



SUPREME COURT OF CANADA

CITATION: Professional Institute of the Public Service of Canada v. Canada (Attorney General), 2012 SCC 71 **DATE:** 20121219
DOCKET: 33968

BETWEEN:

Professional Institute of the Public Service of Canada, Canadian Merchant Service Guild, Federal Government Dockyard Trades and Labour Council (East), International Brotherhood of Electrical Workers, Federal Government Dockyard Chargehands Association, Research Council Employees' Association, Association of Public Service Financial Administrators, Professional Association of Foreign Service Officers, Federal Government Dockyard Trades and Labour Council (West), Canadian Association of Professional Radio Operators, Canadian Air Traffic Control Association, Canadian Military Colleges Faculty Association and Federal Superannuates National Association
Appellants
and
Attorney General of Canada
Respondent

AND BETWEEN:

Public Service Alliance of Canada
Appellant
and
Attorney General of Canada
Respondent

AND BETWEEN:

Armed Forces Pensioners'/Annuitants' Association of Canada, Association des Membres de la Police Montée du Québec, British Columbia Mounted Police Professional Association, Mounted Police Association of Ontario and Canadian Association of Professional Employees
Appellants
and
Attorney General of Canada
Respondent
- and -
Attorney General of British Columbia
Intervener

CORAM: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

REASONS FOR JUDGMENT: Rothstein J. (McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Cromwell, Moldaver and Karakatsanis JJ. concurring)
(paras. 1 to 165)

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PIPSC v. CANADA (ATTORNEY GENERAL)

**Professional Institute of the Public Service of Canada,
Canadian Merchant Service Guild,
Federal Government Dockyard Trades and Labour Council (East),
International Brotherhood of Electrical Workers,
Federal Government Dockyard Chargehands Association,
Research Council Employees' Association,
Association of Public Service Financial Administrators,
Professional Association of Foreign Service Officers,
Federal Government Dockyard Trades and Labour Council (West),
Canadian Association of Professional Radio Operators,
Canadian Air Traffic Control Association,
Canadian Military Colleges Faculty Association and
Federal Superannuates National Association**

Appellants

v.

Attorney General of Canada

Respondent

- and -

Public Service Alliance of Canada

Appellant

v.

Attorney General of Canada

Respondent

- and -

Armed Forces Pensioners'/Annuitants' Association of Canada,

**Association des Membres de la Police Montée du Québec,
British Columbia Mounted Police Professional Association,
Mounted Police Association of Ontario and
Canadian Association of Professional Employees**

Appellants

v.

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Attorney General of British Columbia

Intervener

**Indexed as: Professional Institute of the Public Service of Canada v. Canada
(Attorney General)**

2012 SCC 71

File No.: 33968.

2012: February 9; 2012: December 19.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell,
Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Pensions — Pension plans — Surplus — Public sector pension plans administered by government — Government amortizing actuarial surpluses in Superannuation Accounts — New legislation coming into force on April 1, 2000 amending Superannuation Acts — Government debiting over \$28 billion directly from Superannuation Accounts on basis of new legislation — Whether Superannuation Accounts contain assets — Whether government owes fiduciary duty to Plan members — Whether constructive trust should be imposed over balances in Superannuation Accounts as of March 31, 2000 — Whether new legislation authorizing government to debit actuarial surpluses in Superannuation Accounts — Public Service Superannuation Act, R.S.C. 1985, c. P-36 — Canadian Forces Superannuation Act, R.S.C. 1985 c. C-17 — Royal Canadian Mounted Police Superannuation Act, R.S.C. 1985, c. R-11 — Public Sector Pension Investment Board Act, S.C. 1999, c. 34.

There are three pension plans involved in this appeal (the “Plans”). They were established by statute for each of three groups: substantially all those who are employed in the federal public service; the members of the RCMP; and the regular force of the Canadian Forces (the “Plan members”). Each Plan is administered by the Government of Canada, and each is a contributory, defined benefit plan. The statutes governing the Plans establish for each one a “Superannuation Account”, which records payments into and out of the Plan. In the 1990s, the credits to the Superannuation Accounts began to reflect actuarial surpluses (meaning that the credits exceeded the estimated cost of providing pension benefits). By March 1999,

the total surpluses of the three Plans had reached approximately \$30.9 billion. There are two relevant time periods in this appeal. The first period is up to and including March 31, 2000. It precedes the coming into force of the *Public Sector Pension Investment Board Act*, S.C. 1999, c. 34 (“Bill C-78”), legislation that amended the *Superannuation Acts* (*PSSA*; *CFSA* and *RCMPSA*) and, thus, the Plans. The second period begins on April 1, 2000, when Bill C-78 came into effect.

Beginning with the 1990-91 Public Accounts (Canada’s annual financial reports), the government began to “amortize” the actuarial surpluses in the Superannuation Accounts. The effect of this “amortization” was twofold: it reduced the government’s annual budget deficit (or increased the annual budget surplus) by reducing annual pension expenditures, and it brought the government’s net debt down by reducing the net pension liabilities to an amount closer to the actuarial estimates of the government’s future pension obligations.

In 1999, the government introduced Bill C-78, which came into force on April 1, 2000. It made significant changes to the *Superannuation Acts* and changed the way in which contributions to the Plans were collected, managed and distributed. It established a Pension Fund in each of the *Superannuation Acts* that replaced the Superannuation Accounts for post-March 31, 2000 service. Since April 1, 2000, employee and government contributions in respect of current service have been made to the Pension Funds. All benefits for pensionable service prior to April 1, 2000, when paid, are charged to the appropriate Superannuation Account. However,

benefits paid for service thereafter are paid from the appropriate Pension Fund. Bill C-78 also required the Minister to debit from the Superannuation Account certain amounts in excess of specified actuarial surplus ceilings. Unlike the effect of the prior amortization practice, on the basis of Bill C-78, the government debited over \$28 billion directly from the Superannuation Accounts, thereby reducing the actuarial surplus in those accounts.

Various unions and associations filed suit, seeking relief that would require the government to return \$28 billion to the Plans. The trial judge dismissed the claims and the Ontario Court of Appeal upheld the decision. In their appeal in this Court, they seek a declaration that the Plan members have an equitable interest in the outstanding balance in the Superannuation Accounts as of March 31, 2000. They also seek a declaration that Bill C-78 does not authorize the reduction from the Superannuation Accounts of any amount in which Plan members have an equitable interest without compensation. They seek an order that the Superannuation Accounts be credited with all amounts that were removed following Bill C-78 in which the Plan members have an equitable interest, together with interest.

Held: The appeal should be dismissed.

The Superannuation Accounts are legislated records and do not contain assets in which the Plan members have a legal or equitable interest. The Plan members' interests are limited to their interest in the defined benefits to which they are entitled under the Plans. The *Superannuation Acts* created the Accounts to track

Plan-related Consolidated Revenue Fund (“CRF”) transactions and to estimate the government’s pension liabilities to Plan members. In this way, they are accounting records, not funded and segregated pools of assets. When the word “assets” is used in the legislation in reference to the Superannuation Accounts, it merely signifies their credit balances, not anything of value to which the Plan members could have an interest. Even if reference to extrinsic aids was appropriate, the extrinsic evidence available is inconclusive. Nor does it afford insight into the intention of Parliament when creating the Superannuation Accounts.

The courts below were correct to reject the theory that the government borrowed from the Accounts, placing in them promises to pay by the government (the purported assets in the Accounts). This theory is inconsistent with the legislation in that it assumes that the government was required to contribute property into the Accounts in the first place. As the Accounts are no more than accounting records, this would have been impossible. Prior to April 1, 2000, all of the real money associated with Canada’s pension scheme remained unsegregated in the CRF, until benefits were actually paid — out of the CRF — to Plan members. The superannuation scheme reflects “internal borrowing” only in the sense that it avoids, by design, the need for the external borrowing that would otherwise be required to finance the government’s pension obligations. The Superannuation Accounts are just accounting records and they are not funds, nor are they “trust-like”, such that it is possible to borrow from them.

As the Superannuation Accounts do not contain assets there was no property in respect of which Plan members can have a legal or equitable interest. However, even if the Accounts did contain assets, it has not been established that the Plan members have a proprietary interest in either their contributions made or in the government credits under the *Superannuation Acts*. On a plain reading of the *Superannuation Acts*, there is no suggestion that the Plan members have a proprietary interest in their contributions. Contributing employees can claim no continuing property interest in these amounts. In exchange for their contributions, and with each year of pensionable service, employees gain a legal entitlement to a future benefit. It has been asserted that employees have an interest in both the employee and employer contributions, plus interest, on the basis that they form part of employees' total compensation. Even if it were to be assumed that employees have an interest in the contributions at the point in time at which their salaries are to be paid to them, no interest in these amounts could survive the requirement in the *Superannuation Acts* that they be paid into the CRF and credited to the Accounts. Rather, this is the "cost" paid by employees for the future legal entitlement to their statutorily defined benefits. The *Superannuation Acts* also do not establish that employees have an equitable interest in the amounts credited to the Accounts. They provide only a legal entitlement to statutorily defined pension benefits.

Nor was the government subject to a fiduciary obligation in favour of the Plan members with respect to the actuarial surplus. In this case, the government does not fall into any of the *per se* fiduciary relationships. It is contended the government

is in a recognized fiduciary role in its capacity as a pension plan administrator; however, it is not necessary to decide the precise ambit of any potential fiduciary duty that might arise between the government, as pension plan administrator, and the beneficiaries of the plan, or whether the relationship inherently carries with it some set of fiduciary obligations. It is clear that the government had no fiduciary duty to the plan members with respect to the actuarial surplus. There was no *ad hoc* fiduciary relationship between the government and the Plan members with respect to the actuarial surplus reflected in the Superannuation Accounts. Most importantly, the government did not undertake, either expressly or impliedly, to act in the best interests of the Plan members with respect to the actuarial surplus. Without such an undertaking of loyalty in favour of these particular stakeholders, the government's duty was to act in the best interests of society as a whole. This is inconsistent with the existence of a fiduciary duty. Moreover, while the government exercised discretion in its accounting treatment of the surpluses in the Superannuation Accounts, the Plan members were not vulnerable to that discretion, nor did they have any legal or practical interest at stake. The effect of the amortization was to disclose more accurately Canada's actual pension obligations, not to affect Plan members' statutory entitlements under the Plans.

Further, a constructive trust should not be imposed over the balances in the Superannuation Accounts as of March 31, 2000. There was no enrichment and corresponding deprivation, and a *prima facie* case of unjust enrichment has not been established. As the Superannuation Accounts are mere accounting records, and do

not contain assets in which the Plan members have an interest, no enrichment and corresponding deprivation can be found in either (1) the government's decision prior to April 1, 2000, to amortize the surpluses for accounting purposes, or (2) Parliament's decision to enact Bill C-78 to require the debiting of a portion of the surplus directly from the Accounts.

Bill C-78 authorized the government to debit the actuarial surpluses in the Superannuation Accounts. The courts below did not err in determining that the Plan members have no equitable interest in the surpluses in the Superannuation Accounts. Bill C-78 thus could not have expropriated the Plan members' property. Further, the *Superannuation Acts* are unambiguous in establishing that the Minister *may* debit any actuarial surplus and *must* debit all amounts exceeding 110 percent of the estimated liability under the Plans. Moreover, it is "extremely clear" that Parliament did not intend any compensation to be given to the Plan members for these debits, whether or not this constituted expropriation. It would be absurd to read Bill C-78 as requiring the government to debit excess amounts and then compensate the Plan members for the amounts debited. Such an interpretation would be to convert the relevant provisions of Bill C-78 into a distribution mechanism — where the surpluses would be reduced and the Plan members would receive some form of compensation in lieu of having surpluses in the Accounts — which was quite clearly not Parliament's intent.

Cases Cited

Applied: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; **distinguished:** *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222; **referred to:** *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, [2005] 1 S.C.R. 325; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217; *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919.

Statutes and Regulations Cited

Act to amend the Civil Service Superannuation Act, S.C. 1944-45, c. 34, s. 6.

Act to amend the Militia Pension Act, S.C. 1946, c. 59, s. 6.

Act to amend the Royal Canadian Mounted Police Act, S.C. 1947-48, c. 28, s. 10.

Canadian Forces Superannuation Act, R.S.C. 1985, c. C-17, s. 55(9) to (13).

