Defining Pension Surplus Entitlement in Quebec: *Sauvé* v. *Pierre Moreault Ltée* and *A. Janin & Compagnie Ltée* v. *Allard*

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Introduction

The 1980s proved a decade of great innovation in the area of corporate finance, from currency swaps to junk bonds to flow-through shares. It should not be surprising, then, that some corporations chose during this period to reach for an even more original source of funding, namely the surplus assets in their employee pension funds. In so doing, these corporations have sparked a new form of litigation, the pension surplus entitlement case.

Since 1986, over a dozen Canadian companies have appeared in court to argue their right to recapture the actuarial surplus in their pension funds. These include the Bank of British Columbia[1] in B.C., Gainers,[2] Canadian Commercial Bank,[3] and Sulpetro[4] in Alberta, and Canada Dry,[5] Dominion Stores,[6] Dominion Securities,[7] and Otis Elevator[8] in Ontario. As a result, there is now a fairly well-

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[1] *Hockin* v. *Bank of British Columbia* (1989), 36 B.C.L.R. (2d) 220 (S.C.), aff'd (1990), 46 B.C.L.R. (2d) 382 (C.A.), leave to appeal ref'd [1991] 51 B.C.L.R. (2d) xxxv (S.C.C.) [hereinafter *Hockin*].

[2] *Gainers Inc.* v. *U.F.C.W. Local 280-P* (1986), 50 Alta L.R. (2d) 109 (Q.B.).

[3] *Canada Deposit Insurance Corp.* v. *Canadian Commercial Bank* (1989), 62 D.L.R. (4th) 498, 70 Alta L.R. (2d) 71, [1990] 2 W.W.R. 19 (Q.B.).

[4] *Re National Trust Co. and Sulpetro Ltd* (1989), 57 D.L.R. (4th) 120 (Alta Q.B.), rev'd in part (1990), 66 D.L.R. (4th) 271 (C.A.).

[5] *Re Reevie and Montreal Trust Co. of Canada* (1984), 6 C.C.E.L. 25, 10 D.L.R. (4th) 287 (H.C.J.), aff'd (1986), 53 O.R. (2d) 595, 25 D.L.R. (4th) 312 (C.A.), leave to appeal ref'd (1986), 56 O.R. (2d) 192 (S.C.C.) [hereinafter *Reevie* cited to O.R.].

[6] *Re Collins and Pension Commission of Ontario* (1986), 56 O.R. (2d) 274 (H.C.J.).

[7] *Re Heilig and Dominion Securities Pitfield Ltd* (1986), 55 O.R. (2d) 783, 29 D.L.R. (4th) 762 (H.C.J.), rev'd (1989), 67 O.R. (2d) 577, 59 D.L.R. (4th) 394 (C.A.), addendum as to costs (1989), 69 O.R. (2d) 159 (C.A.) [hereinafter *Heilig*].

[8] *Otis Canada Inc.* v. *Ontario (Superintendent of Pensions)* (1991), 2 O.R. (3d) 737 (Ct.) [hereinafter *Otis*].

developed body of jurisprudence in the common law provinces concerning the entitlement to such surplus.

The pension surplus controversy was somewhat slower to develop in Quebec. Nonetheless, the courts in Quebec have addressed various aspects of the issue on a number of occasions over the past ten years. Most recently, the Quebec Superior Court has rendered a pair of judgments which examined squarely the question of entitlement to surplus pension assets. In the first decision, it was held that such assets belonged to the plan participants.[9] In the second decision, the surplus was held to belong to the sponsoring employer.[10]

The purpose of this comment is to examine and, if possible, reconcile these seemingly conflicting decisions. As both decisions are currently under appeal, it is obvious that this will not be the last word on the matter. Nevertheless, with a growing number of surplus disputes being put before the courts in Quebec, an extended analysis of these two decisions at this juncture should prove timely for many jurists in Quebec. The analysis should also be of interest to observers in other Canadian jurisdictions, since the approach of the courts in Quebec has been free of the common law trusts analysis so often favoured by the courts in the other provinces and so frequently criticized by legal commentators in those provinces.

I. Background

Modern-day private pension plans, established by employers for their retired employees, date back to the late 1800s. With the rise of industrialization and the large-scale enterprise, and the breakdown of family, village, and church assistance networks, it became necessary to devise new means of support for those past working age. The first solution was to create employer-sponsored private pension plans, enabling legislation for which was passed by Parliament in 1887.[11] The second solution was to devise a government-sponsored public pension system, which was accomplished by stages in the middle of this century. Together with individuals' savings, especially as amassed through registered retirement savings plans and other tax-assisted formats, public and private pensions now constitute the primary sources of income for retired Canadians.

Private pension plans today are governed at the federal level (where sponsored by banks, railways, airlines, and other enterprises deemed to constitute federal undertakings pursuant to subsection 92(10) of the *Constitution Act, 1867* (U.K.)[12]) and in most provinces (where sponsored by any other employer) by

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[9]*Sauvé* v. *Pierre Moreault Ltée*, [1990] R.J.Q. 1007 (C.S.), under appeal Montreal 500-09-000482-901 (C.A) [hereinafter *Sauvé*].

[10]*A. Janin & Compagnie Ltée* v. *Allard*, [1991] R.J.Q. 1737 (C.S.), under appeal Montreal 500-09-000913-913 (C.A.) [hereinafter *Janin*] .

[11]*Pension Fund Societies Act*, R.S.C. 1985, c. P-8.

[12]30 & 31 Vict., c. 3.

pension benefits legislation.[13] The pension benefits statutes in the various Canadian jurisdictions are uniform in many respects, though they do vary on some important points.

The legislation in Quebec, the *Quebec Supplemental Pension Plans Act* (*QSPPA*), was originally enacted in 1965 and was substantially revised in 1989.[14] This legislation sets out the standards which all private plans must meet in order to obtain registration. Beyond these standards, however, employers and employees are left with considerable choice as to how to structure their pension plans.

To begin with, a pension plan may be either contributory or non-contributory. Under a contributory plan, both employer and employee bear the cost of financing the plan. Under a non-contributory plan, the employer alone bears the cost.

A second, critical distinction is that between defined contribution (or money purchase) and defined benefit plans. In a defined contribution plan, either the employer alone (in a non-contributory plan) or both the employer and employee (in a contributory plan) pay(s) in a set amount, which is then invested for the account of the pension fund. The size of the employee's eventual pension depends on the rate of return earned on the investment. In a defined benefit plan, on the other hand, the employer promises the employee a certain monetary benefit upon retirement. In order to keep that promise, the employer must invest whatever the plan actuary estimates to be necessary to generate the required income. It follows that a defined benefit plan is more advantageous to the employee than a defined contribution plan, since the "market risk"[15] rests with the employer in a defined benefit plan but on the employee in a defined contribution plan. It also follows that an actuarial surplus can only accumulate in a defined benefit plan, given that all deposits into a defined contribution plan must by definition be paid out to pensioners upon retirement.[16]

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[13]Each of the provinces except British Columbia, New Brunswick, and Prince Edward Island currently has pension benefits legislation in force. The latter three provinces have enacted but not yet given royal assent to their statutes, and proclamation in force is expected imminently. For a discussion of constitutional jurisdiction over pensions, see D.J. Baum, "Profit Sharing and Pension Plans in Canada: Profile in Action — A Melding of Interests" (1971) 6 Texas Int'l L. Forum 165.

