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INTELLECTUAL PROPERTY

NO PRIVATE COPY LEVY ON MP3S IN CANADA - FOR NOW

By Marek Nitoslawski

On July 28, 2005, the Supreme Court of Canada refused to grant leave to appeal the 2004 Federal Court of Appeal ruling [1] which had overturned a hefty tariff imposed by the Copyright Board on MP3s in 2003: $2/unit for players having less than 1Gb of memory, $15/unit for 1-10Gb players, and $25/unit for MP3s over 10Gb. No reasons were given. Thus, the Supreme Court confirmed by implication that there is no private copying levy payable on MP3 players in Canada – and by the same token, it cast doubt on the legality of their use in this country.

In 1997, Canada introduced amendments to the *Copyright Act* which state that it is not an infringement of copyright to reproduce all or any substantial part of a musical work, a performer's performance or a sound recording onto an "audio recording medium" for the private use of the person making the recording.[2] The amendments also provided that manufacturers and importers of blank audio recording media would be liable for the payment of royalties to authors, performers and producers to compensate for losses of sales due to private copying.

An "audio recording medium" is defined as being a "recording medium, regardless of its material form, onto which a sound recording may be reproduced and that is of a kind ordinarily used by individual consumers for that purpose…"

The Copyright Board, which has statutory authority to determine royalties payable to collective societies and other rights holders for the right to use copyrighted works, had already authorized two successive tariffs in which it imposed various levies on audio cassettes, CD-Rs, CD-RWs and Mini Discs. In 2002, the Canadian Private Copying Collective (“CPCC”) filed a proposed tariff in which it sought to extend the royalty scheme to DVDs and various forms of removable and non-removable memory used in MP3s and similar audio recording devices. Significantly, CPCC targeted the memory rather than the device itself. CPCC also chose not to target computer hard drives, PDAs and other devices that aren’t “ordinarily used” for the purpose of recording and playing music.

The Copyright Board’s decision on CPCC’s proposed tariff was handed down in late 2003. The Board ruled that on the evidence before it DVDs were not “ordinarily used” for recording music, and thus no levy was payable. The Board came to the same conclusion with respect to removable memory, even if installed in digital audio recorders, since such memory could be found in many other devices. However, the Board concluded that non-removable solid state or hard disk memory, when incorporated into a digital audio recorder, is ordinarily used by individual consumers to copy music, and thus falls within the definition of an “audio recording medium” under the Act. The Board based its reasoning on the premise that since such recorders are designed, manufactured and advertised for the purpose of copying sound recordings of musical works, it follows that non-removable memory permanently embedded in such players falls within the purview of the Act.

This conclusion was overturned by the Federal Court of Appeal, which held that the Board had no authority under the Act to impose a levy on memory embedded in digital audio recorders. The Court ruled that the effect of the Board’s decision was to impose a levy on the device itself. Since a digital audio recorder is not a medium, it cannot qualify as an “audio recording medium” under the Act; even the CPCC seemed to acknowledge as much when it asked that the levy be applied on the memory found in the recorder but not on the recorder itself.

The Court took issue with the Board’s attempt to "see through" a digital audio recorder to reach the memory embedded in the recorder, and found that the Board’s reasoning was flawed: having acknowledged that a memory standing alone could not attract payment of the levy because it had many possible uses and was not ordinarily used by consumers to copy music, the Court failed to see how such a memory could undergo a change of form when it was embedded in an MP3 player.

The Court also found that the Board had ignored commercial reality. Liability for the payment of the levy can only arise under the Act "on selling or otherwise disposing of (…) blank audio recording media". Yet manufacturers and importers of MP3s sell the players themselves, and not the blank media contained in such players. In the absence of a sale of the medium itself, there was no liability for the levy.

Finally, the Court took comfort in the fact that when Parliament passed the private copy amendments, it was aware of proposals in other jurisdictions to extend the levy obligation to recording devices, but chose to limit the ambit of Canadian legislation to blank media only. Parliament had clearly distinguished between the recording

“The Court acknowledged that if MP3 players or the memory they contain do not qualify as ‘audio recording media’, their use is no longer covered by the private copy exemption introduced by the 1997 amendments to the *Copyright Act*.”

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medium and recording devices. It was thus incumbent on Parliament to abolish this distinction if deemed appropriate.

The Court acknowledged that if MP3 players or the memory they contain do not qualify as "audio recording media", their use is no longer covered by the private copy exemption introduced by the 1997 amendments to the *Copyright Act*. Copyright infringement could therefore result from their use to reproduce music, even by consumers for private use. However laudable the Board's goals may have been in establishing a tariff on MP3s, the Court nevertheless felt that it is up to Parliament to remedy any real or perceived mischief caused by such devices.