Canadian Forces Superannuation Act, S.C. 1959, c. 21.

Civil Service Superannuation Act, R.S.C. 1952, c. 50, s. 21.

Defence Services Pension Act, R.S.C. 1952, c. 63.

Financial Administration Act, R.S.C. 1985, c. F-11, ss. 2 “Consolidated Revenue Fund”, “money”, “negotiable instrument”, “public money”, 17, 63, 64.

Financial Administration Act, S.C. 1951, c. 12, s. 2(e) “Consolidated Revenue Fund”.

Fisheries Act, R.S.C. 1985, c. F-14.

Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.), s. 4.

Public Pensions Reporting Act, R.S.C. 1985, c. 13 (2nd Supp.), ss. 5, 7, 8, 9(1).

Public Sector Pension Investment Board Act, S.C. 1999, c. 34, s. 4.

Public Service Labour Relations Act, S.C. 2003, c. 22 [as en. by *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2], ss. 2(1) “employee”, “public service”, 113.

Public Service Modernization Act, S.C. 2003, c. 22, s. 2.

Public Service Staff Relations Act, R.S.C. 1985, c. P-35 [rep. 2003, c. 22, s. 285], ss. 2 “employee”, 57.

Public Service Superannuation Act, R.S.C. 1985, c. P-36, ss. 3(1) “*Superannuation Act*”, 4, 43, 44, 45.

Public Service Superannuation Act, S.C. 1952-53, c. 47, s. 33.

Royal Canadian Mounted Police Act, R.S.C. 1952, c. 241.

Royal Canadian Mounted Police Superannuation Act, R.S.C. 1985, c. R-11, s. 29(9) to (13).

Royal Canadian Mounted Police Superannuation Act, S.C. 1959, c. 34.

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Canada. Receiver General for Canada. *Public Accounts of Canada 1997*, vol. I, *Summary Report and Financial Statements*. Ottawa: Treasury Board, 1997.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Gillese and Juriansz JJ.A.), 2010 ONCA 657, 102 O.R. (3d) 241, 275 O.A.C. 40, 84 C.C.P.B. 161, [2010] O.J. No. 4248 (QL), 2010 CarswellOnt 7532, affirming a decision of Panet J. (2007), 66 C.C.P.B. 54, 2007 CanLII 50603, [2007] O.J. No. 4577 (QL), 2007 CarswellOnt 7541. Appeal dismissed.

Paul J. J. Cavalluzzo, Hugh O'Reilly and Amanda Darrach, for the appellants the Professional Institute of the Public Service of Canada et al.

James Cameron, Andrew Raven and Andrew Astritis, for the appellants the Public Service Alliance of Canada, the Armed Forces Pensioners'/Annuitants' Association of Canada et al.

Peter Southey, Dale Yurka and Christine Mohr, for the respondent.

Written submissions only by *J. Gareth Morley*, for the intervener.

The judgment of the Court was delivered by

ROTHSTEIN J. —

I. Introduction

[1] This appeal concerns three statutory, public sector pension plans, the members of which are federal public service employees, members of the Canadian Forces, and members of the RCMP. Each plan is administered by the Government of Canada, and each is a contributory, defined benefit plan.

[2] The statutes governing the plans establish for each one a “Superannuation Account”, which records payments into and out of the plan. In the 1990s, the credits to the Superannuation Accounts began to reflect actuarial surpluses (meaning that the credits exceeded the estimated cost of providing pension benefits). By March 1999, the total surpluses of the three plans had reached approximately \$30.9 billion.

[3] Beginning with the 1990-91 Public Accounts (Canada’s annual financial reports), the government began to “amortize” the actuarial surpluses in the Superannuation Accounts. On April 1, 2000, the *Public Sector Pension Investment Board Act*, S.C. 1999, c. 34 (“Bill C-78”) came into force. Bill C-78 changed the way

in which contributions to the plans were collected, managed and distributed. It also required the Minister to debit from the Superannuation Account certain amounts in excess of specified actuarial surplus ceilings. Unlike the effect of the prior amortization practice, on the basis of Bill C-78, the government debited over \$28 billion directly from the Superannuation Accounts, thereby reducing the actuarial surplus in those accounts.

[4] The appellants (being various unions and employee/pensioner associations) filed suit, seeking relief that would require the government to return \$28 billion to the plans. The trial judge dismissed the claims, and the Ontario Court of Appeal upheld the decision ((2007), 66 C.C.P.B. 54 (Ont. S.C.J.), aff'd 2010 ONCA 657, 102 O.R. (3d) 241).

[5] In order to succeed, the plan members must establish that they have an equitable entitlement to the actuarial surpluses. Otherwise, their entitlement will be limited to the defined pension benefits set out in the governing statutes. In this connection, the nature of the Superannuation Accounts is an issue of central importance. The appellants have argued that the Superannuation Accounts were funds that contained assets in which an equitable interest could be claimed. They say their equitable interest is protected by a fiduciary duty on the part of the government, and, in the alternative, by a constructive trust based on unjust enrichment. The government counters that the Superannuation Accounts were merely accounting records and contain no assets to which an equitable interest could attach. A further

issue raised on appeal is whether, if the plan members did have an interest in the actuarial surplus, that interest was extinguished by Bill C-78.

[6] I have determined that the courts below were correct to conclude that the Superannuation Accounts were not separate funds containing assets, but were rather accounting ledgers used to track pension-related payments, and to estimate Canada's future pension liabilities in the Public Accounts. Therefore, the plan members' entitlements are limited to the statutorily defined benefits set out in the *Superannuation Acts*.

[7] I have also concluded that the government was not subject to a fiduciary obligation in favour of the plan members with respect to the actuarial surplus. Nothing in the *Superannuation Acts*, or any other legislation, supports the contention that the government has undertaken to forsake the interests of all others (including taxpayers) in favour of the plan members with respect to the actuarial surplus. Further, there was no unjust enrichment and therefore no basis for a constructive trust. As the Superannuation Accounts did not contain assets in which the appellants had an interest, they did not suffer any detriment as a result of the government's accounting treatment of the Superannuation Accounts. For the same reason, Bill C-78 did not expropriate any property of the plan members. Accordingly, I would dismiss the appeal.

II. Facts

A. *The Pension Plans*

[8] The summary of facts that follows parallels the findings of the Court of Appeal closely. There are three pension plans involved in this appeal (the “Plans”). They were established by statute for each of three groups: substantially all those who are employed in the federal public service; the members of the RCMP; and the regular force of the Canadian Forces (the “Plan members”). The relevant statutes are the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36 (“*PSSA*”); the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17 (“*CFSA*”); and the *Royal Canadian Mounted Police Superannuation Act*, R.S.C. 1985, c. R-11 (“*RCMPSA*”) (collectively, the “*Superannuation Acts*”).

[9] Each of the *Superannuation Acts* has legislative antecedents dating back to the late 19th or early 20th centuries. As currently enacted, they date from the coming into force of the present *Superannuation Acts* — January 1, 1954, for the *PSSA*, S.C. 1952-53, c. 47 (“*PSSA 1954*”); March 1, 1960, for the *CFSA*, S.C. 1959, c. 21; and April 1, 1960, for the *RCMPSA*, S.C. 1959, c. 34.

[10] The Plans are the same in all aspects relevant to these proceedings. For ease of reference, I will generally refer only to the *PSSA*, but the analysis and conclusions apply equally to the *CFSA* and the *RCMPSA*.

[11] The *Superannuation Acts* set out the terms of the Plans. They establish contributory, defined benefit pension plans. Membership in the Plans is compulsory for all eligible public service employees, members of the regular force of the Canadian Forces, and members of the RCMP.

[12] There are two relevant time periods in this appeal. The first period is up to and including March 31, 2000. It precedes the coming into force of Bill C-78, legislation that amended the *Superannuation Acts* and, thus, the Plans. The second period begins on April 1, 2000, when Bill C-78 came into effect.

[13] Employees are required to make a contribution to the relevant Plan, by way of reservation of salary. While the contribution rates for these Plans varied, employees generally contribute in the range of 5 to 7.5 percent of their salaries.

[14] The defined benefit to which an employee is entitled, upon retirement, is determined in accordance with a formula. The basic pension is two percent per year of pensionable service (to a maximum of 35 years) multiplied by the average of the best five consecutive years of salary.

[15] The terms of the Plans are not subject to collective bargaining. The *PSSA* Plan is excluded by virtue of s. 113(b) of the *Public Service Labour Relations Act*, enacted by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2 (“*PSLRA*”) (formerly s. 57(2)(b) of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (“*PSSRA*”) [rep. S.C. 2003, c. 22, s. 285]). The *RCMPSA* Plan is not subject to

collective bargaining because RCMP members are expressly excepted from para. (d) of the definition of “employee” in s. 2(l) of the *PSLRA* (formerly para. (e) of the definition of “employee” in s. 2(1) of the *PSSRA*) and thus have no collective bargaining rights. The *CFSA* Plan is not subject to collective bargaining because members of the Canadian Forces are neither Crown employees nor part of the public service as defined in the *PSLRA* and therefore do not have collective bargaining rights. Nor are the Plans subject to the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) (see s. 4).

[16] Employee contributions to the Plans were required to be deposited into the Consolidated Revenue Fund (“CRF”). “Consolidated Revenue Fund” is defined to mean “the aggregate of all public moneys that are on deposit at the credit of the Receiver General”, in the *Financial Administration Act*, R.S.C. 1985, c. F-11 (“*FAA*”), s. 2. Prior to April 1, 2000, contributions to the Plans were reflected as credits to the “Superannuation Accounts” (or “Accounts”), which were statutorily established for each of the Plans. Amounts payable pursuant to the *Superannuation Acts* (pension benefits) were paid from the CRF and debited to the appropriate Superannuation Account.

[17] In addition to credits reflecting Plan members’ contributions, the legislatively prescribed credits to the Superannuation Accounts prior to April 1, 2000, consisted of the following: (1) credits in respect of contributions by Public Service corporations; (2) government contribution credits; (3) additional actuarial liability

credits (to cover actuarial liabilities); (4) transfers from other pension plans and Supplementary Retirement Benefits Accounts; and (5) interest credits on the balance in the Superannuation Accounts at the rate prescribed by regulation.

[18] The required government contribution credits varied over time. For example, the government was required to credit the Superannuation Account created for the *PSSA* Plan with amounts matching employee contributions in respect of current service: a year in arrears, from 1954 to 1991, and on a monthly basis, from 1991 to 2000. Additionally, further credits were required in relation to past or “buy-back” service, and to provide for the cost of benefits accrued in the month in relation to current service.

[19] The reporting of the government’s pension liabilities is subject to the *FAA*, the applicable *Superannuation Act*, and the *Public Pensions Reporting Act*, R.S.C. 1985, c. 13 (2nd Supp.) (“*PPRA*”). Pursuant to s. 64 of the *FAA*, for each fiscal year the Receiver General must prepare, and the President of the Treasury Board must lay before the House of Commons, an annual report known as the “Public Accounts”. The Public Accounts reflect the value of the assets and liabilities of Her Majesty in Right of Canada. They are the Government of Canada’s main financial reporting document.

[20] The two principal statements in the Public Accounts are the Statement of Financial Position, which sets out the assets and liabilities of the government, and the

Statement of Operations and Accumulated Deficit, which sets out the government's revenues and expenditures.

[21] The transactions and balances in the Superannuation Accounts are reported annually in the Public Accounts. The government's annual credits made pursuant to the *Superannuation Acts* are shown as a government expense in the Statement of Operations and Accumulated Deficit. The amounts set out in the Superannuation Accounts are shown as an ongoing liability of the government in its Statement of Financial Position. The Superannuation Accounts have been classified as "Specified Purpose Accounts" under the liabilities section of the Statement of Financial Position since the 1980-81 fiscal year.

[22] As required by the *Superannuation Acts* and the *PPRA*, actuarial reports were received from time to time with respect to each of the Plans. The *PPRA* requires the Chief Actuary of the Office of the Superintendent of Financial Institutions to periodically estimate the cost of the government's future pension obligations, and to cause a "certification of the assets" of the Plans (ss. 5, 8(1) and 9(1)). To the extent that the estimated cost of the pension liabilities is greater than the certified value of the "assets" reflected in the Superannuation Accounts, there is an "actuarial deficit". On the other hand, where the certified value of the "assets" reflected in the Superannuation Accounts exceeds estimated pension liabilities, there is an "actuarial surplus".