[14]S.Q. 1965, c. 25, consolidated into R.S.Q., c. R-17, as amended and partially replaced by S.Q. 1989, c. 38.

[15]This term is used in C.A. Butler, "Pension Plan Terminations and Asset Reversions: Accommodating the Interests of Employers and Employees" (1985) 19 Mich. J.L. Ref. 257 at 266.

[16]Technically, a surplus could accumulate in a defined contribution plan as a result of the forfeiture by terminating employees of employer contributions to which their right had not yet vested. In practice, however, such surpluses are not large, and their importance can be expected to diminish steadily as the earlier vesting requirements legislated in most jurisdictions in the 1980s reduce the number of such forfeitures. Moreover, such surpluses differ qualitatively from those in defined benefit plans in that they are easily traceable to particular plan participants, so that the entitlement

Further distinctions may be drawn between the various formulae according to which defined benefits are calculated, such as a flat benefit formula (x dollars per month of service), career average earnings formula (a percentage of earnings over the employee's entire career), or highest average earnings formula (a percentage of earnings during the employee's peak income years). Finally, pension plans generally operate either through insurance companies, as insured plans or *via* a vehicle such as a deposit administration contract, or through trust companies as trusteed plans.[17]

II. Accrual of Pension Fund Surpluses

It is readily apparent that the actuary's task in calculating the contributions required to fund a defined benefit plan is a difficult one. The variables are numerous, the possibilities endless. Consider the hypothetical case of an employee aged thirty-five who is being promised a pension based on a career average benefit formula: the actuary must estimate, among other things, whether that employee will work for thirty more years or retire early, how fast her salary will increase in the interim, and how interest rates will behave and various investments will perform over a period of several decades. The uncertainty only increases when the pension plan in question covers hundreds or even thousands of employees, each with his or her own level of seniority and salary.

Not unnaturally, actuaries have generally preferred to err on the side of caution. They would much prefer that the pension fund's actual performance show an "experience gain" (*i.e.*, a better than anticipated return) than an "experience deficiency" (*i.e.*, a poorer than anticipated return), as the latter can lead to an unfunded actuarial liability which must be made up by increasing the employer's contributions in ensuing years. At one time, the fear was that unfunded liabilities would overwhelm the pension system,[18] but beginning in the early 1980s actuaries' conservative assumptions and a unique confluence of economic factors combined to push many pension funds into massive surplus instead.

Primary among those factors were the high interest rates that accompanied the adoption of monetarism by the U.S. Federal Reserve in 1979, the 1982-1987 stock market boom, and the recession of 1981-1982. The first two factors

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issue takes on a different colouration. To date, no defined contribution surplus has been the subject of litigation. For a description of an Australian scheme for the appropriation of defined contribution plan surpluses, see M.L. Dickson, "Pension Surplus" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 131 at 132-33.

[17]Trusteed plans can also operate with individual or pension fund society trustees. For statistics on the relative popularity of the different funding and trust arrangements, see Statistics Canada, *Pension Plans in Canada 1988* (Ottawa: Minister of Supply and Services, 1990) at 23.

[18]See N.P. Stein, "Raiders of the Corporate Pension Plan: The Reversion of Excess Plan Assets to the Employer" (1986) 5 Am. J. Tax Policy 117 at 125.

allowed pension fund managers to earn a much higher rate of return than had been forecast by plan actuaries. The last mentioned factor, meanwhile, resulted in a series of widespread lay-offs, in many cases affecting employees who had not yet attained enough seniority for their pension rights to vest, *i.e.*, for the employer's contribution with respect to those employees to be committed irrevocably to their pensions. When they lost their jobs, they also forfeited their future pension rights, but the employer's contributions remained in the pension fund and either reduced the unfunded liability vis-à-vis the remaining employees or became surplus assets.

Since 1987, a new confluence of economic factors appears to have caused most pension fund surpluses to level off, diminish, or even disappear.[19] In addition, in late 1988 the Quebec government responded to a perceived abuse by some corporations of their access to surpluses by inserting into the *QSPPA* provisions imposing a temporary moratorium on the removal by employers of surplus assets from their employee pension funds in all but the most extraordinary of circumstances.[20] As a result, the surplus entitlement issue has lost some of its immediacy for certain employers. Nonetheless, the question of surplus entitlement remains critical for the parties to plans terminated before the imposition of the moratorium, whose rights are now being determined in a number of cases working their way through the courts, for the parties to plans terminated during the moratorium, whose rights are temporarily in suspense, and for all persons concerned with the determination of the rules which are to govern access to pension surpluses following the eventual lifting of the moratorium.

III. Early Jurisprudence

The first pension surplus cases heard by the courts in Quebec date back to the early 1980s. These cases generally turned on considerations peculiar to their particular fact situations and peripheral to the basic question of entitlement.

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[19]F.A. Livsey & D.A. Short, "The Development of Funding Surpluses in Canadian Pension Plans" in Ontario, *Task Force on Inflation Protection for Employment Pension Plans: Research Studies*, vol. 2 (Toronto: Queen's Printer, 1988) at 105-06 [hereinafter *Task Force*]; C. Crossen, "Who Gets Pension Surpluses? Legislators Try to Settle Firms' Disputes with Retirees" *The Wall Street Journal* (17 December 1987) 31; Statistics Canada, *Trusteed Pension Funds: Financial Statistics* (Ottawa: Minister of Supply and Services, 1991).

[20]By S.Q. 1988, c. 79, *QSPPA* s. 43 was replaced and s. 43.1 was added so as to prohibit the distribution of surplus assets from a pension plan to the sponsoring employer except where, without the investment of such assets in the employer's enterprise, the government determines that "the survival of the enterprise would be endangered and the employments of the members would be threatened." For a sense of the perceived crisis which preceded the enactment of this moratorium, see R. Côté, "Le scandale des 'fonds de pension': des milliers de salariés crient au vol" *La Presse* (24 October 1988) 1; D. Lessard, "Québec gèle l'excédent des regimes de retraite" *La Presse* (11 November 1988) 1.

Nevertheless, in certain instances these decisions contained *dicta* which have been judicially considered in the resolution of subsequent surplus cases, and they therefore deserve to be canvassed briefly.

In *Stelco Inc.* v. *Régie des rentes du Québec*,[21] the pension plan in question stipulated that all pension fund assets were to serve for the exclusive benefit of the participants, whereas the funding agreement between the employer and the trust company which had custody of the pension fund provided that surplus assets could be returned to the employer upon plan termination. The Superior Court held that the trust agreement formed a part of the pension plan and was subsidiary to the plan text itself, so that the inconsistency between the two documents had to be resolved in favour of the plan text. As a result, the Court held that the employer was not entitled to recapture the surplus assets, and this decision was upheld by the Court of Appeal.

