. (4th) 257. In that case, the majority held that a labour grievance arbitrator has the power to enforce the substantive rights and obligations of "human rights and other employment-related statutes", which Justice Iacobucci stated at page 271 "establish a floor beneath which an employer and union cannot contract."

[79] The Defendants argue that the **PBA** may be characterized as an "employment-related statute", but that it is not an "employment statute." Although Justice Iacobucci used the phrase "employment-related statute" in **Parry Sound**, *supra*, there is no suggestion in that case, or in any other authority which I have been able to locate, that there is any substantial distinction between the meaning of the two expressions.

[80] The Defendants' claim that the **PBA** is not an "employment statute" is inconsistent with their position that this Court does not have jurisdiction in the present action because pension benefits are a term and condition of employment - an employment issue covered by collective agreement. When they maintain that this Court has no jurisdiction, the Defendants suggest any violation of the **PBA** falls within the exclusive jurisdiction of an arbitrator. I am unable to reconcile that position, which must be premised on pensions being an employment issue, with the submission that the **PBA** is not an "employment statute" in the TCSAP context.

[81] TCSAP, paragraph V.A. relates the benefits provided under that program to "benefits or allowances prescribed by employment statutes." TCSAP, paragraph II indicates that payments are intended to satisfy "...pension entitlements and all other benefits of employment." I conclude that the **PBA**, being legislation applicable to "pension plans for persons employed in the province" is an "employment statute" contemplated by the use of that term in TCSAP.

BREACH OF RELEASE

[82] The following two questions are posed:

Question #1: Have the Defendants breached the term of the Release by seeking or obtaining a partial wind-up order and "grow- in" benefits under the Pension Benefits Act?

Question #7 - Issue number one includes but is not limited to the following question: have the individual Defendants breached the terms of the releases by seeking or obtaining partial wind-up order and "grow- in" benefits under the Pension Benefits Act?

[83] The answer to these two questions is no.

[84] It is not disputed that the Defendants sought and obtained the Wind-up Order and that some Individual Defendants received "grow-in" benefits; however, this action by the Defendants does not constitute breach of Release terms.

[85] The text of the Release is as follows:

> In consideration of the severance allowance and other benefits to be received by me in accordance with the provisions of the Texaco Canada Severance Allowance Program, I do hereby release and discharge MCCOLL-FRONTENAC INC. and IMPERIAL OIL LIMITED, their subsidiary and affiliated companies, including but not restricted to Esso Resources Canada and Esso Resources Canada Limited, and their directors and employees from all claims, demands, damages, actions or causes of action arising out of my separation from employment with any of the companies described in this release.

[86] The Plaintiffs claim that each of the Defendants who participated in pursuit of partial wind-up of the pension plan breached the contract contained in the Release which they signed. The Plaintiffs also maintain that each Defendant who signed the release and then participated in pursuit of the Wind-up Order is jointly and severally liable for losses incurred by the Plaintiffs, regardless whether that Defendant received any benefit pursuant to the Wind-up Order. The Plaintiffs claim they are entitled to recover damages not only against Employees U-50 who received "grow-in" benefit pursuant to the Wind-up Order, but against all Defendants who supported the pursuit of the Wind-up Order.

[87] It is the Plaintiffs' position that ordinary principles of contract language interpretation, applied in the context of events leading to execution of the Release, support the conclusion that the Release was intended to and did prohibit claims relating to the Defendants' pension rights, including making application to the Superintendent for partial pension plan wind-up.

[88] I do not subscribe to the broad interpretation of the Release proposed by the Plaintiffs, and I find that the Defendants' actions do not amount to a breach of the plain or ordinary meaning of the Release. The document released specific named companies, subsidiaries, and affiliates, but I find its language did not prohibit an application to the Superintendent for a statutory benefit, which was not a direct

claim against a releasee, even though contemplated releasees might ultimately be affected by the result.