In view of the Supreme Court's refusal to hear the case, the debate now moves to the legislative sphere. Parliament is currently contemplating substantive new amendments to the *Copyright Act*, and the issue of MP3 players is sure to be put on the agenda by the rightsholders collectives. However, given that MP3 players are increasingly being used to collect music downloaded from authorized music sites, where consumers pay a fee for that downloaded music, one could question whether the private copy regime remains as relevant as it was a mere 10 years ago.

CORPORATE LAW

ONE STEP CLOSER TO A TRUE PROVINCIAL "OPPRESSION REMEDY"

By Paul Martel

On July 29, 2005, a preliminary decision handed down by the Superior Court of Québec in *Desautels v. Desautels*[1] paved the way to a true "oppression remedy" for shareholders governed by the *Companies Act*,[2] a piece of legislation that has no provision similar to section 241 of the *Canada Business Corporations Act*[3] (CBCA), which provides shareholders of federal business corporations with just such a recourse.

At the federal level, an "oppression remedy" allows the court to remedy any situation of injustice or abuse of right in companies that prejudice plaintiffs or fail to take their interests into account, mainly by violating their "reasonable" or "legitimate" expectations. To this end, the court disposes of a virtually inexhaustible arsenal of powers with which to intervene, wielding the ability not only to forbid the censured behaviour, appoint a receiver, sentence a party to pay damages and liquidate such companies, but also to amend their articles of incorporation, by-laws, contracts or unanimous shareholder agreements, and to order the mandatory acquisition of the plaintiffs' or other shareholders' securities – all extraordinary remedies that fall beyond the normal scope of a court's powers under the general rules of civil law. This frequently used remedy allows minority shareholders who are victims of injustice or abuse of right to request, often successfully, that their securities be redeemed by the company or the majority shareholders at a price fixed by the court.

1) Canadian Private Copying Collective v. Canadian Storage Media Alliance, *2004 FCA 424 (CanLII); 2004-12-14; Noël, Linden, Evans J.A.; See : http://www.canlii.org/ca/cas/fca/2004/2004fca424.html;*

2) *R.S. 1985, c. C-42, section 80.*

> "More specifically, could the Superior Court issue orders that force a company or other shareholders to purchase the shares of a plaintiff shareholder where there is no contractual obligation to do so?"

No similar law exists in Québec. Under article 33 of the *Code of Civil Procedure* ("C.C.P."), courts do have general superintending and reforming powers over legal persons, which includes companies, but they were highly reticent in the past to use them to intervene in the internal affairs of companies other than in cases of fraud.

As a result, shareholders of companies in Québec did not enjoy the same level of protection against the abuses of majority shareholders as did shareholders of federal corporations.

In recent years, however, Québec courts started to question the traditional limits placed on their power to intervene under article 33 C.C.P.

The first major development occurred when courts began confirming that article 33 C.C.P. does allow the Superior Court to intervene in a provincial company's internal affairs not only in cases of fraud, but also in instances of abuse of right or violation of the "legitimate expectations" of shareholders.[4] The Court of Appeal of Québec recently confirmed this trend in *9022-8818 Québec Inc. (Magil Construction Inc.) (Trustee of)*[5] when it made the following statement:

> In conclusion, a judge asked to exercise the "superintending and reforming" power of article 33 C.C.P. can determine measures to protect a shareholder after finding a violation or abuse of right.

Despite this new openness on the part of the courts, one question remained unanswered: could the Superior Court, in the exercise of its superintending and reforming powers under article 33 C.C.P., issue orders that exceed the usual scope of a civil court's general powers, going so far as to avail itself of the powers of an "oppression remedy"?

More specifically, could the Superior Court issue orders that force a company or other shareholders to purchase the shares of a plaintiff shareholder where there is no contractual obligation to do so? To answer in the affirmative would effectively transform article 33 C.C.P. into a true "oppression remedy" similar to the one in the federal act. Some legal doctrine casts doubt on this assertion, however, claiming that there must be statutory support for conferring such extraordinary powers to the court.

Desautels v. Desautels deals specifically with this crucial issue. The action that the plaintiff filed under article 33 C.C.P. specifically requested that the court order the company and other shareholders to purchase the plaintiff's shares.

The judge also ruled on a motion to dismiss. The *mise en cause* argued that, barring any statutory authority or contract imposing such an obligation, no court could force it to redeem the shares of one of its shareholders, and therefore such a conclusion had no place in the proceeding.

The judge dismissed the motion, maintaining that nothing authorizes him to maintain that it is impossible for a court to issue an order for the mandatory acquisition of shares under articles 33 and 46 C.C.P.[6] He specified:

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[TRANSLATION] The emergence of an oppression remedy in Québec law that is fashioned by circumstances and bears an ever increasing resemblance to remedies found in the CBCA, or even the Ontario *Companies Act*, is becoming more and more of a certainty. (par. 14)

This means that there truly is a principle underlying the Superior Court's intervention power under article 33 C.C.P., and its inherent powers partially codified in article 46 C.C.P. How far do these powers extend? That will depend on the facts, the circumstances and the evidence adduced at trial. (par. 19)

There is undeniably a trend to broaden rather than restrict the intervention power that articles 33 and 46 C.C.P. bestow on this Court's judges.