[23] In the 1990s, the actuarial valuations showed that the estimated cost of the present and future obligations for each of the three Plans was less than the total of the amounts showing in the Superannuation Accounts. The surplus arose as a result of a combination of factors, including low inflation rates, high interest rates, government-imposed restraints on salaries, the capping of indexing benefits in the 1980s, and changing assumptions in calculating the actuarial liability of the Plans. The surplus in the three Superannuation Accounts reached \$16.6 billion by December 1992, climbing to \$23.4 billion in March 1996 and \$30.9 billion in March 1999.

B. *Amortization of the Surplus*

[24] In the 1990-91 fiscal year, the government began to “amortize” the actuarial surplus in the Superannuation Accounts. The word “amortize” is used to describe the actions undertaken by the government, over a number of years, to gradually reduce the impact of the actuarial surplus on the Public Accounts. The amortization consisted of the following actions: the government continued to credit its contributions to the Superannuation Accounts in accordance with the *Superannuation Acts*. However, the Public Accounts recorded lower net annual pension expenses. To accomplish this objective, the government booked into the Public Accounts negative expenses to reflect the amount of the surplus amortized during the year, thereby reducing the government’s total pension expenses. For the books to balance, the negative adjustments to pension expenses were equally reflected in reductions in the government’s total stated pension liabilities on its Statement of

Financial Position. To make this happen, the amounts amortized each year were debited to contra-liability accounts (i.e., liability accounts having a debit balance) created in the Public Accounts. These accounts went by different names over the years — such as the “Allowance for Pension Adjustments” — but their function was the same: they allowed the government to reduce its stated net pension liabilities in the Public Accounts by the amount of the amortization without debiting the Superannuation Accounts themselves. The Superannuation Accounts maintained their credit balances, unaffected by the amortization, but the debit balances in the separate allowance accounts partially offset them in the Public Accounts. The government’s stated net pension liabilities were in this way gradually brought toward the actuarial valuation of Plan liabilities (i.e., the surplus was gradually reduced), but the balances in the Superannuation Accounts were not affected.

[25] The effect of this “amortization” was therefore twofold: it reduced the government’s annual budget deficit (or increased the annual budget surplus) by reducing annual pension expenditures, and it brought the government’s net debt down by reducing the net pension liabilities to an amount closer to the actuarial estimates of the government’s future pension obligations.

[26] During the 1990s, the government amortized a total of \$18.6 billion, with further amounts being amortized after the year 2000.

C. *Bill C-78*

[27] In 1999, the government introduced Bill C-78, which came into force on April 1, 2000. It made significant changes to the *Superannuation Acts*. It established a Pension Fund in each of the *Superannuation Acts* that replaced the Superannuation Accounts for post-March 31, 2000 service (“Pension Funds”). Since April 1, 2000, employee and government contributions in respect of current service have been made to the Pension Funds.

[28] Under Bill C-78, the amounts in the Pension Funds were to be invested externally. Bill C-78 established an investment board to manage the assets in the Pension Funds. One of the objects of the investment board is to manage the amounts that are transferred to it, pursuant to the amended Superannuation Act, “in the best interests of the contributors and beneficiaries under those Acts” (s. 4(1)(a)).

[29] Bill C-78 added s. 44(9) to (13) to the *PSSA*. In general terms, these subsections both grant discretion to and create an obligation on the Minister to debit the Superannuation Accounts to reduce the actuarial surplus. While the Minister has the discretion to debit the Superannuation Accounts with any amount of the surplus between 100 percent and 110 percent of the amount estimated to be required to meet the cost of benefits payable, as determined from the actuarial reports, the Minister is required to debit the Accounts for any actuarial surplus that exceeds 110 percent of the amount required to pay future benefits.

[30] Bill C-78 provided that after January 1, 2004, employee contribution rates would no longer be set by legislation but would be set at the discretion of the Treasury Board, subject to certain restrictions. Employees faced a legislated increase of 15 to 33 percent in contribution rates in the years from 2000 to 2003. In 2005, the Treasury Board announced further increases.

[31] Bill C-78 also changed the basis for the government's annual contributions. Instead of being required to make contributions matching those made by employees, the government's contributions are now determined by the President of the Treasury Board, based on the actuarial valuations for each Plan.

[32] All benefits for pensionable service prior to April 1, 2000, when paid, are charged to the appropriate Superannuation Account. However, benefits paid for service thereafter are paid from the appropriate Pension Fund.

[33] Between 2001 and 2004, the government relied on Bill C-78 to debit over \$28 billion from the Superannuation Accounts. Since the effect of the prior amortization was to reduce the annual deficit or increase the annual surplus, and to reduce the government's net debt, the debiting of any amounts already amortized had no effect on Canada's financial position.

D. *The Appellants' Action*

[34] The appellants brought an action for the return of the actuarial surplus reflected in the Superannuation Accounts, arguing that the government had breached its trust and fiduciary duties by amortizing and debiting the surplus. The appellants also maintained that Bill C-78 did not extinguish Plan members' interest in the surplus as it did not evidence an unambiguous intent to expropriate without compensation. The trial judge dismissed the appellants' action. The Ontario Court of Appeal dismissed their appeal.

[35] In their appeal in this Court, the appellants seek a declaration that the Plan members have an equitable interest in the outstanding balance in the Superannuation Accounts as of March 31, 2000. They say that the equitable interest includes the right to have the entire amount in the Superannuation Accounts used solely for the purpose of providing pension benefits to Plan members. In the alternative, the appellants seek a declaration that the equitable interest of the Plan members constitutes a right to have a share of the actuarial surplus in the Superannuation Accounts used for the purpose of providing benefits to the Plan members. Under this alternative, the appellants have prorated their share in accordance with the ratio of employee and employer contributions as of March 31, 2000. The Plan members' contributions were the equivalent of 42.2 percent of the actuarial surplus on that date. They also seek a declaration that ss. 44(9) and 44(10) of Bill C-78 do not authorize the reduction from the Superannuation Accounts of any

amount in which Plan members have an equitable interest without compensation. And they seek an order that the Superannuation Accounts be credited with all amounts that were removed following Bill C-78 in which the Plan members have an equitable interest, together with interest.

E. *Relevant Statutory Provisions*

[36] The relevant statutory provisions are set forth in the Appendix at the conclusion of these reasons.

III. Judgments Below

A. *Ontario Superior Court of Justice (Panet J.)*

[37] The appellants brought a claim for breach of trust, and a claim for breach of fiduciary duty with respect to the outstanding balance in the Superannuation Accounts, as of March 31, 2000.

[38] In considering the statutes and other documents, Panet J. found that the trust requirement that there be certainty of intention was not present. Panet J. also concluded that there was no certainty of subject matter. He found that there was no separate or segregated fund. Panet J. rejected the appellants' claim for breach of fiduciary duty, as there was no scope for the exercise of any discretion or power, a

necessary element of a fiduciary relationship. Panet J. held that the government had no discretion because the *PSSA* was a complete statutory code.

[39] The appellants also objected to the amortization of the surplus. Panet J. rejected this claim on the basis that the Public Service Superannuation Plan was not a funded plan, and that the amortized amounts in the Superannuation Account were not assets that had been removed.

[40] In Panet J.'s view, the Superannuation Accounts did not contain assets. Rather, the Accounts were maintained by the government, pursuant to the *FAA*, to record and disclose an estimate of its pension liability (the cost of the pension obligation).

[41] Panet J. considered whether the government had borrowed from the Superannuation Accounts the difference between the contributions to the Plans plus interest, and the pension payments from the Plans. He found there was no amount owing by the government to the Superannuation Accounts.

[42] In his view, the government's pension liability comes from the *Superannuation Acts*, not the Accounts. The Superannuation Accounts are effectively an estimate of the cost of the government's pension liability. Panet J. considered the actuarial reports periodically submitted to Parliament, which make reference to assets and liabilities in the Plans. However, he found that the use of the word "assets" in these reports does not correspond to the ordinary meaning of that word. "Asset" was

used to mean the recorded contributions of employees and the government, less benefits paid — i.e., the balances in the Superannuation Accounts.

[43] Even though he concluded that the Superannuation Accounts did not contain assets, Panet J. went on to consider whether Bill C-78 expropriated any interest that the Plan members had in the surplus. He concluded that, in clear and unambiguous terms, Bill C-78 required the Minister to debit from the Superannuation Accounts any amount that exceeds 110 percent of the amount estimated to be required to meet pension obligations, and that it gave him the discretion to debit additional amounts of the surplus.

[44] Finally, Panet J. rejected the appellants' argument that Bill C-78 breached the *Charter* rights of Plan members.

[45] Panet J. concluded that the declarations sought by the appellants should not be granted.

B. *Court of Appeal for Ontario (Gillese J.A., Concurred in by Laskin and Juriensz J.J.A.)*

[46] Gillese J.A. found that the trial judge had correctly concluded that the Superannuation Accounts did not contain assets, notwithstanding the appearance of the word “assets” in the *PSSA*. In her view, Superannuation Accounts were “legislated ledgers”, designed to record the amounts credited to the Plans, and to

estimate the government's liability to provide benefits to Plan members. The "real money" deducted from employees' pay cheques was deposited (retained) in the CRF, becoming a part of the aggregate of all public moneys, with a corresponding credit in the appropriate Superannuation Account (paras. 49 to 52).

[47] Although government documents referred to the Plans as being "fully funded", Gillese J.A. held that, understood in context, that phrase simply meant that the value of credited contributions in the Superannuation Accounts was sufficient to discharge the government's liability for promised pension benefits (para. 55).

[48] However, Gillese J.A. held that the trial judge erred by determining that the *PSSA* was a complete code. While the *PSSA* listed many of the parties' rights and obligations, prior to April 1, 2000, the *PSSA* did not address the actuarial surpluses in the Superannuation Account. Accordingly, the Act did not constitute a complete code prior to Bill C-78 coming into force.

[49] It did not follow from this conclusion that Plan members had equitable rights to the actuarial surplus. They did not have an interest in the surplus flowing from the *PSSA*, the employment relationship, trust principles, or from the government's fiduciary obligations as plan administrator.

[50] Gillese J.A. found that the government was not a fiduciary in its capacity as administrator of the Plans prior to April 1, 2000. However, she held that the trial judge had erred by determining that the government did not have any discretion that

could give rise to a fiduciary duty. In her view, the government had discretion in managing the amounts credited to the Superannuation Accounts. The government made the decision to deal with the actuarial surplus by amortizing it, and this amounted to the exercise of discretion.

[51] Gillese J.A. held that there was no property belonging to the Plan members that was affected by the government's exercise of discretion, but that the way the government exercised its discretion had an effect on the practical interests of the Plan members. It appeared to her that the exercise of discretion led to the employees having to contribute more towards the cost of their pensions. However, the core question was whether "given all the surrounding circumstances, one party could reasonably have expected that another would act in the former's best interests" (para. 94). In this case, she concluded it would *not* be reasonable for Plan members to expect the government to act in their best interests when exercising its discretion. A fiduciary duty is unlikely to apply to the Crown, as it would create a conflict between the Crown's responsibility to act in the public interest, on one hand, and its obligation to act in the best interests of beneficiaries, on the other.

[52] Gillese J.A. also held that a constructive trust should not be imposed. She found that it need not be imposed to satisfy the requirements of good conscience, in view of the lack of an equitable obligation on the part of the government. Second, the government was not enriched by the amortization and removal (pursuant to Bill C-78) of the actuarial surplus. In her view, whatever benefit there was to the amortization, it

enured to all Canadian taxpayers. In any event, Bill C-78 was a juristic reason justifying any removal.

[53] Accordingly, Gillese J.A. dismissed the appeal. Laskin and Juriensz JJ.A. concurred.

IV. Issues

[54] The issues in this appeal are:

- a. Did the Superannuation Accounts contain assets?
- b. Did the government owe a fiduciary duty to the Plan members?
- c. Should a constructive trust be imposed over the balances in the Superannuation Accounts as of March 31, 2000?
- d. Did Bill C-78 authorize the government to debit the actuarial surpluses in the Superannuation Accounts?

V. Analysis

[55] This Court has considered the law related to pension plan surpluses on several occasions, but it has always done so in the context of private sector pension plans. In this appeal, the Court must consider pension plan surpluses in the context of statutory, public sector pension plans.