[89] Individual Defendants signed the Release relating to claims arising "out of my separation from employment." Each document was an individual release, concerned with termination of a person's own employment and his or her claims arising therefrom. The application for Wind-up Order was not triggered by personal separation from employment, but, in accordance with Section 74(1)(d) and (e) of the **PBA**, by discontinuance of the Plaintiffs' business in Nova Scotia.

[90] The Release refers only to claims arising out of "my" separation from employment; its plain meaning does not extend application to claims arising from another person's separation. The document's wording does not expressly or by implication support the Plaintiffs' position that a Defendant who did not benefit from the Wind-up Order is jointly and severally liable for benefits received by other persons.

[91] I have concluded that the plain meaning of the Release confines prohibited claims to those brought directly against companies named and related or affiliated entities arising from an individual releasor's claim for personal benefit resulting from that person's own separation from employment. The Defendants' pursuit of partial pension plan wind-up is not a prohibited claim against a protected party. Alternatively, if the Release does not have the plain and ordinary meaning which I have attributed to its words, I would deem it ambiguous, apply the *contra proferentem* rule, and construe its terms against the Plaintiffs, who authored the document. "Where the meaning of a contract is ambiguous, that is, that its meaning is obscure, the application of the *contra proferentem* rule requires that the meaning least favourable to the author of the contract ought to prevail..." (See **Arnoldin Construction & Forms Ltd. v. Alta Surety Co.**, [1995] N.S.J. No. 43 (N.S.C.A.) (QL), at p.11; see also **Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.** (1986), 25 D.L.R. (4th) 649 (S.C.C.) (QL))

[92] Based upon either its plain meaning or the *contra proferentem* rule, operation of the Release should be restricted to claims brought against named releasees and related or affiliated companies arising from an employee's own separation. None of the Defendants breached the Release by pursuing partial wind-up of the pension plan, and it would be particularly unjust to construe the

Release to hold an employee who did not receive a benefit under the Wind-up Order jointly and severally liable to the Plaintiffs because other employees received benefits.

UNJUST ENRICHMENT

[93] Questions #4 and #8 read as follows:

Question #4 - Have the Defendants been unjustly enriched by obtaining "grow- in" benefits under a partial wind-up of the Pension Plan?

Question #8 - Issue #4 includes but is not limited to the following question: have those individual Defendants who did not receive "grow- in" benefits been unjustly enriched under the partial wind-up of the Pension Plan?

[94] The Plaintiffs claim that the Defendants were unjustly enriched when "grow- in" benefits were received under the Wind-up Order.

Development of Doctrine

[95] The Plaintiffs contend that the Court should apply equitable principles developed during the past 60 years to deny a benefit that is against conscience for the recipient Defendants to obtain.

[96] In **Deglman v. Brunet Estate**, [1954] S.C.R. 725, the Supreme Court of Canada considered a situation where the Respondent had an oral agreement with his aunt by which he claimed she had promised to leave him a piece of land in her will in exchange for services to be performed in her lifetime. Although he was unable to establish the writing requirements of the **Statute of Frauds**, the Court found that he was entitled to recover the value of the services on the basis of quasi-contract or restitution as described in **Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.**, [1943] A.C. 32 (H.L.). In that case, when the unjust enrichment doctrine was in its infancy, Lord Wright stated that a man could not retain "the money of or some benefit derived from another which it is against conscience that he should keep." Justice Wilson, for the Supreme Court of Canada, put the principle in these terms in **Palachik et al. v. Kiss**, [1983] 1 S.C.R. 623: "Equity fastens on the conscience of the appellant and requires him to deliver up that which it is manifestly inequitable that he retain."

[97] The test for unjust enrichment was set out by Justice Dickson (as he then was) in **Rathwell v. Rathwell**, [1978] 2 S.C.R. 436, and again in **Pettkus v. Becker**, [1980] 2 S.C.R. 834. Justice Dickson held in that case, for the majority of the Court:

> [T]here are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach...is supported by general principles of equity that have been fashioned by the courts for centuries, though, admittedly, not in the context of matrimonial property controversies.