The *Stelco* decision is unlikely to serve as a critical precedent except where an employer has not been careful enough to ensure consistency among all the relevant documents as to surplus entitlement. The decision is of interest from a Canadian comparative law perspective, however, in that it runs directly counter to the Ontario courts' holding in *Heilig* v. *Dominion Securities Pitfield Ltd*[22] and *Re Lear Siegler Industries Ltd and Canada Trust Co.*[23] that a conflict between a plan text provision which permits the employer access to surplus and a trust agreement provision reserving surplus for the plan participants must be resolved in favour of the trust agreement. It is true that the *Stelco*, *Heilig*, and *Lear Siegler* decisions might possibly be reconciled as all standing for the proposition that any carelessness in the drafting of plan documents must redound to the advantage of the plan participants, who after all are rarely involved in this drafting process. On a close reading of the decisions, however, one is compelled to conclude that the opposing orderings of document priority stem from the different roles of the trust in the civil law and the common law, such that the decisions are ultimately not reconcilable. The effect on pension surplus entitlement of the differing civil and common law appreciations of trusts is a point which will be returned to in greater detail below. At this time, it is interesting merely to note as an aside that the recent Ontario Court of Justice (General Division) decision in *Maurer* v. *McMaster University*[24] adopted the same relative weighting as between the plan text and the trust agreement as did *Stelco*, although without referring either to *Stelco* or the previous Ontario decisions.

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[21](15 December 1982), Quebec 200-05-003291-817, J.E. 83-144 (C.S.) aff'd (17 July 1985), Quebec 200-09-000039-831 (C.A.) [hereinafter *Stelco*].

[22]*Supra*, note 7.

[23](1988), 66 O.R. (2d) 342, C.E.B. & P.G.R. 8077 (H.C.J.) [hereinafter *Lear Siegler* cited to O.R.].

[24](1991), 4 O.R. (3d) 139 at 155.

A second early Quebec case of note was that of *J.J. Newberry Canadian Ltd* v. *Régie des rentes du Québec*.[25] This case arose in the context in which surplus disputes are most frequently brought before the courts, namely the original plan text reserved all plan assets for the exclusive benefit of the participants and the employer subsequently attempted to amend the plan so as to provide that the surplus would revert to the employer upon plan termination. In this particular instance, the *Régie des rentes du Québec* (the government agency charged with regulating pension plans registered in Quebec) refused to approve the said amendment. The Superior Court ruled against the employer, only to be overturned by the Court of Appeal. The decision of the Court of Appeal turned more on the extent of the *Régie*'s powers than on the merits of the proposed amendment itself. The decision is therefore of greater interest from the point of view of administrative law than pension law *per se*.

The remaining decisions rendered by the courts in Quebec prior to 1990 in situations involving pension surplus were all restricted either to procedural issues,[26] jurisdiction,[27] or other tangential matters.[28] As of 1990, the courts in Quebec had much less experience with and much less of a fixed approach to pension surplus cases than, say, the courts in Ontario. The stage was thus set for the first significant judicial efforts to define pension surplus entitlement in this province.

IV. *Sauvé* v. *Pierre Moreault Ltée*

The first of the two decisions which form the subject of this comment is *Sauvé* v. *Pierre Moreault Ltée*,[29] decided by Tessier J. in the Superior Court on March 7, 1990. *Sauvé* was an action for declaratory judgment and injunction by a group of twenty-nine former employees of the defendant company, asking that a pension surplus of $166 636 be distributed amongst the plaintiffs. As will be described further below, Tessier J. found in favour of the plaintiffs, though his decision is currently under appeal.

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[25](14 November 1980), Montreal 500-05-016900-753, J.E. 81-8 (C.S.), rev'd [1986] R.J.Q. 1884 (C.A.).

[26]See, for example, *Châteauneuf* v. *La Compagnie Singer du Canada Ltée* (23 September 1988), Iberville (Saint-Jean-sur-Richelieu) 755-06-000001-871, J.E. 88-1298 (C.S.); *Châteauneuf* v. *La Compagnie Singer du Canada Ltée*, [1990] R.J.Q. 216 (C.S.).

[27]See, for example, *Montreal Trust Co.* v. *René* (20 November 1989), Quebec 200-05-001082-895, J.E. 90-166 (C.S.).

[28]See, for example, *Le Régime des rentes des employés du Syndicat de Québec* v. *Paquet-Syndicat Inc.*, [1986] R.J.Q. 1695 (C.S.), which turned on a deficiency in the corporate governance of the pension plan in question, such pension plan being constituted, exceptionally, as a corporation.

[29]*Supra*, note 9.

A. The Faets

The facts in *Sauvé* were essentially as follows. The pension plan in question was established in 1973, pursuant to the terms of a collective bargaining agreement. All Pierre Moreault Ltée employees who belonged to the union which negotiated the collective agreement were apparently required to join the plan. The plan was a non-contributory defined benefit plan, under which pensions were computed according to a flat benefit formula. It operated at all times through an insurance company, Crown Life. When the employer, a Molson distributor in the Hull area, lost its distribution contract with the brewery as of June 30, 1986, it laid off all twenty-nine employees, closed its doors, and undertook the procedures necessary to terminate the pension plan. As it happens, the employees began work the following day with the new Molson distributor in Hull and enrolled in the new distributor's pension plan.

On the termination of the Pierre Moreault Ltée pension plan, a surplus of $166 636 remained in the pension fund. The actuary's termination report recommended that this surplus be returned to the employer, but the *Régie des rentes* refused to rule on the matter until a judicial determination of the parties' rights was issued. The ex-employees then brought an action before the Superior Court, which gave rise to the decision presently under examination.

B. The Decision

Tessier J. boiled the case down to four questions. First, did the amendments made to the plan by the employer over the years require the employees' consent, and if so, was such consent given? Second, did the various contractual documents create a *stipulation pour autrui* (*i.e.*, a stipulation for the benefit of another, the tripartite relationship between stipulator, promissor, and third party beneficiary described in art. 1029 of the *Civil Code of Lower Canada* (*Civil Code*) which, once accepted by the beneficiary, becomes irrevocable), and if so, what was its scope? Third, did the employer's contributions to the plan constitute a condition of employment? Fourth, did the employees acquire a right to the surplus in spite of the fact that on termination the plan contained a stipulation favouring the employer?[30]

In coming to grips with these questions, the judge had recourse to a wide range of documents. In addition to the plan text and the various amendments thereto, he examined the successive collective bargaining agreements, the group pension policy, the pension portfolio contract, and the pension service contract entered into by Pierre Moreault Ltée and Crown Life, and the explanatory brochure distributed by the employer to plan participants.[31] As will be described in

[30] *Ibid.* at 1009.
[31] *Ibid.* at 1010.

further detail below, he also analyzed closely former *QSPPA* regulation 3.13 (enacted in 1976,[32] renumbered in 1981 as regulation 38,[33] and repealed for most purposes in 1990[34]), which reads as follows:

> Lors de la terminaison totale d'un régime, l'administrateur de celui-ci doit répartir entre les participants, au *prorata* de leur crédit de rente, le solde de l'actif non utilisé, sauf si le régime stipule que tel solde retourne à l'employeur.[35]
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> [When a plan is terminated in whole, the administrator thereof shall distribute to the members the unused assets according to their proportionate shares of the fund, except where the Plan provides that such assets shall revert to the employer].