[56] *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, is the leading statement of the law on pension plan surpluses. That case establishes the principle that, in the absence of overriding legislation, the first step to assessing competing claims to the surplus is to determine, in accordance with ordinary principles of trust law, whether the pension fund is impressed with a trust. If it is, all applicable trust principles apply. If, on the other hand, the pension fund is not subject to a trust, entitlement to the surplus will be assessed in accordance with the principles of contract interpretation.

[57] In *Burke v. Hudson's Bay Co.*, 2010 SCC 34, [2010] 2 S.C.R. 273, this Court affirmed *Schmidt*, along with *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, and *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, to the effect that entitlement to a pension plan surplus is “determined according to the words of the relevant documents and applicable contract and trust principles and statutory provisions” (para. 26).

[58] At trial, the appellants advanced the argument that the *Superannuation Acts* created express trusts for the benefit of Plan members. However, the trial judge rejected the express trust argument, and it has not resurfaced on appeal.

[59] In this appeal, the appellants have based their arguments not on express trust, but on constructive trust. Their contention is that the Superannuation Accounts contain assets, and that the government is under an equitable (fiduciary) obligation in

respect of its management of them. The appellants argue that the government breached its fiduciary duty by amortizing the surplus, and that this gives rise to a constructive trust over the assets in the Superannuation Accounts, in favour of the Plan members. The appellants have also argued that a constructive trust should be imposed on the basis of unjust enrichment. As mentioned above, central to both of these arguments is the issue of whether the Superannuation Accounts in fact contained assets. If they did not, then there could be no equitable interest subject to a fiduciary duty, nor any unjust enrichment justifying a constructive trust. Accordingly, the first issue to address is whether the Superannuation Accounts contained assets.

A. *Did the Superannuation Accounts Contain Assets?*

[60] Both courts below found that the Superannuation Accounts did not contain assets. At first instance, Panet J. rejected appellants' expert evidence that the primary asset of each Account is a receivable from the government. He found that, in fact, the government had not borrowed from the Superannuation Accounts and that there were no amounts owing by the government to the Accounts. Rather, the Superannuation Accounts were no more than accounts maintained by the government to record and disclose its estimated pension liability. At the Court of Appeal, Gillese J.A. found no error with this conclusion. In her view, "[i]n essence, the Superannuation Accounts are legislated ledgers" (para. 50).

[61] While there is no question that the Superannuation Accounts are not pools of marketable securities, the appellants maintain that the courts below erred in not finding that the Accounts contain assets, namely, receivables owing from the government to the Accounts. They submit that real money was contributed to the Accounts in each year, but, because the amounts were not invested externally, the government effectively borrowed this money from the Accounts for its own use — leaving promises to pay in the Accounts. These promises to pay, they say, are assets, much like Government of Canada bonds.

[62] As I will presently explain, I agree with the respondent and the courts below that the Superannuation Accounts do not contain assets. The Superannuation Accounts are no more than accounting records designed to track the operation of the Plans and to estimate the government's future pension liabilities.

(1) The Superannuation Acts

[63] The Superannuation Accounts are all established by statute and therefore, an analysis of their nature must begin with the legislation. The current Superannuation Account for the Public Service Superannuation Plan is a continuation of the account established by the 1952 revision of the *Civil Service Superannuation Act*, R.S.C. 1952, c. 50 (*PSSA*, definition of “*Superannuation Act*” in s. 3(1) and s. 4(2)). The 1952 Revised Statutes of Canada re-enacted, in turn, a provision that was originally found in *An Act to amend the Civil Service Superannuation Act*, S.C. 1944-45, c. 34, s. 6, enacted by Parliament in 1944.

[64] The *Civil Service Superannuation Act*, s. 21, provided that all funds collected and distributed pursuant to that Act flowed into, and out of, the CRF:

21. (1) The moneys received under the provisions of this Act shall form part of the Consolidated Revenue Fund, and the moneys payable under the said provisions shall be payable out of the said Consolidated Revenue Fund.

The CRF was defined to mean, at the relevant time, in *The Financial Administration Act*, S.C. 1951 (2nd Sess.), c. 12, s. 2(e), assented to December 21, 1951, “the aggregate of all public moneys that are on deposit at the credit of the Receiver General”. Section 21 of the *Civil Service Superannuation Act* further provided for a special account in the CRF, to be known as the Superannuation Account, for purposes of funds received and payable in respect of the Act:

(2) There shall be kept in a Special Account in the Consolidated Revenue Fund, to be known as the Superannuation Account, of all moneys so received or so payable, and there shall be added to the said Account annually an amount representing interest, at such rate and calculated in such manner as the Governor in Council may by regulation prescribe, on the amount to the credit of such account.

[65] The description of the Superannuation Account as a “Special Account in the Consolidated Revenue Fund . . . of all moneys so *received* or so *payable*” describes accounting entries — a record of transactions relating to government pension plans reflected in credits and debits. It is apparent from the statutory language that Parliament contemplated that the Account would reflect Plan-related transactions into and out of the CRF. Considered together with the direction to

receive all Plan-related moneys into the CRF, and to pay them out of the CRF, the language is consistent with accounting entries rather than with a direction to keep a separate, identifiable accumulation of assets.

[66] As the current Superannuation Account is a continuation of the account established by the 1952 Revised Statutes of Canada (originally established legislatively in 1944), the current Superannuation Account continues to represent accounting entries reflecting, through credits and debits, superannuation Plan-related transactions into and out of the CRF.

[67] In this regard, I pause to remind that the Superannuation Account continues to exist notwithstanding the establishment in 2000 of the Pension Funds pursuant to Bill C-78. Benefits for pensionable service prior to April 1, 2000, are, generally, charged to the Superannuation Account and paid out of the CRF (*PSSA*, s. 43).

[68] The current *FAA* supports the view that all pension-related transactions are into and out of the CRF, and no money is deposited in or withdrawn from the Superannuation Accounts themselves. The *FAA* provides that “all public money shall be deposited to the credit of the Receiver General”, and it defines “public money” as including “all money that is paid to or received or collected by a public officer under or pursuant to any Act . . . and is to be disbursed for a purpose specified in or pursuant to that Act” (ss. 17 and 2). Thus, while the *PSSA* no longer refers specifically to the Superannuation Account as being an account in the CRF, the

scheme of the *FAA* provides that the moneys collected under the *PSSA* form part of the CRF. Thus, the continuation of the 1944 Superannuation Account, an account in the CRF, is consistent with the financial administration legislation currently in force.

[69] When Parliament first established the Superannuation Account, the intention was to create an accounting ledger to track the operation of the superannuation Plan. Not only does the Account record transactions into and out of the CRF, as I have explained, but the credit balance reflects an estimate of Canada's future pension liability under the *PSSA*. This is demonstrated by the fact that, when the Account is in deficit (i.e., is an understatement of the actuarial estimate of pension liabilities), the *PSSA* requires the government to record actuarial liability credits to bring the credit balance in the Account — through annual instalments, to spread out the impact on the Public Accounts — toward the actuarial estimate of the future pension obligation (*PSSA*, s. 44(6) to (8)). In this way, the Superannuation Account is useful from a financial reporting perspective. And it explains why it is disclosed in the Public Accounts as a government liability.

[70] While the above discussion focuses on the Superannuation Account applicable to the Public Service Superannuation Plan, the conclusions apply equally to the other two pension plans at issue on this appeal. The Canadian Forces Superannuation Account is a continuation of the Permanent Services Pension Account established in the accounts of Canada pursuant to the *Defence Services Pension Act*, R.S.C. 1952, c. 63, as it read before March 1, 1960. The Permanent

Services Pension Account was earlier enacted pursuant to *An Act to amend the Militia Pension Act*, S.C. 1946, c. 59, s. 6, and was described as “a Special Account in the Consolidated Revenue Fund”. Likewise, the RCMP Superannuation Account is a continuation of the Royal Canadian Mounted Police Pension Account established in the accounts of Canada pursuant to the *Royal Canadian Mounted Police Act*, R.S.C. 1952, c. 241, as it read before April 1, 1960. The Royal Canadian Mounted Police Pension Account was earlier enacted pursuant to *An Act to amend the Royal Canadian Mounted Police Act*, S.C. 1947-48, c. 28, s. 10, and was also said to be “a Special Account in the Consolidated Revenue Fund”.

[71] The legislation supports the finding that the Superannuation Accounts are accounting entries, rather than funded pools of assets.

(2) The “Borrowing Theory”

[72] The appellants’ argument that the Superannuation Account contained assets did not rely on the contention that there was identifiable property in the Accounts that could be liquidated or sold. (This much was admitted by the appellants’ expert, John Christie, at trial, upon cross-examination: A.R., vol. III, at 142.) His theory (the “Borrowing Theory”) was instead, that “[t]he assets of the plan are a promise to pay from the government of Canada, a debt of the government of Canada” (A.R., vol. III, at pp. 142-43). In his opinion, the assets consisted of the “promise to pay to the account the amount that was owed to it by the government of Canada” (p. 147).

[73] Scott Milne (the appellants' accountant) presented a similar opinion. He stated at trial that the government has

effectively paid the money into the account, and then they have borrowed the money back from the account. So the end result is . . . that the pension account has a receivable from the government and the government has a payable to the pension account. [A.R., vol. IV, at p. 48]

[74] The trial judge rejected the expert evidence supporting the Borrowing Theory, and the Court of Appeal agreed. I see no reason to interfere with this finding.

[75] The appellants argue, incorrectly in my view, that “if the Government did not borrow the amounts in the Superannuation Accounts, the only conclusion available is that it violated the *PSSA* by failing to contribute to the Accounts in the first place” (A.F., at para. 57). They assert that the experts testified at trial that the only way for the government to have met its statutory obligations without actually transferring money into the Accounts was through the Borrowing Theory. The problem, however, is that this argument is premised on a legally incorrect interpretation of the governing legislation. As already discussed, the Superannuation Accounts were — and are — legislated ledgers to track Plan-related CRF transactions and to estimate the government's pension liabilities to Plan members. In short, they are accounting records — that is to say, *information* — not repositories of assets capable of holding property.

[76] For the appellants' Borrowing Theory to hold together, it must be possible to say that the government was required to contribute property to the Superannuation Accounts, and that it was, in fact, borrowing this property back and depositing it into the CRF for public purposes. However, if the Superannuation Accounts are informational accounting records, as I have already concluded they are, this is manifestly impossible. There can be no transfer of actual property to — or borrowing from — an informational record. The property is, and always was, elsewhere: viz., prior to April 1, 2000, the legislation contemplated that all property associated with the operation of the Plans was to be held in, and ultimately be paid out of, the CRF. Throughout the operation of the Superannuation Accounts, there was no intermediate step in which any property should have gone into the Accounts, only to be immediately borrowed back by the government. Not only were such “offsetting cheques” (A.R., vol. IV, at p. 51) not contemplated by the legislation, but the trial judge also found as a fact that this is not how the government was operating the Accounts. Legislatively, the Accounts were informational records incapable of holding assets; in practice, they were treated as such. There was no borrowing from them; there was no debt owing to them; there was no property in them.

[77] As I have said, the *Superannuation Acts* required the government to record accounting credits and debits to track the operation of the Plans, and to pay the statutorily defined benefits to members out of the CRF. But they did *not* require the government to transfer assets into the Accounts, nor did they require the government to “borrow” from the Accounts or to place paperless government receivables in them

to reflect this “borrowing”. The suggestion that any of this was statutorily required is not reflected in the relevant legislation. The Superannuation Accounts were intended to be, and were, part of the government’s accounting system. Contrary to the appellants’ contention, the Accounts were not capable of holding assets.