[98] The Supreme Court has most recently confirmed the reasoning in **Pettkus v. Becker** as the proper approach to unjust enrichment in **Garland v. Consumers' Gas Co.**, [2004] S.C.J. No. 21, para. 30, (reported at (2004), 237 D.L.R. (4th) 385). In that case, the Court, per Iacobucci J. held, following the reasoning of Justice MacLachlin (as she then was) in **Peel (Regional Municipality) v. Canada**, [1992]

3 S.C.R. 762, that establishing enrichment and deprivation requires a "straightforward economic analysis", with other considerations being incorporated into the analysis to determine whether there was a juristic reason for the enrichment (**Garland**, at para. 31). Justice Iacobucci set out the proper approach to the juristic reason analysis as follows:

> The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery.... The established categories that can constitute juristic reasons include a contract..., a disposition of law..., a donative intent..., and other valid common law, equitable or statutory obligations.... If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
>
> The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a de facto burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
>
> As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case but which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments. [paras. 44-46]

In my view that passage from **Garland** represents the state of the law on the analysis of "juristic reason."

The Present Case: Enrichment and Deprivation

[99] The "straightforward economic approach" suggested by Justice Iacobucci should be applied to determine whether there was an enrichment enjoyed by the Defendants and corresponding deprivation suffered by the Plaintiffs.

[100] The Plaintiffs in this case say certain Defendants recovered twice on account of their pension entitlements – first under TCSAP and again by collecting "grow-in" benefits following the partial wind-up under the **PBA**. The Defendants contend that there has been no unjust enrichment. They point out, for instance, that Individual Defendants who did not receive "grow-in" benefits were not enriched and therefore could not have been unjustly enriched; they say the Plaintiffs' failure to distinguish between Employees who received "grow-in" benefits and those who did not damages their argument that there was double recovery. As for individuals who did receive "grow-in" benefits, the Defendants argue that they were not enriched because the "grow-in" benefits were part of their earned and vested pension benefits. For the same reason, they say, the Plaintiffs suffered no deprivation. The pension fund, according to the Defendants, was for the Employees' benefit, and payments from it did not deprive the company of anything.

[101] Having taken the benefits available under the TCSAP program, which I find were intended to address, *inter alia*, the Defendants' claims against the pension plan, the Defendants then commenced a proceeding before the Superintendent by which a number of them (Employees U-50) also obtained "grow-in" benefits under the pension plan. Without commenting on the propriety of commencing those proceedings before the Superintendent, it is apparent that some of the Defendants received funds as a result of that proceeding. As such, they were enriched, and I find that the Plaintiffs were correspondingly deprived of those funds. Even though the pension funds were trust funds, an economic analysis shows that ultimately any surplus of those funds or any payment after satisfying the obligations to the Employees would go to the Plaintiffs. The decisive question then becomes whether there was a juristic reason for this enrichment and corresponding deprivation.

The Present Case: Juristic Reason

[102] The Plaintiffs claim that the funds paid out under TCSAP encompassed compensation for pension losses resulting from the transfer of McColl-Frontenac to Ultramar. The Plaintiffs argue that Employees U-50, who received "grow-in" under the Wind-up Order, recovered funds twice in satisfaction of their pension claims at the Plaintiffs' expense. The Plaintiffs claim that the TCSAP documents made it clear that the Defendants were not intended to receive further benefits on account of pension rights after signing the release and receiving TCSAP payments. The Plaintiffs also point to the letter from John MacLeod of McColl-Frontenac to the Defendants' counsel, dated October 12, 1990 (Doc.#24), in which Mr. MacLeod stated that an employee who did not sign the TCSAP Release or who brought an action against the company would be disentitled from receiving TCSAP benefits. As such, the Plaintiffs claim, double recovery was not intended or sanctioned by contract. Further, the Plaintiffs say the **PBA** does not contemplate gratuitous payments by the employer in addition to employees' entitlement under a winding-up order. Thus, the Plaintiffs argue, there was no juristic reason for the enrichment.