Tessier J. found that the collective agreement, Crown Life contracts, and explanatory brochure did not contain any provisions helpful to the determination of surplus entitlement. Rather, he focused on certain clauses of the original 1973 plan text and amendments 10 and 11 thereto, effective in 1980 and 1982, respectively. Specifically, he honed in on s. XIX, which set out the rules regarding amendment and termination of the plan. At the outset in 1973, s. XIX read in part as follows:

> L'Employeur se réserve le droit, sans le consentement des membres, d'amender, de modifier ou de résilier le régime en tout temps; cependant, l'Employeur n'aura pas le droit d'amender, de modifier ou de résilier le régime de façon à ce que quelque partie de ou des fonds réservée aux membres serve à des fins autres que l'intérêt exclusif de ces derniers ou de leurs bénéficiaires. À la cessation du régime, l'Employeur n'effectuera plus aucune contribution et il verra au partage équitable de la partie du ou des Fonds à laquelle les anciens membres et les membres actuels ont droit. Les montants du ou des Fonds ainsi partagés serviront à constituer des rentes de retraite auprès de l'Assureur... .[36]

No provision of the original 1973 plan text spoke directly to surplus entitlement.

Effective 1980, by virtue of amendment 10, the paragraph set forth below was added to s. XIX:

> Si après la création de ces prestations il reste un actif dans le ou les fonds, cet actif sera remboursé à l'Employeur ou employé conformément à ses instructions.[37]

Finally, in 1982, amendment 11 replaced the paragraph added to s. XIX two years previously with a passage that read as follows:

> Si après la création de ces prestations il reste un actif dans le(s) fonds, cet actif est (i) entièrement remboursé à l'Employeur ou (ii) réattribué entre les participants pour créer un supplément de rente de retraite ne dépassant pas la prestation maximum indiquée de temps à autre dans les circulaires d'information publiées par le

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[32]O.C. 2312-76, G.O.Q. 1976.II.4835.
[33]R.R.Q. 1981, c. R-17, r. 1.
[34]O.C. 1158-90, s. 69, G.O.Q. 1990.II.2318.
[35]*Supra*, note 9 at 1013.
[36]*Ibid.* at 1015.
[37]*Ibid.* at 1019.

> Ministère du Revenu National. Tout actif restant dans le fonds par suite du choix de l'option (ii) est remboursé à l'employeur.[38]

Faced with these texts, Tessier J. found as follows. While the plan spoke in 1973 of the "intérêt exclusif" (*i.e.*, exclusive benefit) of the members and their beneficiaries, this reference was in the context of a reference to the "fonds réservés aux membres" (*i.e.*, funds reserved for the members). Thus, by implication it was only that part of the fund necessary to pay the promised defined benefits, and not the surplus, to which the plan members were entitled. The evidence did not permit one to conclude that the parties to the plan considered either the employer's contributions or the members' pension credits as deferred compensation.[39] On the grounds that a group annuity policy constitutes a *stipulation pour autrui*,[40] Tessier J. assumed without further ado that the plan in question represented such a stipulation, but he held that at its inception in 1973 s. XIX did not create a stipulation for the benefit of the plan members in respect of any actuarial surplus.[41]

With the enactment of regulation 3.13 in 1976, however, he appeared to consider that the situation had changed. He wrote as follows regarding the effect of this regulatory enactment:

> [e]n 1976, lors de l'adoption de l'article 3.13, le régime ne stipulait pas, *i.e.*, énonçait clairement et expressément, que le solde de l'actif non utilisée retourne à l'employeur. Telle stipulation n'a été formulée qu'en 1982... . À compter de l'entrée en vigueur de cette disposition réglementaire en 1976, les salariés peuvent raisonnablement invoquer un droit au surplus, puisque de façon résiduaire le régime leur profite exclusivement, à défaut de stipulation valable contraire favorisant l'employeur quant à la disposition du surplus d'actif.[42]

In support of his interpretation of the verb "stipuler" as signifying a clear and express enunciation, he cited the general (*i.e.*, non-legal) dictionary definition set out below:

> "stipuler" signifie: "énoncer comme conditions dans un contrat, un acte" ou "faire savoir expressément". "Énoncer" signifie: "exprimer en termes nets, sous une forme arrêtée (ce qu'on a à dire)". Stipuler, c'est donc exprimer en termes nets et explicites.[43]

Tessier J. then turned to the effect of amendment 10. In his view, the statement therein that any surplus would be "remboursé à l'Employeur ou employé conformément à ses instructions" gave the employee a right of first refusal to

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[38]*Ibid.* at 1020.

[39]*Ibid.* at 1018.

[40]*Ibid.*, citing *Toussaint* v. *Cie d'assurance-vie Crown Life* (21 January 1983), Montreal 500-09-001108-794, J.E. 83-164 (C.A.).

[41]*Ibid.*

[42]*Ibid.* at 1017.

[43]P. Robert, *Dictionnaire alphabétique et analogique de la langue française* (Paris: Société du Nouveau Littré, 1988), cited *ibid.* at 1015 n. 17.

the surplus, for in the event both employer and employee requested the refund, the "exclusive benefit" language in s. XIX required that the employee's request prevail.[44] He therefore held:

> Depuis à tout le moins le 31 juillet 1980, sinon depuis l'adoption de la disposition réglementaire en 1976, une stipulation pour autrui existe en faveur du salarié, laquelle est devenue aussitôt irrévocable, quant aux sommes non requises pour l'acquittement des crédits de rente en cas de terminaison du régime. Cette stipulation vaut à l'égard de la totalité des fonds. Ce droit au surplus constitue une condition de travail intégrée à la convention collective signée le 2 juillet 1980 et en vigueur du 1er janvier 1980 au 31 décembre 1982. Les salariés n'ont pas par la suite consenti à l'élimination de ce droit acquis.[45]

In other words, a *stipulation pour autrui* in favour of the members in respect of the surplus was created at least from the effective date of amendment 10 in 1980, if not from the adoption of regulation 3.13 in 1976, and formed a condition of their employment.