[78] The appellants also put before the Court various government documents and reports that refer to “borrowing” from the Superannuation Accounts. In the Auditor General’s 1991 report to the House of Commons, for example, it is stated that

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substantial portion of the government’s budgetary deficit is financed through internal non-cash borrowing from specified purpose accounts (SPAs). . . . These borrowings do not involve cash but rather result from a deferral of payments of contributions and interest owed by the government to the third parties on whose behalf the SPAs are administered. [A.R., vol. IV, at p. 233]

[79] Similarly, it is written in the 1994 report of the Economic Analysis and Forecasting Division, entitled “Public Service Pension Review: The Macroeconomic Impacts of Investing in A Diversified Portfolio of Market Assets”:

At present, the pension funds are, in effect, segmented off from the capital market. They constitute a pool of funds to which only the government has access. The Government ‘borrows’ from the fund and credits the fund with interest as if the borrowing was done exclusively through 20-year Government of Canada bonds. [A.R., vol. V, at p. 167]

[80] It is important, however, to understand these references to “borrowing” in context. As the Treasury Board Secretariat explained in its response to the Auditor General’s 1991 report:

The government does not borrow funds directly from the public service pension accounts to finance other spending activities. The government has borrowed from the pension accounts only in the sense that by not raising money to invest required employee and government contributions in marketable securities it has not had to borrow money in the capital markets. [A.R., vol. IV, at p. 237]

[81] There is a difference between saying that the effect of the superannuation scheme operates *as if* the government were borrowing from the capital markets, without actually doing so — as the Treasury Board Secretariat explains — and saying the government is *actually* borrowing *from* the Superannuation Accounts, in the sense that a debt is owing *to* the Accounts (such that the Accounts hold government receivables). The legislation does not support the appellants’ contention that there was borrowing from the Accounts. The superannuation scheme reflects “internal borrowing” only in the sense that it avoids, by design, the need for the external borrowing that would otherwise be required to finance the government’s pension obligations.

[82] It remains only to dispose of the appellants’ reliance on *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222. In that case, this Court was concerned with the Crown’s obligations in respect of oil and gas royalties collected on behalf of Aboriginal bands. The Crown deposited the royalties

into the CRF and credited interest based on the market yield of long-term government bonds. Superficially relevant to this appeal is the discussion in that case of the Crown's "borrowing" of royalty moneys. The bands argued that the Crown was in breach of its fiduciary duty because (1) a trustee is not permitted to borrow from a trust fund, and (2) by holding the royalties in the CRF for use by the Crown, the Crown was engaged in "forced borrowing" of the assets in the trust (para. 126). This Court agreed that the "Crown is borrowing the bands' money held in the CRF" (para. 127). However, it concluded that this practice was not a breach of the Crown's fiduciary duty because the "borrowing" was required by legislation (para. 127).

[83] It might be said that similar type of "borrowing" is reflected in the present appeal. While the government owed future obligations to the Plan members (their statutorily defined benefits), it had the use of current funds in the CRF, including the amounts of employee contributions withheld from their pay cheques. Likewise, by not having to withdraw funds from the CRF to satisfy its own contribution obligations, the government continued to have the use of funds that it would have otherwise had to set aside to invest in marketable securities. As already discussed, however, it does not follow from this "internal borrowing" that the Superannuation Accounts contain government receivables: the Superannuation Accounts are no more than legislated accounting records. *Ermineskin* does not suggest otherwise.

[84] Further, in *Ermineskin*, the Crown received royalty moneys "in trust" for the bands, and the Court concluded that the relationship between the Crown and the

bands was “trust-like in nature” (para. 74). Upon collecting the royalty moneys, “in trust”, the Crown was statutorily required to retain them in the CRF (para. 127). In other words, the legislation required the Crown to take property that was subject to a “trust-like” fiduciary duty, collected on behalf of beneficiaries, and to deposit it into the CRF for public use. It is accurate to describe this statutory scheme as involving the public “borrowing” of property from the “trust”. This is in contrast to the present case: the government did not undertake, expressly or impliedly, to act in the best interests of Plan members with respect to the actuarial surplus (discussed below). The Superannuation Accounts are just accounting records and they are not funds, nor are they “trust-like”, such that it is possible to borrow from them.

[85] Accordingly, the courts below were right to reject the Borrowing Theory. Panet J. correctly found that, “[i]n fact, there is no such borrowing and there is no amount owing by the government to the Superannuation Account of each plan” (para. 222).

(3) The Word “Assets”

[86] The appellants point out that the *Superannuation Acts* and the *PPRA* use the word “assets” in connection with the Superannuation Accounts.

[87] The 1954 version of the *PSSA* required the reporting of “an estimate of the extent to which the assets of the said [Superannuation] Account are sufficient to meet the cost of the benefits payable under this Act” (s. 33). The *PPRA* provides that

the “Minister shall cause a certification of the assets of a pension plan established under the *Canadian Forces Superannuation Act*, . . . the *Public Service Superannuation Act*, [and] the *Royal Canadian Mounted Police Superannuation Act* . . . to be made and a report thereof to be filed” (s. 8). The *PPRA* also refers to the “going concern assets” of the Plans (s. 7).

[88] These provisions pre-date Bill C-78, which amended the *Superannuation Acts* to make specific reference to the *PPRA*. From September 14, 1999, onward, the *PSSA*, for example, provided:

45. In accordance with the *Public Pensions Reporting Act*, a cost certificate, an actuarial valuation report and an assets report on the state of each of the Superannuation Account, the Public Service Superannuation Investment Fund and the Public Service Pension Fund shall be prepared, filed with the Minister designated under that Act and laid before Parliament.

[89] The appellants say that these legislative references mean that the Superannuation Accounts contain assets, in the sense that there is something of value in the Accounts to which the Plan members could have an equitable interest.

[90] In my view, the word “assets” in the *Superannuation Acts* and the *PPRA*, when it is used in connection with the Superannuation Accounts, refers to the credit balances reflected in the Accounts. As discussed above, the actual moneys related to pension contributions remained in the CRF until paid out to members, and the Accounts did not contain government debt. The Superannuation Accounts

themselves reflect accounting credits and debits. Prior to Bill C-78, there was no mechanism in the *Superannuation Acts*, or elsewhere, to direct payments into a separate pension fund.

[91] Accordingly, the word “assets” in the legislation cannot indicate that the Superannuation Accounts contain any property to which the Plan members could have an interest. I would not, however, agree with the Court of Appeal’s suggestion that the Parliamentary use of the word “assets” reflects “sloppy use of language” (para. 49). Rather, the word “asset” is being used in the *Superannuation Acts* and the *PPRA* in a different sense: as Panet J. said in respect of the actuarial reports periodically submitted to Parliament, the term “assets” refers to the credit balances in the Superannuation Accounts (para. 228). The same, in my view, applies to the legislation. It is simply a matter of definition.

(4) Extrinsic Aids

[92] The appellants rely on several representations by government to the effect that the Superannuation Accounts contain assets. The authority to rely on such representations is found in *Schmidt*, where Cory J. stated:

Documents not normally considered to have legal effect may nonetheless form part of the legal matrix within which the rights of employers and employees participating in a pension plan must be determined. Whether they do so will depend upon the wording of the documents, the circumstances in which they were produced, and the effect which they had on the parties, particularly the employees. [p. 669]

[93] In *Burke*, however, this Court determined that, where the relevant articles in the plan documents were unambiguous, it was not necessary to consider surrounding documents (in that case, employer pension booklets) as interpretative aids.

[94] *Schmidt* and *Burke* were decided in the private law context. As this case involves statutory plans, the considerations are different. Specifically, it is necessary to consider the law on extrinsic evidence in statutory interpretation.

[95] As this Court reiterated in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, “[i]t is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids” (para. 29 (emphasis deleted), quoting *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14).

[96] I have found that the *Superannuation Acts* require the Superannuation Accounts to operate like accounting records, tracking pension-related payments that are made into and out of the CRF. The Accounts are not required by the *Superannuation Acts* to be segregated, funded accounts, that receive or make any actual payments themselves; thus, the legislation does not require them to contain assets. The language in the legislation is quite consistent: “assets” simply has a statutorily specific meaning, namely, the credit balances in the Accounts. However,

even were it appropriate to look at extrinsic materials, they do not assist the appellants for the reasons that follow.

[97] The appellants present documents that were produced years after the Superannuation Accounts were established. They have not pointed to documents coinciding with (or preceding) the creation of the Superannuation Accounts, which, as noted above, are *continued* by the current *Superannuation Acts*.

[98] The appellants' documents therefore reflect subsequent governments' interpretations of previous Parliamentary work (*United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 45). However, as Cory and Iacobucci JJ. wrote in the context of subsequent legislative history, "in matters of legal interpretation, it is the judgment of the courts and not the lawmakers that matters. It is for judges to determine what the intention of the enacting Parliament was" (*Dynar*, at para. 45). Accordingly, it is necessary to be cautious when relying on the many subsequent government documents to which the appellants have referred the Court.

[99] Further, Parliament, which created the Superannuation Accounts, is to be distinguished from the executive branch of government, which administers them. Although it is not impossible that governmental documents could assist in the interpretation of legislation, the words of subsequent government Ministers and bureaucrats offer minimal guidance in identifying Parliament's intention concerning the Superannuation Accounts.

[100] The appellants present one Parliamentary debate that took place prior to the enactment of Bill C-78. In February 1992, the President of the Treasury Board said, when introducing Bill C-55, that the “bill also proposes that all [superannuation] plans should henceforth be operated on a fully funded basis” (*House of Commons Debates*, vol. VI, 3rd Sess., 34th Parl., February 24, 1992, p. 7486). He went on to say that the *Superannuation Acts* would be amended to “consolidat[e] the assets and obligations in respect of each [sector]” (p. 7486).

[101] However, Bill C-55, which was enacted as S.C. 1992, c. 46, did nothing to change the nature of any of the Superannuation Accounts. The Accounts did not hold actual assets before 1992, and the amendments did not change this fact.

[102] The notion that Bill C-55 made the Superannuation Accounts “fully funded” is also found in the 1993 document “Treasury Board Secretariat and Department of Finance Study of the Implications of the Current and Alternative Methods of Financing Federal Public Service Pensions”. With respect to the words “fully funded”, the document states: “Among other provisions of Bill C-55, the Superannuation Acts were amended to require, effective April 1991, that the plans be fully funded; that is, that contributions be made each month by the Government which, together with employee contributions and interest credits, are sufficient to provide for the cost of the benefits that have accrued in respect of that month” (A.R., vol. V, at p. 221). In other words, “fully funded” in this context refers to government contribution credits that must be made to record the cost of benefits accruing each

month. It does not refer to an identifiable fund of assets set aside to cover the government's pension liabilities.

[103] The appellants also present a Treasury Board document entitled “Basic Facts about Pensions in the Public Service of Canada”, dated October 18, 1976. The Treasury Board expressly denied that the Plans (other than indexation benefits) were “pay-as-you go”. Rather, the Treasury Board said that the “basic pensions are fully funded in a government account” (A.R., vol. V, at p. 11). The “Basic Facts” document explained the meaning of “fully funded” as follows: “This means that pensions are provided for in such a way that, if the Plan were suddenly terminated, the Account would, without further contributions but with future interest earnings, have sufficient credits to meet the pension payments . . .” (A.R., vol. V, at pp. 10-11).

[104] The description of the Accounts as “fully funded” is also found in an undated pension booklet which was at one time given to federal employees (A.R., vol. V, at p. 83). And, as in the *Superannuation Acts*, the language of “assets” can be found in various internal and external governmental documents (see e.g. “Public Service Pensions”, January 1970 (A.R., vol. V, at p. 5).

[105] While the government documents presented by the appellants use language stating that the Accounts contain assets, other government documents, presented by the government, support the argument that they do not. The Auditor General has several times expressed — in his official observations on the Public Accounts — that the Superannuation Accounts are “unfunded pensions, in the sense

that assets have not been set aside to pay for ultimate pension benefits” (“Supplementary Information: Observations by the Auditor General on the Financial Statements of the Government of Canada and the Statement of Transactions of the Debt Servicing and Reduction Account”, in *Public Accounts of Canada 1997* (1997), vol. I, 1.25, at p. 1.28; see also “Supplementary Information: Observations by the Auditor General on the Financial Statements of the Government of Canada, the Statement Required Under the *Spending Control Act* and the Statement of Transactions of the Debt Servicing and Reduction Account”, in *Public Accounts of Canada 1996* (1996), vol. I, 1.24, at p. 1.27).

[106] Similarly, the Towers Perrin consulting report, “Return Expectations for the Public Service Superannuation Fund”, prepared for the Department of Finance and Treasury Board in 1993, states that, “[i]n the case of the PSSF [the “Public Service Superannuation Fund”], the plan is not ‘funded’ in the sense of an externally invested trust fund, but it is accounted for and actuarially treated as if it were” (A.R., vol. V, at p. 145 (emphasis added)). In this document, the Plans are referred to as “notionally-funded”.