[103] The Defendants contend there were juristic reasons for them to receive "grow-in" benefits: first, the pension plan formed part of an employment contract; second, the pension plan was subject to the **PBA**, which provided for "grow-in" benefits; and third, in the earlier proceedings the Court of Appeal held that the individuals who received "grow-in" benefits as part of their accrued and vested pension benefits were entitled to them.

[104] The Defendants propose several grounds upon which the juristic reasons existed. Some of these appear to fit within the established categories mentioned by Iacobucci J. in **Garland**, such as contract or statutory obligation.

Pension Plans and Collective Agreements

[105] The Defendants argue that the terms of a lawfully created pension plan can constitute a juristic reason for enrichment. For instance, in **Whitsitt v. Ontario**, [1998] O.J. No. 6211 (Ont. C.J. (Gen. Div.)) the applicant sought return of contributions to a pension plan (the "50/30" plan) for police officers, arguing, *inter alia*, that the respondents (the Crown and the Ontario Pension Board) would

be unjustly enriched if the contributions were not refunded. The applicant's argument revolved around the legislative treatment of contributions to the "50/30" plan by members who were also eligible for a benefit known as "Factor 80." The Court held that the two plans were part of an integrated regulatory scheme which did not contain a "gap" as claimed by the applicant. As to unjust enrichment, there was no basis upon which to conclude that the Crown or the Board were enriched, or, if they were, that there was any deprivation. Even if there had been an enrichment and a deprivation, there was "plainly a juristic reason for the enrichment, namely, that it is the direct result of the terms [of] a lawfully enacted pension scheme" (para. 11). Accordingly, the court struck the notice of application on the grounds that it was plain and obvious that it was doomed to fail.

[106] In **Goodwin v. Benefit Plan Administrators (Atlantic) Ltd.** (2000), 195 Nfld. & P.E.I.R. 159 (P.E.I.S.C.-T.D.), a small claims action, the plaintiff sought the return of pension contributions made in circumstances where he did not meet the conditions for a refund under the terms of the pension plan. He claimed that the defendants had been unjustly enriched as a result of retaining his contributions. DesRoches J. held that, while there might have been a deprivation, there was probably no enrichment "in the usual sense" (para. 17). The crux of the decision, however, was the "juristic reason" analysis. Justice DesRoches referred at length to **Re Attorney General of Canada and Confederation Life Insurance Company** (1995), 24 O.R. (3d) 717 (Ont. Ct. (G.D.)).. He found that the plaintiff was obliged to contribute to the pension fund pursuant to the collective agreement, and that his pay rate was not affected. While he might have had a reasonable expectation that the contributions would be refunded, there was no indication that the trustees knew of this expectation. Justice DesRoches concluded:

> Even if it could be said that there had been an enrichment of the defendant Board of Trustees and a corresponding detriment to the plaintiff, based on the evidence presented I find a juristic reason existed for any benefit or enrichment the Board of Trustees may have received by way of the contributions to the pension fund made on the plaintiff's behalf. This juristic reason flows from the terms of the Collective Agreement, the provisions of the Pension Plan, and the restrictions placed on the Board of Trustees by the Pension Trust Fund agreement. [para. 23].

[107] The plaintiff did not qualify for a refund, and the Board of Trustees would have violated the Pension Trust Fund agreement by making a refund in these circumstances (paras. 25-27).

[108] The **Whitsitt** decision is sparing with the facts, being a brief decision on a preliminary application, but the Court stated clearly that a *pension scheme* could constitute a juristic reason for enrichment. It is less clear that **Whitsitt** stands for the proposition that the terms of a *collective agreement* can create a juristic reason for enrichment, as the defendants claim it does. The phrase "collective agreement" does not appear in the decision. However, the Court in the more comprehensive **Goodwin** decision numbered the terms of the collective agreement among the factors that founded a juristic reason. I am satisfied that there may be circumstances where the terms of a pension plan or collective agreement provide a juristic reason for what would otherwise be an unjust enrichment. However, these situations do not mirror the present case, where the terms of the collective agreement and pension plan must be considered in the context of the TCSAP agreement. As such, I do not find a juristic reason exists on this basis.