Finally, Tessier J. examined the text of s. XIX as revised in 1982 pursuant to amendment 11, which for the first time expressly reserved at least a portion of any surplus (*i.e.*, that portion exceeding the assets necessary to pay the maximum pension benefits permitted by the Department of National Revenue) for the employer. He determined that the plan members had not consented to this amendment,[46] and accordingly held that Pierre Moreault Ltée could not deprive them of their acquired right to the surplus by invoking its power of unilateral plan amendment.[47]

In consequence, Tessier J. responded as follows to the four questions he had posed at the beginning of his judgment. First, the plan amendments required the employees' consent, and such consent was not given, at least in the critical case of amendment 11. Second, the entire arrangement constituted a *stipulation pour autrui*, whose scope included the surplus assets as from either 1976 or 1980. Third, an entitlement to the surplus generated by the employer's contributions constituted a condition of employment. Fourth, the employees were entitled to the surplus even though the plan as it read at termination stated otherwise. His decision to allocate the $166 636 surplus amongst the twenty-nine plaintiffs *pro rata* to their pension credits flowed naturally from the responses he formulated to the four questions at issue.

C. *Analysis*

It is a truism to assert that every judicial decision turns on its own facts, and the courts in most pension surplus cases have hastened to affirm that their opinion might change in the presence of a different plan text, trust agreement,

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[44] *Ibid.* at 1019.
[45] *Ibid.* at 1019-20.
[46] *Ibid.* at 1020.
[47] *Ibid.* at 1021.

or other circumstances.[48] Nonetheless, *Sauvé* contains a number of elements which transcend the particular facts of the Pierre Moreault Ltée pension plan and will be germane to many other pension surplus disputes.

First, Tessier J. was prepared to determine entitlement to surplus assets on the basis of an interpretation not only of the official plan text, but also of other documents including the explanatory brochure distributed to employees. Such brochures have been subjected to judicial examination before,[49] but *Sauvé* is the first reported pension surplus case in Quebec where they were enumerated as potentially relevant documents. The message should not be lost on plan sponsors: any statement contained in an employee brochure or summary which is of even tangential relevance to surplus entitlement (*e.g.*, a description of the use to which employer contributions to the plan will be put) could be determinative. Plan sponsors ought therefore to ensure that the texts of such brochures are consistent with the official plan texts. Any inconsistency could well be resolved in favour of the plan participants.

Second, Tessier J. found as a fact that neither the company contributions nor the pension credits constituted deferred compensation in the eyes of the parties to the plan. While this finding had no bearing on his decision in the case, it exemplifies the courts' reluctance to treat pensions as deferred compensation. Since the ultimate argument invoked by proponents of reserving actuarial surplus for plan members is that employer contributions do in fact represent a form of employee remuneration, this judicial statement should undercut much of the philosophical basis for employee entitlement to surplus. Rather, such entitlement should be founded only on narrower considerations peculiar to the circumstances of each case, if at all.

A third important element of the decision is the characterization of the Pierre Moreault Ltée pension plan as a *stipulation pour autrui*. Given that the common law trusts analysis adopted by the Ontario Court of Appeal in *Reevie*[50] is clearly inapplicable in Quebec civil law, jurists have debated the legal nature of a pension plan in this province.[51] *Sauvé* has weighed into this debate by describing a pension plan operated through an insurance company as a *stipulation pour autrui*. If this characterization is correct, then the rules governing every *stipulation pour autrui*, set out at article 1029 *et seq.* of the *Civil Code*, would apply to insurance company-operated pension plans as well. Most nota-

[48]See, for example, the Ontario Court of Appeal in *Reevie*, *supra*, note 5 at 596 and the B.C. Supreme Court in *Hockin*, *supra*, note 1 at 224.

[49]See, for example, *Otis*, *supra*, note 8.

[50]*Supra*, note 5.

[51]See, for example, R. Crête, "Les régimes complémentaires de retraite au Québec: une institution à découvrir en droit civil" (1989) 49 R. du B. 177 at 187-200; J. Laurent, "Droit des participants aux surplus des caisses de retraite" (1990) 50 R. du B. 959 at 968-86. See also *infra*, note 82 and accompanying text.

bly, the rule that a stipulation becomes irrevocable upon acceptance (whether express or tacit) by the third party beneficiary could operate so as to render irrevocable any provision in such a plan attributing surplus to the participants, even where the plan sponsor reserved a power of amendment.

This neat juridical characterization has a certain initial appeal, fitting as it does many pension plans into one of the *Civil Code*'s nominate categories of legal arrangements. Unfortunately, Tessier J. appears to have confused *insured* pension plans with pension plans *operated through insurance companies.* He describes the Pierre Moreault Ltée pension plan as an insured plan,[52] but ordinarily any surplus in an insured pension plan would be for the benefit of the insurer, not the employer or participants as in this case. Most probably, the pension plan at issue was actually a non-insured plan which just happened to operate through an insurance company, whether through a deposit administration contract, segregated fund, or otherwise; the *Sauvé* decision, however, does not specify. Assuming the latter to be the case, though, the participants' pensions would in the normal course have been paid from the Pierre Moreault Ltée pension fund held by Crown Life, not from Crown Life's general funds. It would not then make sense to speak of a tripartite stipulator-promissor-beneficiary relationship as exists in a true insurance arrangement, which is the classic *stipulation pour autrui.*

A fourth important element, and one that could be critical in the case of many pension plans that were established prior to 1976, is the discussion in *Sauvé* as to the effect of former regulation 3.13. If Tessier J. is right, then no employer who sponsored a plan in 1976 could ever recover the plan surplus unless the plan stated clearly and explicitly at that time that upon termination the surplus reverted to the employer. Because many plans in existence in 1976 had been established in an earlier period when the Department of National Revenue would not register pension plans for tax purposes unless they provided that all employer contributions were irrevocable,[53] then in the absence of a pre-1976 amendment such plans would not have contained a surplus reversion provision of the type envisaged in regulation 3.13 at the time such regulation was enacted.

With respect, it is submitted that the learned judge's application of former regulation 3.13 is erroneous on two counts. First, his equating of the French verb "stipuler" with a clear and express statement would seem an excessively narrow understanding of the meaning of that term. That the expression "stipuler" does not necessarily connote an express statement is indicated by the judge's own words, in the passage of his decision where he states that s. XIX "ne *stipule* pas *explicitement*" that surplus is to be returned to the employee.[54]

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[52]*Supra*, note 9 at 1013.

[53]Dickson, *supra*, note 16 at 135.

[54]*Supra*, note 9 at 1017 (emphasis added).

Presumably he would not have felt the need to modify "stipule" by "explicitement" if "stipule" itself connoted an explicit statement. His suggestion that any pension plan which attributed surplus to the employer only implicitly rather than explicitly would thereby fail to meet the test set out in former regulation 3.13, then, is open to some doubt.

Even if the interpretation he gives to the verb "stipuler" is correct, however, a more fundamental objection to his application of former regulation 3.13 can be made. Specifically, that regulation merely stated that for an employer to recover surplus, the plan had to provide for such recovery. Nowhere in the text of former regulation 3.13 was it indicated that such a provision was necessary at the time of the regulation's enactment in 1976 or that, failing such provision at that time, the plan could not be amended. Indeed, in the absence of such a statement in the regulation, it would seem more reasonable to search for the required provision at the point in the plan's history of greatest relevance for surplus recapture purposes, *i.e.*, plan termination, not the entirely arbitrary date of 1976.