[107] In my view, even if reference to extrinsic aids was appropriate, the extrinsic evidence available is inconclusive. Nor does it afford insight into the intention of Parliament when creating the Superannuation Accounts. Thus, I cannot give much weight to the documents presented by the appellants in their submissions.

It would appear that, from time to time, government officials have inaccurately described the Superannuation Accounts in publications and internal communications.

(5) Conclusion on Whether the Superannuation Accounts Contain Assets

[108] For the reasons given, I agree with the courts below that the Superannuation Accounts do not hold assets — not even the government receivables that the appellants suggest they contain. The *Superannuation Acts* created the Accounts to track Plan-related CRF transactions and to estimate the government’s pension liabilities to Plan members. In this way, they are accounting records, not funded and segregated pools of assets. When the word “assets” is used in the legislation in reference to the Superannuation Accounts, it merely signifies their credit balances, not anything of value to which the appellants could have an interest.

[109] The courts below were correct to reject the theory that the government borrowed from the Accounts, placing in them promises to pay by the government (the purported assets in the Accounts). This theory is inconsistent with the legislation in that it assumes that the government was required to contribute property into the Accounts in the first place. As the Accounts are no more than accounting records, this would have been impossible. Prior to April 1, 2000, all of the real money associated with Canada’s pension scheme remained unsegregated in the CRF, until benefits were actually paid — out of the CRF — to Plan members.

[110] I have concluded that the Superannuation Accounts do not contain assets. Therefore, there was no property in respect of which Plan members can have a legal or equitable interest. However, even if the Accounts did contain assets, the appellants have not established that Plan members have a proprietary interest in either their contributions made or in the government credits under the *Superannuation Acts*.

[111] On a plain reading of the *Superannuation Acts*, there is no suggestion that the Plan members have a proprietary interest in their contributions. Contributing employees can claim no continuing property interest in these amounts. In exchange for their contributions, and with each year of pensionable service, employees gain a legal entitlement to a future benefit. That is the nature of this defined benefit plan.

[112] The appellants asserted that employees have an interest in both the employee and employer contributions, plus interest, on the basis that they form part of employees' total compensation. Even if it were to be assumed that employees have an interest in the contributions at the point in time at which their salaries are to be paid to them, no interest in these amounts could survive the requirement in the *Superannuation Acts* that they be paid into the CRF and credited to the Accounts. Rather, this is the "cost" paid by employees for the future legal entitlement to their statutorily defined benefits. The *Superannuation Acts* also do not establish that employees have an equitable interest in the amounts credited to the Accounts. They provide only a legal entitlement to statutorily defined pension benefits.

B. *Did the Government Owe a Fiduciary Duty to the Plan Members?*

(1) Was There a Fiduciary Relationship Between the Government and the Plan Members?

[113] Fiduciary relationships may be either *per se* or *ad hoc*. The former refers to those relationships that the law presumes to be — and characterizes as — fiduciary (*Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at paras. 36-37). The recognized categories give rise to fiduciary duties “because of their inherent purpose or their presumed factual or legal incidents” (para. 36). The existence of an *ad hoc* fiduciary relationship, on the other hand, is determined on a case-by-case basis. Whereas the *per se* categories describe relationships in which the fiduciary character is “innate”, *ad hoc* fiduciary relationships arise from the specific circumstances of a particular relationship (*Galambos*, at para. 48).

[114] The appellants argue that the Court of Appeal erred in failing to find that the government was a *per se* fiduciary in its role as plan administrator. Alternatively, they say that the Court of Appeal erred in failing to find an *ad hoc* fiduciary relationship in the circumstances: “the Government had undertaken to act in the Plan Members’ best interests with respect to their pension contributions; the Plan Members were in a vulnerable relationship in which the Government had significant discretion; and the Government could exercise this discretion to affect the Plan Members’ interests” (A.F., at para. 67). According to the appellants, that interest includes both

receiving pension benefits and ensuring that their contributions were maintained to be used for pension purposes.

[115] Chief Justice McLachlin recently listed the *per se* fiduciary relationships in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, identifying the following: trustee-*cestui que trust*, executor-beneficiary, solicitor-client, agent-principal, director-corporation, guardian-ward, and parent-child.

[116] In this case, the government does not fall into any of these categories. The closest category (trustee-*cestui que trust*) does not apply because the government is not a true trustee in equity in respect of any trust property held for the benefit of the Plan members. The appellants contend, however, that the government is in a recognized fiduciary role in its capacity as a pension plan administrator.

[117] The administrator/pension Plan member relationship was dealt with in *Burke*. This Court found that the indicia of an *ad hoc* fiduciary relationship were met.

[118] However, the authority of *Burke* on this point is limited to the private pension plan context. Participants in public pension plans are not subject to the same vulnerabilities or risks as participants in private pension plans. The government stands behind the pension plans that it provides for its employees, and is not subject to the same sort of credit risks as are private entities. Furthermore, this Court recognized in *Elder Advocates* that while the Crown is subject to the normal requirements for establishing an *ad hoc* fiduciary relationship, “the special

characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances” (para. 37). McLachlin C.J. in that case quoted Dickson J., as he then was, writing for the majority in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 385:

It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the “political trust” cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. [Emphasis added by McLachlin C.J.; para. 37.]

[119] Binnie J. made the same point writing for the Court in *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 96: “The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting” The same principle also dictates that the Crown will not be presumed to be a fiduciary based solely on its role bearing a similarity to a traditional category of fiduciary.

[120] It is not necessary to decide the precise ambit of any potential fiduciary duty that might arise between the government, as pension plan administrator, and the beneficiaries of the Plan, or whether the relationship inherently carries with it some set of fiduciary obligations. This is because it is clear that the government had no fiduciary duty to the Plan members with respect to the actuarial surplus. This is demonstrated under the template provided for identifying *ad hoc* fiduciary duties in *Frame v. Smith*, [1987] 2 S.C.R. 99, and *Elder Advocates*.

[121] Beginning with Wilson J.'s dissenting opinion in *Frame*, and subsequently adopted by the majority of this Court (see e.g. *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377), the following characteristics were said to identify those relationships where fiduciary obligations had been imposed.

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. [p. 136]

[122] Most recently, in *Elder Advocates*, McLachlin C.J. stated that the aforementioned characteristics were useful but did not provide a complete code. This Court adopted the *Hodgkinson* factors, but added the requirement of an undertaking by the alleged fiduciary to act in the best interest of the alleged beneficiary or beneficiaries.

[123] Each lower court in this case applied the earlier version of the test, as *Elder Advocates* had not yet been decided.

(2) Undertaking to Act in the Best Interest of the Alleged Beneficiary

[124] It is now definitely a requirement of an *ad hoc* fiduciary relationship that the alleged fiduciary undertake, either expressly or impliedly, to act in accordance with a duty of loyalty. It is critical that the purported beneficiary be able to identify a

forsaking of the interests of all others on the part of the fiduciary, in favour of the beneficiary, in relation to the specific interest at issue.

[125] I have been able to identify nothing in the *Superannuation Acts*, the *FAA*, or the *PPRA* that supports the contention that the government has undertaken to forsake the interests of all others (including taxpayers) in favour of the Plan members, with respect to the actuarial surplus — the specific interest at issue here.

[126] By contrast, Bill C-78 establishes a legislated undertaking on the part of the Board (the administrator of the new Pension Funds) to act in the best interest of contributors, but only in respect of post-April 1, 2000 contributions. Section 4(1)(a) of Bill C-78 provides that the Board is “to manage amounts that are transferred to it . . . in the best interests of the contributors and beneficiaries under those Acts”. These words are not found in the *Superannuation Acts* in respect of the Superannuation Accounts.

[127] I am reinforced in the view that there was no undertaking here by the Chief Justice’s comment in *Elder Advocates* that, where the issue relates to the exercise of a government power or discretion, the required undertaking will generally be lacking. As the Chief Justice said, at para. 44, an undertaking of a duty of loyalty by the government

is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance: *Sagharian (Litigation*

Guardian of) v. Ontario (Minister of Education), 2008 ONCA 411, 172 C.R.R. (2d) 105, at paras. 47-49. The circumstances in which this will occur are few. The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484, at para. 178.

And further, “[i]f the undertaking is alleged to flow from a statute, the language in the legislation must clearly support it” (para. 45). The *Superannuation Acts* do not. Accordingly, I would conclude that there has been no undertaking to act in accordance with a duty of loyalty with respect to the actuarial surplus at issue here. There is not, therefore, a fiduciary relationship between the government and the Plan members. However, for the sake of completeness, I will consider the other elements of the test.

(3) Were the Plan Members Vulnerable to the Exercise of Discretion by the Government?

[128] The second element of an *ad hoc* fiduciary relationship, following *Elder Advocates*, at para. 33, requires (1) a defined *person or class of persons* (i.e., the beneficiary or beneficiaries), who is or are (2) *vulnerable* to the fiduciary, (3) in that the fiduciary has a *discretionary power* over them.

[129] In this case, there is no doubt that there is a defined class of persons capable of being the beneficiaries in the alleged fiduciary relationship. The class consists of the current and former employee-contributors and their beneficiaries. The issue is whether the government had a discretionary power over this class of persons

in relation to the Superannuation Accounts. Following Bill C-78, the Pension Investment Board and the Treasury Board had clear discretionary powers in relation to the management of the new Pension Funds, including the setting of employee contribution rates (the latter only following January 1, 2004). As the appellants seek an equitable interest in the Superannuation Accounts as they stood on March 31, 2000, the question is whether the government had a discretionary power in relation to the administration of the Superannuation Accounts prior to Bill C-78 coming into force (April 1, 2000).

[130] If, as the trial judge found, the *Superannuation Acts* constituted a complete code with respect to the actuarial surplus, the government would have no discretionary power to exercise with respect to the surplus so as to affect any interest the Plan members may have in the surplus. The concept of a “complete code” was discussed in *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, [2005] 1 S.C.R. 325. In that case, the Department of Fisheries and Oceans seized and sold spawn that Donald and William Gladstone were accused of attempting to sell in violation of the *Fisheries Act*, R.S.C. 1985, c. F-14. Pursuant to that Act, the Department deposited the net proceeds of the sale in the CRF. The proceedings against the Gladstones were eventually stayed, and the net proceeds from the sale were paid to them. However, the Attorney General refused to pay interest.

[131] This Court concluded that the *Fisheries Act* is a “complete code” dealing with the return of seized property (*Gladstone*, at para. 9). Major J. reasoned that the

Act “creates a comprehensive framework for dealing with issues arising from seizure” (para. 10). Thus, the Act did not create an obligation on the Crown to pay interest on the proceeds of seized property.

[132] I agree with Gillese J.A. that the *Superannuation Acts* were not “complete codes” as these are described in *Gladstone*, before the amendments made by Bill C-78 on April 1, 2000. Prior to that bill coming into force, the *Superannuation Acts* did not address the surpluses in the Superannuation Accounts. While the *Superannuation Acts* dealt with the accounting of deficits, there was no mention of surpluses. Thus, the *FAA* — which gave the President of the Treasury Board and the Minister of Finance discretion to include adjustment accounts in the Public Accounts — was employed to supplement the accounting rules in the *Superannuation Acts* (*FAA*, s. 64(2)(d)). The government was entitled to exercise its discretion to amortize the surplus because of the absence of provisions in the *Superannuation Acts* governing the actuarial surpluses. Gillese J.A. correctly concluded that the *Superannuation Acts* were not a complete code prior to April 1, 2000.

[133] However, as I have explained, the accounting treatment of the surpluses (the amortization) in respect of which the government exercised a discretion did not alter the accounting balances in the Superannuation Accounts; it only altered the representation of the financial position of the Government of Canada in the Public Accounts.

[134] As earlier determined, prior to Bill C-78 coming into force, the government exercised discretion in respect of the surplus in the Public Accounts. Section 63(2) of the *FAA* provides that the Receiver General “shall cause accounts to be kept to show such of the assets and direct and contingent liabilities of Canada and shall establish such reserves with respect to the assets and liabilities as, in the opinion of the President of the Treasury Board and the Minister, are required to present fairly the financial position of Canada”. Further, s. 64(2)(d) of the *FAA* provides that the Public Accounts shall include “such other accounts and information relating to the fiscal year as are deemed necessary by the President of the Treasury Board and the Minister to present fairly the financial transactions and the financial position of Canada”.