Pensions vs. Severance and Other Employment Benefits

[109] As part of their contention that there has been no unjust enrichment, the Defendants assert that there is a necessary distinction between pension benefits and various other employment-related income benefits.

[110] In **Imperial Oil v. Ontario (Superintendent of Pensions)**, [1996] 15 C.P.C. 31, the Ontario Pension Commission held that a claim to "grow-in" benefits under the Ontario **Pension Benefits Act** was not satisfied by severance pay. Severance was an entitlement according to employment law principles, and had to be paid regardless of whether "grow-in" benefits were provided. The Commission commented however, in paragraph 44 of the decision, that it would likely not have granted a partial wind-up had it been proven that benefits equivalent to those provided under the Act had been given. In the present case, the facts demonstrate that benefits equivalent to those under the **PBA** were given by the Plaintiffs under TCSAP, and had the employees chosen to commute the benefits to pension benefits, they would have been better off under TCSAP than under the **PBA**.

[111] As part of an employee's wage package, pension benefits are distinguishable from wrongful dismissal damages. For instance, in **Girling v. Crown Cork & Seal Canada Inc.** (1995), 127 D.L.R. (4th) 448 (B.C.C.A.), the issue was whether a terminated employee was entitled to collect unreduced early

retirement benefits and pay in lieu of notice for the same time period. Carrothers J.A., for the majority, agreed with the Chambers judge that the pension benefits

> are collateral benefits of the employment contract which should not be considered income and should not be deducted from damages which are income in lieu of notice. The damages (pay in lieu of notice) flow from breach of the employment contract and the collateral pension benefits are payable pursuant to the contractual arrangements therefor. They are not to be modified by the appearance of duplication. [para. 10].

[112] Carrothers J.A. took judicial notice of the phenomena of "downsizing" and large-scale layoffs and commented that the employees were entitled to "the maximum benefits available in their forced early retirement" (para. 12).

[113] In **Boarelli v. Flannigan** (1973), 36 D.L.R. (3d) 4 (Ont. C.A.), the issue was the treatment to be given to collateral benefits in tort actions where there was an assessment of damages for lost income or lost earning capacity. While the immediate issue involved the overlap of welfare payments with personal injury damages, the Court, *per* Dubin J.A., commented on collateral benefits obtained through collective agreements or private employment contracts. Dubin J.A. held that such benefits should be considered part of the wage package and thus paid for by the employee. There was no equitable principle permitting

> ..a tortfeasor to obtain the advantage of benefits earned by the person who has been injured. It is for the contracting parties to determine whether such benefits are to be subrogated and it is of no concern of the party otherwise liable in damages [p. 14].

[114] While **Boarelli** speaks to the overlapping of various types of benefits, the case was primarily concerned with the effect of those benefits on damages for personal injury, rather than the relationship between the contracting parties. The most important principle it raises is that such benefits are earned and, in effect, paid for, by the employee.

[115] In **Emery v. Royal Oak Mines Inc.** (1995), 24 O.R. (3d) 302 (Ont. Ct. (Gen. Div.)), the plaintiff sought damages for wrongful dismissal. During the notice period (as it was ultimately established) he received payments under his early retirement pension plan. He sought his full salary for the concurrent period.

The defendant argued that this constituted double recovery and contended that, although the law generally required pension benefits to be non-deductible from compensation for lost salary, this should not apply where the pension was non-contributory, as was the case here. Chapnik J. rejected this argument, and stated:

> The prevailing view appears to be that dismissed employees who are eligible to take pension benefits should be free to do so without being penalized by having them deducted from damages for wrongful dismissal.... As a matter of policy, if this deduction were made, the defendant would benefit from withholding the appropriate termination allowance in breach of a specific term in Mr. Emery's employment contract. The triggering of the pension only occurred due to the halting of salary payments at the end of July 1990 arbitrarily and without justification. To allow the deduction of these moneys from the plaintiff's salary entitlement would, in my view, be contrary to public policy.
>
> Aside from policy considerations, the facts underlying the payment in this case make the company's contention even more untenable. The correspondence, memoranda, board of director's minutes, and other company documents clearly confirm the importance of this aspect of Mr. Emery's contractual package. The retirement pension benefit plan constituted a known feature of his employment agreement. The pension moneys did not represent a gratuitous payment made to him, but rather, one earned by him over the years, in effect, a reward for past services. [p. 311].