This interpretation of regulation 3.13's effect is supported by the decision of the Ontario High Court of Justice in *Re King Seagrave Ltd. and Canada Permanent Trust Co.*[55] In this case, the equivalent Ontario regulation, former Ontario *Pension Benefits Act* regulation 14(4)(c), was at issue. Former regulation 14(4)(c) read as follows:

> Notwithstanding the terms of the plan, where a pension plan is terminated or wound up, no part of the assets of the plan shall revert to the benefit of the employer unless, ...
>
> (c) where proceedings for termination or winding up of the plan are commenced on or after the 1st day of January, 1982, the pension plan provides for such reversion to the employer.[56]

In its judgment, the High Court stated that King Seagrave Ltd. could have amended its plan at any time prior to termination to insert the necessary provision, which amendment would have sufficed to satisfy the requirement set forth in former regulation 14(4)(c).[57] The judge did not at any point suggest that the employer was enjoined from making such an amendment as from the enactment of former regulation 14(4)(c). *Sauvé*, however, does not refer to *King Seagrave*.

It is not entirely clear whether the interpretation given to former regulation 3.13 forms part of the *ratio decidendi* of *Sauvé*. At certain points in his opinion, Tessier J. implies that the plan members' entitlement to the surplus arose in 1976;[58] elsewhere, he seems to indicate that it stemmed only from the adoption

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[55](1985), 51 O.R. (2d) 667 [hereinafter *King Seagrave*].

[56]R.R.O. 1980, Reg. 746.

[57]*Supra*, note 55 at 675.

[58]See text accompanying note 42.

of amendment 10 effective 1980.[59] On the basis of the doubts as to the correctness of his interpretation raised in the preceding paragraphs, it would probably be preferable to opt for the latter and treat his remarks on former regulation 3.13 strictly as *obiter dicta*.

This leads to the fifth and final element of the *Sauvé* decision worthy of closer analysis, namely the discussion of amendment 10's impact. As noted above, Tessier J. interpreted the phrase "cet actif sera remboursé à l'Employeur ou employé conformément à ses instructions" as giving the employee a right of first refusal to the surplus. This interpretation would require the word "employé" to be translated as "employee", which makes no sense, for it is impossible for any amount in a non-contributory plan to be "remboursé" (*i.e.*, refunded) to a participant who never contributed anything in the first place. A more plausible translation of "employé" would be "employed", such that the phrase as a whole should be interpreted as providing that the surplus could be refunded to the Employer or employed as the Employer instructed. It is therefore arguable that amendment 10 should not entitle the participants to the surplus. At most, this provision could be invoked in support of the proposition that any ambiguity, carelessness or inconsistency in the drafting of pension plan documentation should be resolved in favour of the participants, although as pointed out earlier the cases which seem *prima facie* to stand for that proposition are actually better understood in a different perspective.[60]

In summary, *Sauvé* is noteworthy for its emphasis on the contents of the employee brochure and its rejection of the deferred compensation argument in support of employee entitlement to surplus. It is submitted, with respect, that the decision goes astray in its application of the rules governing *stipulation pour autrui* to what appears to have been an uninsured pension plan and in its interpretation of former *QSPPA* regulation 3.13. Unless the not entirely logical wording of amendment 10 can be held to have disqualified the employer from entitlement to surplus on the grounds of carelessness or inconsistency, then, it is arguable that the case was wrongly decided.

V. *A. Janin & Compagnie Ltée* v. *Allard*

The second of the two decisions which form the subject of this comment is *A. Janin & Compagnie Ltée* v. *Allard*,[61] decided by Trudeau J. in the Superior Court on May 15, 1991. *Janin* was a motion by the employer and its trustee in bankruptcy for a declaratory judgment to the effect that the employer was enti-

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[59]See text accompanying note 45.

[60]See text accompanying notes 21-24.

[61]*Supra*, note 10. This decision should not be confused with that regarding a preliminary procedural skirmish between the same parties, reported with the same style of cause at [1990] R.J.Q. 1056 (C.S.).

tled to a pension surplus of $10 465 000. This motion was contested by 174 former employees of the company who belonged to the pension plan in question. As will be described further below, Trudeau J. found in favour of the employer, but his decision has been appealed.

A. The Facts

The facts in *Janin* can be summarized as follows. A. Janin & Compagnie Ltée unilaterally established a defined contribution plan in 1958. Under the plan, employer and employee each contributed to the plan an amount equal to 5% of the employee's salary. Employee contributions were deposited into a group annuity contract with an insurance company, North American Life, while the employer's contributions were placed in a trust fund held by a trust company, Royal Trust.

In 1971, the plan was substantially revised. Most significantly, the plan was converted from a defined contribution plan to a defined benefit plan. The employee contribution was maintained at 5% of salary, while the employer's contribution henceforth varied in accordance with the plan's needs for funding of a highest average earnings benefit. As from 1971, employee and employer contributions were both directed to insurance companies, Sun Life and Desjardins Life, respectively.

Throughout the 1970s, the pension fund stood in deficit, only to move into a surplus position in the early 1980s. Upon plan termination in August 1988, the surplus stood at $10 465 000. The company cited its parlous financial situation to apply in 1989 to the government for a refund of some $9 million of the surplus, invoking an exception to the 1988 moratorium on surplus removals for sums necessary to save the jobs of plan members.[62] The government withheld a decision on the application pending a judicial determination of the company's entitlement to the surplus; hence the motion which led to the decision here under review.

B. The Decision

Trudeau J. identified four questions requiring resolution in order to come to a decision. First, was the 1971 plan a continuation of the 1958 plan or a separate and distinct plan? For reasons which are not of great general interest, he found that the 1971 plan was a continuation of the 1958 plan.[63] Second, was the insertion into the plan text in 1971 of language providing that surplus could be returned to the employer legal? Third, did the employer fulfil its obligation to the employees to inform them of the plan's contents and the amendments

[62]See text accompanying note 20.
[63]*Supra*, note 10 at 1742-44.

thereto? Finally, was the survival of the enterprise a relevant criterion for the Court to consider in arriving at its decision?[64]

In the judge's eyes, the key question was the second one.[65] Accordingly, he dissected the pertinent provisions of the 1958 and 1971 plans. The pertinent provision of the 1958 plan was clause 29, set out in part below:

> The Company expects to continue the Plan indefinitely, but necessarily must and does reserve the right to modify or discontinue the Plan, should future conditions in the judgment of the Company warrant such action. However, all contributions made by the Company are irrevocable and together with all contributions made by the Members, may only be used exclusively for the benefit of Members, retired Members, their beneficiaries and estates, and Joint Annuitants. No change or modification will affect any right which a Member may have had with respect to the terms of payment of the amount of pension provided by contributions made by the Member and the company on his behalf prior to the effective date of such change or modification.[66]

The pertinent provision from the 1971 plan was art. XV-2(a), which read as follows:

> Si le régime est interrompu par la compagnie, toutes les sommes gardées en fiducie seront affectées, après avoir pourvu aux frais du régime, à des catégories, dans un ordre de priorité. Ces catégories seront déterminées par la compagnie, avec l'aide de l'actuaire, en considérant une distribution équitable des sommes disponibles et aussi les exigences de la Loi sur les régimes supplémentaires de rentes. Après avoir rempli tous les engagements vis-à-vis toutes les prestations du régime, les sommes qui restent seront remboursées à la compagnie.[67]

In the course of his analysis, Trudeau J. engaged in an exhaustive discussion of numerous precedents both from the courts in Quebec and from the courts in the common law provinces. With regard to the Quebec cases, he distinguished each as a *cas d'espèce* which could not aid in the interpretation of the A. Jamin & Compagnie Ltée pension plan. In particular, he dismissed *Sauvé* on the grounds that the pension plan there in question was installed bilaterally by the employer and union, but the critical plan amendment was enacted unilaterally by the employer without being submitted to the participants.[68]

Insofar as the common law cases were concerned, he considered that the decisions cited by the employees would not have been decided as they were but for the principles of trust law.[69] He maintained that this position applied even in respect of *Reevie*, the leading Ontario pension surplus case and one where the plan's power of amendment clause was all but identical to that in clause 29 of

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[64]*Ibid.* at 1741.
[65]*Ibid.* at 1744.
[66]Cited *ibid.*
[67]Cited *ibid.* at 1740.
[68]*Ibid.* at 1760.
[69]*Ibid.* at 1759.

A. Jánin & Compagnie Ltée's 1958 plan. Specifically, the relevant clause in the Canada Dry pension plan considered in *Reevie* read in part as follows:

> However, all Contributions made by the Company are irrevocable and, together with all Contributions made by Members, may only be used exclusively for the benefit of Members, retired Members, Eligible Spouses, Contingent Annuitants or their Beneficiaries, and no change or modification will affect any rights which a Member may then have with respect to the terms of payment of, or the annual amount of, pension which the Contributions made by the Member and/or the Company prior to the effective date of such change or modification will provide.[70]

On the basis of the Supreme Court of Canada's decision in *Crown Trust Co.* v. *Higher*,[71] he held the principles of common law trusts to be inapplicable in Quebec law,[72] intimating that *Reevie* could in any case be distinguished on the grounds that the Canada Dry plan was terminated immediately after the surplus reversion amendment, while A. Janin & Compagnie Ltée maintained its plan for seventeen years following the crucial 1971 amendment.[73]

In the result, Trudeau J. highlighted the fact that the 1958 plan was a defined contribution plan and focused on the closing words of clause 29 to the effect that no amendment could "affect any right ... with respect to the terms of payment of the amount of pension provided by contributions made ... prior to the effective date" of the amendment. He held that art. XV-2(a) of the 1971 plan did not violate this restriction and was therefore legal. He summarized his reasoning in the following passage, which represents the critical portion of his judgment:

> En l'espèce, le Tribunal est d'avis que rien dans la législation, la doctrine ou la jurisprudence ne permet d'inférer qu'un employeur qui a unilatéralement instauré un régime de retraite pour le bénéfice de ses employés, ne puisse, même unilatéralement, l'amender, s'il s'est réservé ce droit, à la condition toutefois qu'il n'enlève aux participants aucun des avantages qu'ils ont acquis avant cet amendement. C'est par ailleurs le postulat qui se dégage de la jurisprudence québécoise et même canadienne, sauf qu'au niveau d'une certaine jurisprudence canadienne on ait fait jouer à l'encontre de cette proposition les impératifs du *trust law*, qui ne sont aucunement applicables en droit québécois. Le Tribunal décide en conséquence que, dans le contexte d'un seul régime fondamentalement modifié en 1971, Janin pouvait légalement par amendement prévoir le retour en sa faveur du surplus d'actif.[74]

Thus, in the absence of trust law considerations, he laid down the principle that an employer which unilaterally establishes a pension plan may unilaterally amend such plan if it has reserved a power of amendment and as long as it does not thereby deprive the participants of any acquired rights.

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[70]Cited *supra*, note 5 at 597.
[71][1977] 1 S.C.R. 418, 69 D.L.R. (3d) 404.
[72]*Supra*, note 10 at 1758-59.
[73]*Ibid.* at 1759.
[74]*Ibid.* at 1760-61.

Once he had resolved this second question in the employer's favour, Trudeau J. dealt briefly with the two remaining questions. With regard to the question of the employer's obligation to inform participants of the plan contents and amendments, the participants complained that a statement contained in a 1987 explanatory brochure to the effect that all company contributions to the plan were for their exclusive benefit was false, given the provisions of article XV-2(a). Trudeau J. found that the extent of the employer's power of amendment under the 1958 plan and its right to recover surplus under the 1971 plan had been duly communicated to the members, and that the official plan text was at all times available for their inspection. Consequently, he held that the company had properly fulfilled its obligation.[75] In regard to the fourth question, regarding the relevance of the enterprise's survival as a criterion for the Court's consideration, he stated flatly that it was not relevant.[76]

The four questions he had put thus answered, Trudeau J. declared the employer to be entitled to the plan surplus, subject to the rights of the trustee in bankruptcy. He referred the parties back to the *Régie des rentes* to determine the precise amount of the surplus and the modalities of the refund process.

C. Analysis

As in *Sauvé*, *Janin* contains several elements which transcend the particular facts of the pension plan there in issue. The discussion which follows will examine these elements and, where appropriate, contrast them with *Sauvé*.

The first noteworthy element in *Janin* is Trudeau J.'s dismissal of the participants' argument that the reference in the explanatory brochure to the company's contributions as being for their exclusive benefit should estop the company from recovering the surplus generated by those contributions. Ordinarily, such brochures contain a cautionary note to the effect that in case of conflict between the brochure and the official plan text, the official text governs. Assuming the brochure distributed in this case contained such a cautionary note, Trudeau J.'s decision in this regard would appear to be correct; however, he does not indicate whether the brochure did in fact include a caveat of that sort. In any event, his ruling would seem to militate against an interpretation of earlier decisions such as *Stelco*, *Heilig*, and *Lear Siegler* as requiring absolute consistency in all plan or plan-related documents in order for the employer to be entitled to surplus, especially as he cited all of those decisions at one point or another in his ruling. Nevertheless, prudence would still seem to dictate that plan sponsors avoid making any assertions in explanatory brochures that could be construed as conferring on members any rights in addition to those granted under the plan itself.

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[75] *Ibid.* at 1762.
[76] *Ibid.* at 1763.

Second, it is noteworthy that references to a pension plan as a *stipulation pour autrui* are conspicuously absent from *Janin*. This is so despite the fact that employee contributions between 1958 and 1971 were made under a group annuity contract with North American Life and from 1971 employee and employer contributions were deposited under unspecified arrangements with Sun Life and Desjardins Life, respectively. For the reasons described above,[77] it is submitted that Trudeau J. was wise to avoid the temptation to characterize this insurance company-funded pension plan as a *stipulation pour autrui*. Given that *Janin* postdates *Sauvé*, and subject to the emergence of further details as to the precise modalities of both plans' operation, it can be tentatively concluded that at this time the courts in Quebec do not consider any pension plan but a true insured plan as a *stipulation pour autrui*.