[135] While the *FAA* requires the Receiver General to present fairly the financial position of Canada, the President of the Treasury Board and the Minister of Finance have flexibility when it comes to establishing the necessary accounts and adjustments. The amortization, which included the creation of the “Estimate of Pension Adjustments” accounts to set off the overstated liabilities (the actuarial surplus) in the Superannuation Accounts, may be seen as an example of a discretionary decision directed at the accurate presentation of the Public Accounts.

[136] Prior to Bill C-78, the surpluses reflected in the Superannuation Accounts were left intact. The surpluses were not debited until Bill C-78 required such debiting after April 1, 2000. The amortization in the 1990s was reflected only in the Public

Accounts, for the purpose of accurately presenting the true net state of Canada's deficit or surplus and net debt. This was an accounting decision, not a decision going to the substance of the Plan members' entitlements or interests. As the appellants' expert accountant asserted on cross-examination, accounting does not determine the substance of a transaction.

[137] I agree that there was a discretionary power exercised in connection with the amortization of the Superannuation Accounts in the 1990s. However, this particular discretion existed for, and was exercised in connection with, the presentation of the Public Accounts, rather than the administration of the Plan members' pensions. The Plan members' entitlement to their statutorily defined benefits, remained unchanged and remained subject to Parliament's legislative prerogative, not the government's discretion. Therefore, the discretion exercised by the government in respect of the Public Accounts was irrelevant to the existence of a fiduciary duty in favour of the Plan members. I conclude that the appellants are unable to establish vulnerability to the government's exercise of discretion.

(4) Did the Plan Members Have a Substantial Legal or Practical Interest in the Actuarial Surplus?

[138] In order to establish an *ad hoc* fiduciary relationship, the purported beneficiary must have an "identifiable legal or vital practical interest that is at stake" (*Elder Advocates*, at para. 35). In *Elder Advocates*, the Chief Justice gave the following examples of sufficient interests: "... property rights, interests akin to

property rights, and the type of fundamental human or personal interest that is implicated when the state assumes guardianship of a child or incompetent person” (para. 51). A statutory interest may also qualify in some circumstances: “. . . a statute that creates a complete legal entitlement might also give rise to a fiduciary duty on the part of government in relation to administering the interest” (para. 51).

[139] As I have concluded that the Superannuation Accounts do not contain assets, the amortization of the surpluses cannot have put any of the Plan members’ legal or equitable interests at risk. However, the Court of Appeal suggested that the members had a vital practical interest at stake. According to that court, “the exercise of Discretion led to the situation where the employees were obliged to contribute more towards the cost of their pensions” (para. 90).

[140] Though the Court of Appeal did not finally decide the matter, in my respectful opinion, its perception of the effect of the exercise of discretion on contribution rates is not supported by the evidence. I cannot agree that the amortization or debiting of the Superannuation Accounts caused increases in contribution rates. The government says that in 2006 the Minister started exercising the discretion conferred upon him by Bill C-78 to raise the employee contribution rates up to a maximum of 40 percent of the total required from both employees and the government. In oral argument, the government indicated that during Parliamentary debates on Bill C-78, the government explained that the Minister would be given discretion to increase rates because the contribution ratios between

government and Plan members had gone from 60/40, historically, to 70/30, and were projected to go to 80/20. The government indicated that it desired a return to the historical 60/40 contribution rate.

[141] In any event, as the Chief Justice explained in *Elder Advocates*, the interest at issue must be a specific private law interest, and the entitlement at stake “must not be contingent on future government action” (para. 51). Federal employees are not entitled to any specific contribution rate, whether the contribution is determined by Parliament (as it was prior to January 1, 2004), or by the Treasury Board (starting January 1, 2004). The Plan members did not have a specific private law interest in any prescribed contribution rates such as to ground a fiduciary duty.

(5) Conclusion on Fiduciary Relationship

[142] For these reasons, I conclude that there was no *ad hoc* fiduciary relationship between the government and the Plan members with respect to the actuarial surplus reflected in the Superannuation Accounts. Most importantly, the government did not undertake, either expressly or impliedly, to act in the best interests of the Plan members with respect to the actuarial surplus. Without such an undertaking of loyalty in favour of these particular stakeholders, the government’s duty was to act in the best interests of society as a whole. This is inconsistent with the existence of a fiduciary duty. Moreover, while the government exercised discretion in its accounting treatment of the surpluses in the Superannuation Accounts, the Plan members were not vulnerable to that discretion, nor did they have any legal or

practical interest at stake. The effect of the amortization was to disclose more accurately Canada's actual pension obligations, not to affect Plan members' statutory entitlements under the Plans.

C. *Should a Constructive Trust Be Imposed Over the Balances in the Superannuation Accounts as of March 31, 2000?*

(1) Equitable Obligation

[143] In order to succeed, the appellants must establish that they have an equitable interest in the actuarial surplus reflected in the Superannuation Accounts, as their legal interest is limited to their entitlement to statutorily defined benefits. They have not pursued their express trust argument on appeal; they have not argued that a resulting trust has arisen in their favour; therefore, a constructive trust is the only basis upon which an "equitable interest" might be recognized in the actuarial surplus (A. F., at para. 142).

[144] Since this Court's decision in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, there have been two grounds on which a court can impose a constructive trust: (1) breach of an equitable obligation, and (2) unjust enrichment. The appellants have argued both in this appeal.

[145] In *Soulos*, McLachlin J. (as she then was) held that a constructive trust "may be imposed where good conscience so requires" (para. 34). In her view, good

conscience might require the imposition of such a trust in two situations: (1) where property is obtained wrongfully by the defendant (such as by breach of fiduciary duty or breach of loyalty), or (2) where the defendant has been unjustly enriched.

[146] Regarding the first category, McLachlin J. identified four conditions which are generally required before a constructive trust for wrongful conduct may be imposed:

- (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
- (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
- (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
- (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [*Soulos*, at para. 45]

[147] I have found that the government was not subject to a fiduciary obligation in relation to its management of the Plans, and the appellants have not argued that the government has breached any other equitable obligation that it had to the Plan members. The appellants' argument fails on the first requirement of the *Soulos* test. I therefore turn to the other basis on which a constructive trust may be imposed: unjust enrichment.

(2) Unjust Enrichment

[148] As this Court found in *Elder Advocates*, it is possible to claim unjust enrichment against the government (provided the issue is not restitution for taxes paid under an *ultra vires* statute).

[149] In order to prove a claim in unjust enrichment, the plaintiff must establish: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575 (“*Pacific National*”), at para. 14). Where these elements are satisfied, the remedy of constructive trust may be available, if (1) “monetary damages are inadequate”, and (2) “there is a link between the contribution that founds the action and the property in which the constructive trust is claimed” (*Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 988).

[150] As Binnie J. explained in *Pacific National*, at para. 15, “[a]n enrichment may ‘connot[e] a tangible benefit’ . . . , or it can be relief from a ‘negative’, such as saving the defendant from an expense he or she would otherwise have been *required* to make” (emphasis in original).

[151] Following this Court’s decision in *Peter v. Beblow*, the enrichment must correspond with a deprivation from the plaintiff. While the test for unjust enrichment is typically articulated as having three elements, it is important to recognize that the

enrichment and detriment elements are the same thing from different perspectives. As Dickson C.J. suggested in *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, cited by Cory J. in his concurring reasons in *Peter v. Beblow*, at p. 1012, the enrichment and the detriment are “essentially two sides of the same coin”.

[152] The “straightforward economic approach”, as described in *Pacific National*, to enrichment and detriment, is properly understood to connote a transfer of wealth from the plaintiff to the defendant (para. 20). As the purpose of the doctrine is to reverse unjust transfers, it must first be determined whether wealth has moved from the plaintiff to the defendant.

[153] Accordingly, the first inquiry is not whether the government was somehow enriched or benefitted by amortizing or removing the surpluses in the Superannuation Accounts. Rather, the question is whether the government was enriched at the appellants’ expense. Even if it could be shown that the government benefitted in some way by reducing the stated financial obligations of Canada, it would not assist the appellants unless the gain corresponded to the appellants’ loss.

[154] As the Superannuation Accounts are mere accounting records, and do not contain assets in which the appellants have an interest, no enrichment and corresponding deprivation can be found in either (1) the government’s decision prior to April 1, 2000, to amortize the surpluses for accounting purposes under the *FAA*, or (2) Parliament’s decision to enact Bill C-78 to require the debiting of a portion of the surplus directly from the Accounts.

[155] The Court of Appeal found that there was no enrichment because “whatever benefit there was to such actions enured to all Canadian taxpayers” (para. 106). I do not understand the nature of the inquiry in the same way. The enrichment and corresponding deprivation elements ask whether there was a transfer of wealth from the plaintiff to the defendant. The fact that the defendant is a public body is irrelevant to whether such a transfer of wealth took place. Indeed, this reasoning would have the effect of insulating the government from any claim for unjust enrichment.

[156] The Court of Appeal indicated that there might have been a deprivation because the government’s actions “were detrimental to plan members if for no other reason than the fact that those actions apparently led to increases in plan member contribution rates” (para. 107). As I observed in connection with the issue of whether the Superannuation Accounts contained assets, the evidence does not support such an alleged deprivation.

[157] Further, if the increase in contribution rates did constitute a deprivation, the corresponding enrichment could only be the additional deductions taken from employee pay cheques following the rate hikes, and not the amount of the surpluses amortized and removed. But the appellants have sought a declaration that they have an equitable interest in the balances in the Superannuation Accounts as at March 31, 2000, and not the return of the increased contributions after Bill C-78 came into force. Accordingly, on the argument that increased contribution rates constituted a

deprivation, there is no link between the alleged deprivation and the property right they seek, the return of the amortized surplus and subsequently debited surplus.

[158] I conclude that there was no enrichment and corresponding deprivation, and that the appellants have not established a *prima facie* case of unjust enrichment. The third branch of the test for unjust enrichment, the absence of a juristic reason for the enrichment, need not be analyzed.

D. *Did Bill C-78 Authorize the Government to Debit the Actuarial Surpluses in the Superannuation Accounts?*

[159] The courts below ruled that any interest Plan members had in the balances and surpluses in the Superannuation Accounts was extinguished by Bill C-78. The appellants have argued that Bill C-78 did not disclose an explicit intention to expropriate their interest, on the basis of the presumption against expropriation without compensation in statutory interpretation (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 478-82).

[160] In *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, this Court affirmed the principle that “potentially confiscatory legislation ought to be construed cautiously so as not to strip individuals of their rights without the legislation being clear as to this intent” (para. 26). In order to confiscate an interest, Parliament must “express [it]self extremely clearly where there is an intention to expropriate or confiscate without compensation” (para. 26).

[161] I have concluded that the courts below did not err in determining that the Plan members have no equitable interest in the surpluses in the Superannuation Accounts. Bill C-78 thus could not have expropriated the Plan members' property. Further, I would agree with the courts below that s. 44(9) to (13) of the *PSSA* are unambiguous in establishing that the Minister *may* debit any actuarial surplus and *must* debit all amounts exceeding 110 percent of the estimated liability under the Plans.

[162] Moreover, it is “extremely clea[r]” that Parliament did not intend any compensation to be given to the Plan members for these debits, whether or not this constituted expropriation. It would be absurd to read Bill C-78 as requiring the government to debit excess amounts and then compensate the Plan members for the amounts debited. Such an interpretation would be to convert the relevant provisions of Bill C-78 into a distribution mechanism — where the surpluses would be reduced and the Plan members would receive some form of compensation in lieu of having surpluses in the Accounts — which was quite clearly not Parliament's intent. If s. 44(9) to (13) amount to confiscatory legislation, the intention was to confiscate without compensation.

[163] The corresponding amendments to the *CFSA* (s. 55(9) to (13)) and the *RCMPSA* (s. 29(9) to (13)) are to the same effect, and are equally clear.

VI. Conclusion

[164] The Superannuation Accounts are legislated records and do not contain assets in which the appellants have a legal or equitable interest. The Plan members' interests are limited to their interest in the defined benefits to which they are entitled under the Plans. The government was not under a fiduciary obligation to the Plan members, nor was it unjustly enriched by the amortization and removal of the pension surpluses. Finally, the Plan members had no legal or equitable interest in the actuarial surplus reflected in the Superannuation Accounts to be expropriated by Bill C-78.

[165] I would dismiss the appeal with costs.