[116] Accordingly, there was no deduction or set-off for pension payments the plaintiff received during the notice period.

[117] The defendants point out that, as MacPherson J.A. said in **Huus et al. v. Ontario (Superintendent of Pensions)** (2002), 58 O.R. (3d) 380 (Ont. C.A.):

> [P]ension plans are for the benefit of the employees, not the companies which create them. They are a particularly important component of the compensation employees receive in return for their labour. They are not a gift from the employer: they are earned by the employees. indeed, in addition to their labour, employees usually agree to other trade-offs in order to obtain a pension.... [para. 25].

[118] The Nova Scotia Court of Appeal commented on the **Pension Benefits Act** in these terms in **Hawker Siddeley Canada Inc. v. Nova Scotia (Superintendent of Pensions***),* [1994] N.S.J. No. 102 (C.A.); 129 N.S.R. (2d) 194:

> ... Underlying this legislation is a significant and important principle of public policy designed to protect and enhance the quality of life to which the subject employees would be entitled in their retirement years after achieving the threshold requirements of continuous employment in the workplace.... [para. 59].

[119] While agreeing that the purpose of employment-related pension benefits is to provide for the employee's welfare after retirement, and concurring with the Defendants' claim that severance pay and pension benefits are not mutually exclusive, I do not see that either assertion helps the Defendants in this case. The present case is distinguishable on the basis that the parties' stated intention in concluding the TCSAP agreement was to provide for severance as well as pension entitlements. That objective is evident from the wording of TCSAP, paras. II and V.A.:

> II ...Under [TCSAP], the Corporation will pay a severance allowance and will provide other benefits in full satisfaction of all claims of an Eligible Employee on Termination on account of salaries and wages, Merit Awards, pension entitlements and all other benefits of employment.
>
> V.A. Payment in lieu of Statutory Payments
>
> The benefits provided under [TCSAP] are intended to be inclusive of, and not in addition to, any benefits or allowances prescribed by employment statutes and are to be in full payment of the Corporation's obligations under such legislation, including the individual notice and severance requirements.

Entitlement to TCSAP and "Grow-in" Benefits, Parties' Intention, Fairness

[120] The Defendants argue that there was also a juristic reason for them to receive the TCSAP benefit. They say TCSAP was a contractual obligation that Imperial assumed when it bought the Texaco shares, and subsequently triggered when it opted to discharge the Individual Defendants.

[121] Thus, the Defendants argue, the receipt by Individual Defendants of both TCSAP and "grow-in" benefits did not constitute double recovery for the termination of their employment. While the TCSAP benefits were meant to compensate for the termination of employment, the "grow-in" benefits arose from the pension plan and became payable when Imperial sold the refinery without confirming that Ultramar had a comparable pension plan that would allow continuity of service and accruing benefits.

[122] The Defendants emphasize the separation of the two benefit plans, claiming that TCSAP replaced severance benefits in the Collective Agreement, but "left undisturbed a right to have pension benefits determined in accordance with the terms of the Pension Plan." They also say Imperial repeatedly assured them that they would receive earned pension benefits in accordance with the terms of the pension plan and that they would receive TCSAP benefits if it was triggered. Finally, the Defendants say the Plaintiffs knew when paying out TCSAP benefits that they could not prevent payment of "grow-in" benefits if the Superintendent ordered a partial wind-up under the **PBA**. The Defendants say neither the TCSAP documents nor the release suggest that TCSAP was intended to compensate employees for "pension losses arising from the transfer of MFI to Ultramar" (with particular reference to Texaco's expectations), and that the evidence does not support the Plaintiffs' assertion that TCSAP contemplated that they were not intended to receive further pension benefits after signing the TCSAP. They also point to provisions of the Guidelines that apparently contemplated changes to TCSAP, and argue against the Plaintiffs' claim that there was a "failure of consideration."