A third noteworthy element, and one which is especially interesting from a Canadian comparative law point of view, is Trudeau J.'s evaluation of the role of trust law in the common law precedents which he cited.[78] Specifically, he considered that the two main cases relied on by the participants, *Re National Trust Co. and Sulpetro Ltd*[79] and *Reevie*, would not have been decided against the plan sponsors by the Alberta and Ontario Courts of Appeal, respectively, but for the appellate judges' feeling constrained to apply basic principles of trust law.[80] Although some might consider that statement by a court in a non-common law jurisdiction to border on presumptuousness, nevertheless it does lend judicial support to those commentators who have criticized the judiciary's rote application of trust law to defined benefit pension plans which ought instead to be understood in a contractual context.[81]

While he does not say so explicitly, Trudeau J. does indeed treat the non-negotiated defined benefit pension plan as a sort of *sui generis* contract, the terms of which are unilaterally established by the employer. It is submitted that this characterization most accurately reflects the reality of the defined benefit pension plan under either the civil law or the common law, and is preferable to charaeterization as either a *stipulation pour autrui* or a classic trust.[82] A uniform

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[77]*Supra*, notes 50-52 and accompanying text.

[78]The judge divided the precedents he cited into two categories. The cases decided by Quebec courts he labelled "Jurisprudence québécoise" (*supra*, note 10 at 1745); the cases decided by courts in the other provinces and, in one instance, an American court (*In re C.D. Moyer Co. Trust Fund*, 441 F. Supp. 1128 (1977)) he labelled "Jurisprudence canadienne" (*supra*, note 10 at 1747). It would have been preferable had he selected a more legally and politically accurate label, sucb as "Common law jurisprudence," for the second category.

[79]*Supra*, note 4.

[80]*Supra*, note 10 at 1759.

[81]See, for example, D. Waters, "The Use of Surpluses in Pension Plans Operating in Ontario" in *Task Force*, *supra*, note 19; and R.E. Scane, "Legal Position in Ontario on Withdrawals of Surpluses" in *Task Force*, *supra*, note 19.

[82]Note that *QSPPA*, s. 6 characterizes a pension *plan* as a contract and the pension *fund* of every uninsured plan as a "trust patrimony." The expression "trust patrimony" imports a certain fiduciary quality to the pension arrangement, a quality that will be strengthened upon the enactment in the

characterization of the defined benefit plan under both the civil and common laws is especially desirable in light of the fact that pension benefits legislation is nearly uniform across the country, with many pension plans registered in Quebec and funded pursuant to Quebec's rules having members in other provinces and *vice versa*. For the moment, though, we are left in the curious position where the same power of amendment clause has been interpreted as allowing an employer to give itself access to surplus in Quebec (*Janin*) but not in Ontario (*Reevie*).

This point ties in with the final element of the *Janin* decision worthy of further analysis, namely the principle laid down therein that an employer which unilaterally establishes a pension plan may unilaterally amend such a plan if it has reserved a power of amendment and as long as it does not thereby deprive the participants of any acquired rights. This principle, which represents the *ratio decidendi* of the case, is eminently sensible from the point of view of most plan sponsors. It must be noted, however, that the case could have been decided in favour of the employer on much narrower grounds, *i.e.*, that the 1958 plan being a defined contribution plan the terms thereof should not bind the plan sponsor in respect of actuarial surplus which could not even have arisen until the 1971 transmogrification into a defined benefit plan. While Trudeau J. did note the conversion in plan type, his reference to the conversion in the critical passage of his decision cited above[83] ("Le Tribunal décide [...] dans le contexte d'un seul régime fondamentalement modifié en 1971") is too ambiguous to allow a guess as to whether he would have decided the case the same way had the plan provided defined benefits as from inception in 1958. If his decision is upheld, it will be interesting to see whether the Court of Appeal chooses the narrower ground of the defined contribution-defined benefit conversion or acts boldly to affirm the validity of the broad principle laid down by the Superior Court.

In summary, *Janin* is noteworthy for its refusal to permit a vague statement on employer contributions in an employee brochure to override the provisions of the official plan text on surplus attribution. It is significant for its implicit rejection of the theory that an insurance company-operated pension plan constitutes a *stipulation pour autrui* and its implicit characterization of the non-negotiated defined benefit plan as a *sui generis* unilateral contract, a characterization which has important implications in both the civil law and common law systems in Canada. It remains to be seen whether this decision will be read

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forthcoming *Civil Code* revision (Bill 125, *Civil Code of Quebec*, 1st Sess., 34th Leg. Qué., 1990) of art. 1266, which describes the pension trust as a form of onerous private trust. Nonetheless, the fundamental characterization of a pension plan as a contract in *QSPPA* s. 6 will remain. It is also noteworthy that s. 6 refers to the pension fund as being appropriated "mainly" for the payment of pensions to plan members and their beneficiaries, the implication being that the plan sponsor is (at least potentially) a subsidiary beneficiary of such trust fund.

[83] *Supra*, note 74.

down or instead continue to stand for the broad proposition laid down by the Superior Court that an employer which unilaterally establishes a pension plan may unilaterally amend such plan if it has reserved a power of amendment and as long as it does not thereby deprive the participants of any acquired rights.

Conclusion

Can *Sauvé* and *Janin* be reconciled? They can certainly be distinguished, on the basis that *Sauvé* involved a negotiated pension plan and *Janin* one established unilaterally, that the Pierre Moreault Ltée plan was a defined benefit plan from its inception while the A. Janin & Compagnie Ltée plan was converted from a defined contribution to a defined benefit plan, or on any one of a number of other narrow grounds. In this sense, they are indeed reconcilable.

On a more fundamental level, though, they seem to reflect differing judicial appreciations of an arrangement that is just now beginning to be understood by judges and jurists in Quebec, the defined benefit pension plan. In this observer's view, *Janin* seems to evince a greater sensitivity to the nature of such a plan and the roles and expectations of the parties thereto than does *Sauvé*. It is to be hoped that both of these decisions will accelerate that understanding process, especially in regard to the determination of pension surplus entitlement.[84] For a better understanding is essential to the success of the forthcoming effort to replace the current surplus removal moratorium in Quebec with a set of permanent rules governing entitlement, as well as to the resolution of all future disputes regarding surplus entitlement both in Quebec and the rest of Canada.

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[84]As this comment was going to press, yet another pension surplus decision was rendered in the Superior Court, *Syndicat national des salariés des Outils Simonds* v. *Eljer Manufacturing Canada Inc.* (12 December 1991), Bedford (Granby) 460-05-000183-884, J.E. 92-170 (C.S.). In a long and rambling opinion, Fréchette J. held in favour of the plan participants. It is noteworthy that this case was pleaded after the publication of *Sauvé* but prior to the release of Trudeau J.'s ruling in *Janin*.