APPENDIX

Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2

2. (1) The following definitions apply in this Act.

...

“employee”, except in Part 2, means a person employed in the public service, other than

(a) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act;

(b) a person locally engaged outside Canada;

(c) a person not ordinarily required to work more than one third of the normal period for persons doing similar work;

(d) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that force under terms and conditions substantially the same as those of one of its members;

(e) a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature;

(f) a person employed on a casual basis;

(g) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more;

(h) a person employed by the Board;

(i) a person who occupies a managerial or confidential position; or

(j) a person who is employed under a program designated by the employer as a student employment program.

...

“public service”, except in Part 3, means the several positions in or under

- (a) the departments named in Schedule I to the *Financial Administration Act*;
- (b) the other portions of the federal public administration named in Schedule IV to that Act; and
- (c) the separate agencies named in Schedule V to that Act.

...

113. A collective agreement may not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if

- (a) doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition; or
- (b) the term or condition is one that has been or may be established under the *Public Service Employment Act*, the *Public Service Superannuation Act* or the *Government Employees Compensation Act*.

Public Service Superannuation Act, R.S.C. 1985, c. P-36

4. (1) Subject to this Part, an annuity or other benefit specified in this Part shall be paid to or in respect of every person who, being required to contribute to the Superannuation Account or the Public Service Pension Fund in accordance with this Part, dies or ceases to be employed in the public service, which annuity or other benefit shall, subject to this Part, be based on the number of years of pensionable service to the credit of that person.

(2) The Superannuation Account, established in the accounts of Canada pursuant to the *Superannuation Act*, is hereby continued.

...

43. (1) All amounts required for the payment of benefits for which this Part and Part III make provision shall be paid out of the Superannuation Account if the benefits are payable in respect of pensionable service to the credit of a contributor before April 1, 2000.

(2) The amounts deposited in the Public Service Superannuation Investment Fund under subsection 44.1(2) shall be transferred to the Public Sector Pension Investment Board within the meaning of the *Public Sector Pension Investment Board Act* to be dealt with in accordance with that Act.

(3) If there are insufficient amounts in the Superannuation Account to pay all the benefits referred to in subsection (1), the amounts required for the payment of those benefits shall be charged to the Public Service Superannuation Investment Fund and paid out of the assets of the Public Sector Pension Investment Board.

...

44. (1) There shall be credited to the Superannuation Account in each fiscal year

(a) [Repealed, 1999, c. 34, s. 95]

(b) in respect of every month, such amount in relation to the total amount paid into the Account during the preceding month by way of contributions in respect of past service as is determined by the Minister; and

(c) an amount representing interest on the balance from time to time to the credit of the Account, calculated in such manner and at such rates and credited at such times as the regulations provide, but the rate for any quarter in a fiscal year shall be at least equal to the rate that would be determined for that quarter using the method set out in section 46 of the *Public Service Superannuation Regulations*, as that section read on March 31, 1991.

(2) to (5) [Repealed, 1999, c. 34, s. 95]

(6) Following the laying before Parliament of any actuarial valuation report pursuant to section 45 that relates to the state of the Superannuation Account and the Public Service Superannuation Investment Fund, there shall be credited to the Account, at the time and in the manner set out in subsection (7), the amount that in the opinion of the Minister will, at the end of the fifteenth fiscal year following the tabling of that report or at the end of the shorter period that the Minister may determine, together with the amount that the Minister estimates will be to the credit of the Account and the Public Service Superannuation Investment Fund at that time, meet the cost of the benefits payable under this Part and Part III in respect of pensionable service that is to the credit of contributors before April 1, 2000.

(7) Subject to subsection (8), the amount required to be credited to the Superannuation Account under subsection (6) shall be divided into equal annual instalments and the instalments shall be credited to the Account over a period of fifteen years, or such shorter period as the Minister may determine, with the first such instalment to be credited in the fiscal year in which the actuarial valuation report is laid before Parliament.

(8) When a subsequent actuarial valuation report is laid before Parliament before the end of the period applicable under subsection (7), the instalments remaining to be credited in that period may be adjusted to reflect the amount that is estimated by the Minister, at the time that subsequent report is laid before Parliament, to be the amount

that will, together with the amount that the Minister estimates will be to the credit of the Superannuation Account and the Public Service Superannuation Investment Fund at the end of that period, meet the cost of the benefits payable under this Part and Part III in respect of pensionable service that is to the credit of contributors before April 1, 2000.

(9) Following the laying before Parliament of any actuarial valuation report pursuant to section 45 that relates to the state of the Superannuation Account and the Public Service Superannuation Investment Fund, there may be debited from the Account, at the time and in the manner set out in subsection (11), an amount that in the opinion of the Minister exceeds the amount that the Minister estimates, based on the report, will be required to be to the credit of the Account and the Public Service Superannuation Investment Fund at the end of the fifteenth fiscal year following the tabling of that report or at the end of a shorter period that the Minister may determine, in order to meet the cost of the benefits payable under this Part and Part III in respect of pensionable service that is to the credit of contributors before April 1, 2000.

(10) If the total of the amounts in the Account and in the Fund referred to in subsection (9) exceeds, following the laying of the report referred to in that subsection, the maximum amount referred to in subsection (13), there shall be debited from the Account, at the time and in the manner set out in subsection (11), the amount of the excess.

(11) Subject to subsection (12), the amount that may be debited under subsection (9) and the amount that must be debited under subsection (10) shall be debited in annual instalments over a period of fifteen years, or a shorter period that the Minister may determine, with the first such instalment to be debited in the fiscal year in which the actuarial valuation report is laid before Parliament.

(12) When a subsequent actuarial valuation report is laid before Parliament before the end of the period applicable under subsection (11), the instalments remaining to be debited in that period may be adjusted to reflect the amount that is estimated by the Minister, at the time that subsequent report is laid before Parliament, to be the amount that will, together with the amount that the Minister estimates will be to the credit of the Superannuation Account and the Public Service Superannuation Investment Fund at the end of that period, meet the cost of the benefits payable under this Part and Part III in respect of pensionable service that is to the credit of contributors before April 1, 2000.

(13) At the end of the period, the total of the amounts that are to the credit of the Superannuation Account and the Public Service Superannuation Investment Fund must not exceed one hundred and ten percent of the amount that the Minister estimates is required to meet the cost of the benefits payable under this Part and Part III in respect of pensionable service that is to the credit of contributors before April 1, 2000.

(14) The costs of the administration of this Act, as determined by the Treasury Board, with respect to benefits payable under this Act in respect of pensionable service that is to the credit of contributors before April 1, 2000, shall be paid out of the Superannuation Account.

Public Sector Pension Investment Board Act, S.C. 1999, c. 34

4. (1) The objects of the Board are

(a) to manage amounts that are transferred to it under subsections 54(2) and 55.2(5) and section 59.4 of the *Canadian Forces Superannuation Act*, subsections 43(2) and 44.2(5) of the *Public Service Superannuation Act* and subsections 28(2) and 29.2(5) of the *Royal Canadian Mounted Police Superannuation Act* in the best interests of the contributors and beneficiaries under those Acts; and

(b) to invest its assets with a view to achieving a maximum rate of return, without undue risk of loss, having regard to the funding, policies and requirements of the pension plans established under the Acts referred to in paragraph (a) and the ability of those plans to meet their financial obligations.

(2) The costs associated with the operation of the Board shall be paid out of the funds.

(3) The Minister shall determine from which funds the costs shall be paid, but no amount shall be taken out of the Canadian Forces Pension Fund or the Canadian Forces Superannuation Investment Fund — or, if regulations are made under section 59.1 of the *Canadian Forces Superannuation Act*, from the fund referred to in section 59.3 of that Act — without consulting the Minister of National Defence, or from the Royal Canadian Mounted Police Pension Fund or the Royal Canadian Mounted Police Superannuation Investment Fund without consulting the Minister of Public Safety and Emergency Preparedness.

Public Pensions Reporting Act, R.S.C. 1985, c. 13 (2nd Supp.)

7. Where, in the review of a pension plan, actuarial assumptions or methods are used that differ from those used for the immediately preceding review in respect of which a cost certificate was filed pursuant to section 5 and such different assumptions or methods result

(a) in a decrease in the going concern unfunded actuarial liability but do not result in an excess of going concern assets over the going concern actuarial liabilities, the outstanding special payments shall be recalculated by multiplying each of the amounts thereof by a factor having, as numerator, the going concern unfunded actuarial liability and, as denominator, the sum of the present values of the

previously determined special payments where the present values are calculated on the basis of the actuarial assumptions used at the current review; or

(b) in an excess of the going concern assets over the going concern actuarial liabilities, the valuation report referred to in section 6 shall include a statement as to the method, if any, proposed for the disposition of such excess.

8. (1) The Minister shall cause a certification of the assets of a pension plan established under the *Canadian Forces Superannuation Act*, . . . the *Public Service Superannuation Act*, [and] the *Royal Canadian Mounted Police Superannuation Act* . . . to be made and a report thereof to be filed with the Minister at the same time as a cost certificate is filed pursuant to subsection 5(1).

(2) The certification and the assets report referred to in subsection (1) shall be made by the Comptroller General of Canada.

9. (1) The Minister shall lay before Parliament any cost certificate, valuation report or assets report filed with the Minister pursuant to this Act, within thirty sitting days of their being filed if Parliament is then sitting, or if Parliament is not then sitting, on any of the first thirty days thereafter that Parliament is sitting.

Financial Administration Act, R.S.C. 1985, c. F-11

2. In this Act,

...

“Consolidated Revenue Fund” means the aggregate of all public moneys that are on deposit at the credit of the Receiver General;

...

“money” includes negotiable instruments;

“negotiable instrument” includes any cheque, draft, traveller’s cheque, bill of exchange, postal note, money order, postal remittance and any other similar instrument;

...

“public money” means all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person authorized to receive or collect such money, and includes

(a) duties and revenues of Canada,

- (b) money borrowed by Canada or received through the issue or sale of securities,
- (c) money received or collected for or on behalf of Canada, and
- (d) all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract;

...

17. (1) Subject to this Part, all public money shall be deposited to the credit of the Receiver General.

(2) The Receiver General may establish, in the name of the Receiver General, accounts for the deposit of public money with

- (a) any member of the Canadian Payments Association;
- (b) any local cooperative credit society that is a member of a central cooperative credit society having membership in the Canadian Payments Association;
- (c) any fiscal agent that the Minister may designate; and
- (d) any financial institution outside Canada that the Minister may designate.

...

(4) Subject to any regulations made under subsection (5), every person employed in the collection or management of, or charged with the receipt of, public money and every other person who collects or receives public money shall pay that money to the credit of the Receiver General.

...

63. (1) Subject to regulations of the Treasury Board, the Receiver General shall cause accounts to be kept in such manner as to show

- (a) the expenditures made under each appropriation;
- (b) the revenues of Canada; and
- (c) the other payments into and out of the Consolidated Revenue Fund.

(2) The Receiver General shall cause accounts to be kept to show such of the assets and direct and contingent liabilities of Canada and shall establish such reserves with respect to the assets and liabilities as, in the opinion of the President of the Treasury Board and the Minister, are required to present fairly the financial position of Canada.

(3) The accounts of Canada shall be kept in the currency of Canada.

64. (1) A report, called the Public Accounts, shall be prepared by the Receiver General for each fiscal year and shall be laid before the House of Commons by the President of the Treasury Board on or before December 31 next following the end of that fiscal year or, if the House of Commons is not then sitting, on any of the first fifteen days next thereafter that the House of Commons is sitting.

(2) The Public Accounts shall be in such form as the President of the Treasury Board and the Minister may direct, and shall include

(a) a statement of

(i) the financial transactions of the fiscal year,

(ii) the expenditures and revenues of Canada for the fiscal year, and

(iii) such of the assets and liabilities of Canada as, in the opinion of the President of the Treasury Board and the Minister, are required to show the financial position of Canada as at the termination of the fiscal year;

(b) the contingent liabilities of Canada;

(c) the opinion of the Auditor General of Canada as required under section 6 of the *Auditor General Act*; and

(d) such other accounts and information relating to the fiscal year as are deemed necessary by the President of the Treasury Board and the Minister to present fairly the financial transactions and the financial position of Canada or as are required by this Act or any other Act of Parliament to be shown in the Public Accounts.

Appeal dismissed with costs.

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