[123] The Plaintiffs respond that their claim is not that Defendants were unjustly enriched by receiving the pension amounts, but rather on account of retaining the TCSAP payments and seeking and receiving the pension amounts. This, I

conclude, is correct. Employees U-50 who received funds under the wind-up as well as TCSAP were compensated twice on account of their pension claims: once under the TCSAP provisions and once under the **PBA**. I have not been directed to any reason derived from the categories set out by Iacobucci J. in **Garland**, *supra*, that provides a juristic reason for this enrichment. I am satisfied that the Plaintiffs have demonstrated that no such reasons apply here. Furthermore, I find that the Defendants have not shown that there is any other reason to deny the Plaintiffs' recovery. Nothing suggests that, while they were negotiating the TCSAP agreement, it was in the reasonable contemplation of the parties that the Defendants would be entitled to recover twice on account of the pension entitlement, and no public policy reasons have been suggested that would provide a foundation for such recovery. Accordingly, I am convinced that there was an enrichment and a corresponding deprivation, without juristic reason.

[124] Funds paid under TCSAP included compensation for pension losses arising out of the transfer of the McColl-Frontenac to Ultramar. The Plaintiffs agreed to accept TCSAP "on account of salaries and wages, Merit Awards, pension entitlements and all other benefits of employment." The amounts recovered by the employees under TCSAP exceed what they were entitled to receive pursuant to applicable legislation in the absence of TCSAP, including what they would have obtained under partial wind-up of the pension plan.

[125] Employees U-50 who have twice received funds in satisfaction of their pension claims obtained a windfall at the expense of the Plaintiffs, who fund the pension plan and are ultimately entitled to any surplus. There is no juristic reason for this result. Double recovery by Employees U-50 was contrary to the terms of a contract to which they were a party. The TCSAP documents indicate that the Defendants were not intended to receive pension beyond what TCSAP provided, and although the release did not prohibit an application to the Superintendent of Pensions, it was not intended that the parties receive further pension benefits outside TCSAP after signing the release.

[126] Employees U-50 have been unjustly enriched by obtaining both "grow-in" benefits under the Wind-up Order and TCSAP benefits - the retention of that enrichment is not fair in all of the circumstances.

Illegality

[127] It is not necessary, given the information which is apparent from the facts as stated by the parties, that I consider whether unjust enrichment principles apply in the context of an illegal contract. However, because the issue has been raised in submissions, I will address it.

[128] My response to Question 2 - that Defendants have not breached terms of the release - does not imply that the release is an illegal contract.

[129] The Defendants strenuously maintained that contractual documentation could not be interpreted to prevent either pursuit of the Wind-up Order or receipt of "grow-in" benefits. Their position was based upon the premise that any agreement contained in TCSAP to "contract out" of minimum employee benefits prescribed by the **PBA** was unlawful, and null and void, because parties cannot agree to diminish entitlement to minimum standards prescribed by public policy legislation. I conclude that the Defendants' premise is not well founded and their argument fails, because each Employee U-50 could have elected to apply TCSAP so that benefits under that plan would exceed the employee's entitlement pursuant to a combination of all benefits available under applicable legislation together with "grow-in" benefits received under the Wind-up Order.

[130] The Defendants' "illegal contract" argument would also fail because the Employees were not entitled to an absolute statutory benefit under the **PBA**. It was not a certainty that the Superintendent would direct that the Wind-up Order issue. Employees could have accepted TCSAP instead of taking a chance that the Superintendent might rule that in the circumstances there should not be a partial Wind-up under **PBA**, and consequently no entitlement to "grow-in" benefits. To accept a sum certain under TCSAP and give up a claim contingent upon a favourable ruling by the Superintendent does not in my view constitute illegally contracting away a statutory right.

[131] Contract illegality principles may save employees from bargaining away their rights upon employment termination, but that is not what happened in this case - the Defendants accepted substitute TCSAP amounts, which exceeded the statutory minimums to which they were found to be entitled.

[132] Even if I had determined that either of TCSAP or the release was an illegal contract (which is not my conclusion), I would apply unjust enrichment principles to provide relief in this case.

[133] The Plaintiffs say the Defendants knew the TCSAP was intended to provide full compensation for their pension rights, but nevertheless stood by and accepted the TCSAP payments while also pursuing proceedings before the Superintendent. They argue that such double recovery is contrary to the policy of the **PBA**.

[134] As authority, the Plaintiffs point to commentary and case law on arguments for "not enforcing illegal agreements and the need to avoid unjust enrichment" (G.H.L. Fridman, **The Law of Contract in Canada**, 4th edn., at pp. 445-446). In **Re Still and Minister of National Revenue** (1997), 154 D.L.R. (4th) 229 (Fed. C.A.) the Court summarized the law on illegality, and specifically statutory illegality. Robertson J.A. said the "modern approach" to illegality does not accept that a contract that is prohibited by statute is void *ab initio*; the purpose and object of the statutory prohibition is relevant to this consideration (para. 37). In the federal context, the Court held,

> where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all of the circumstances of the case, including regard to the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claimed, to do so. [para. 48]

[135] In a similar vein in this jurisdiction, the Nova Scotia Court of Appeal, in **Nova Scotia Union of Public Employees v. Halifax Regional School Board**, [2001] N.S.J. No. 242 (C.A.); 195 N.S.R. (2d) 97 at paras. 20-28, discussed exceptions to the common law rules as to the unenforceability of illegal contract and said, "[i]n addition to these 'exceptions', there is also the possibility that an independent action based on unjust enrichment or *quantum meruit* may lie even though the contract is unenforceable" (para. 26).

[136] See also **Town of Nackawic v. Safeway Shouldering Ltd.** (2001), 196 D.L.R. (4th) 659 (N.B.C.A.), **Berne Development Ltd. v. Haviland et al.** (1983), 40 O.R. (2d) 238 (Ont. H.C.J.), **Ontario New Home Warranty Program v. Grant**, [2002], O.J. No. 3460 (Ont. C.A.); 4 R.P.R. (4th) 56, **First City Development Ltd. v. Durham (Regional Municipality)** (1989), 67 O.R. (2d) 665

(Ont. H.C.J.) and **Gateway Hotel (1985) Ltd. v. Schur** [1990] M.J. No. 400 (Man. Q.B.); 66 Man. R. (2d) 305.

[137] I am persuaded by those authorities that unjust enrichment principles may be applied in the face of an "illegal" contract. The facts of this matter are such that even if the Plaintiffs were relying upon an illegal term in a contract, (which is not the case), equity should not overlook the agreement made by the Defendants and thereby allow, without juristic reason, enrichment of Employees U-50 to the Plaintiffs' detriment. Employees U-50 should not recover twice because they elected not to treat TCSAP payments as pension benefits and obtained "grow-in" benefit under the Wind-up Order, when they had agreed to accept TCSAP in full satisfaction of claims on account of pension entitlements and in lieu of statutory payments.

Conclusion, Unjust Enrichment

[138] Only those Defendants who were Employees U-50 have been unjustly enriched. Accordingly, the answer to Question #4 is:

> Some Defendants have been unjustly enriched by obtaining "grow-in" benefits under a partial wind-up of the Pension Plan.

The answer to Question #8 is:

> Those individual Defendants who did not receive "grow-in" benefits have not been unjustly enriched under the partial wind-up of the Pension Plan.

[139] The Plaintiffs are therefore entitled to relief by application of unjust enrichment principles with respect to Defendants U-50.

REMEDIES

[140] The parties have requested an opportunity to make further submissions concerning remedies available to the Plaintiffs. Arrangements will be made to suit the Parties' convenience. Costs may also be addressed at that time.

J.