Under article 46 C.C.P., the Superior Court can make such orders as are appropriate to deal with specific cases where no remedy is provided by law. We must be able to adapt to the rapid evolution of judicial law, yet remain open. (par. 24 *et seq.*)

In this case, the judge added that the company had already redeemed the shares of plaintiff's ex-husband during their divorce. This prior settlement could incite the judge hearing the merits of this dispute to order an identical solution to put an end to the alleged oppression.

Regardless of the outcome of these proceedings, the decision rendered by the judge at this preliminary stage constitutes, in itself, an important step in the evolution of the protection afforded to shareholders of provincial companies.

The doors seem to have opened to a provincial "oppression remedy" allowing orders to be issued for the mandatory acquisition of a plaintiff's shares.

The *Desautels* decision represents a fundamental shift in the rules that apply to provincial companies, and directors and shareholders would be wise to pay attention.

1) *[2005] J.Q. 10009 (S.C.M.), Justice Robert Mongeon, J.S.C.; See: http://www.canlii.org/qc/jug/qccs/2005/2005qccs59419.html;*

2) *R.S.Q., ch. C-38;*

3) *R.S.C., 1985, ch. C-44;*

4) *This new trend began with a declaration by Justice Beauregard in the 2001 Court of Appeal of Québec's* Martineau, Provencher & Associés ltée v. Grace*, [2001] R.J.Q. 2414 (C.A.), and Justice Denis Lévesque's 2002* Laurent v. Buanderie Villeray ltée*, J.E. 2002-3(S.C.). Two subsequent decisions fall in thisline of thinking. They are* Équipements Ovila Poulin Inc. v. Carrier*, J.E. 2003-180 (S.C.) and* Bergeron v. Paré*, J.E. 2005-995 (S.C.);*

5) *2005 QCCA 275; see http://www.canlii.org/qc/cas/qcca/2005/2005qcca275.html;*

6) *This last provision vests courts with the power to "make such orders as are appropriate to deal with cases for which no specific remedy is provided by law".*

TAX LAW
ELECTRONIC DOCUMENT RETENTION AND TAX REQUIREMENTS

By Louis Tassé

Most Canadian tax laws prescribe certain document retention standards that might be useful to their application. For example, the *Income Tax Act* ("ITA") requires taxpayers operating an enterprise in Canada to retain the books and registers needed to calculate their income taxes for at least six years. A similar requirement is also provided for in the *Taxation Act* (for income taxes in Québec) and in other sales tax laws.[1]

In the last few years, two phenomena that resulted from technological advances have prompted tax authorities to prepare rules governing the retention of electronic documents: these are the conversion of hardcopy documents into electronic format and the creation of electronic documents (e.g. Internet transactions). In both cases, tax authorities have imposed distinct standards that must be followed.

For businesses, retaining electronic documents helps considerably reduce the physical space needed to store the documentation that makes up its corporate memory. Tax authorities, for their part, want to make sure that documents saved in electronic format are reliable and can be easily accessed when conducting their audits.

1) Digitization of Documents

Businesses that generate large quantities of paper documents may be tempted to scan their documentation systematically for storage on such removable media as CD-ROMs or DVDs, or on permanent media such as computers or servers. This helps considerably reduce the space needed to store documents.

“For businesses, retaining electronic documents helps considerably reduce the physical space needed to store the documentation that makes up its corporate memory.”

It is important to note that the Canada Revenue Agency (the “Agency”) imposes a series of strict and detailed requirements on the digitization of document,[2] which specifically include the following:

1. Digitization must be carried out under a detailed program that is applied in the ordinary course of the enterprise’s business;

2. The program must comply with standards established by the Canadian General Standards Board;[3]

3. Programs must be backed by an operational manual detailing the methods that must be used to digitize documents then index, retrieve, certify and control the quality of the digitized version; destroy the originals; store the electronic documents; provide program safeguards; prepare backup copies and destroy electronic documents;

4. Digitization activities must be recorded in a logbook specifically containing, a description of the digitized documents, along with the name of the individuals who authorized and carried out the digitization;

5. The program must include an index listing bibliographical information on the original document and biographical information on the electronic document in order to track and provide background for any given document with ease;

6. When original documents are destroyed, the names of the individuals who authorized and destroyed the documents must be recorded in a logbook.

All of these measures aim to ensure the integrity of documents converted into electronic format and make them as trustworthy as the originals.

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The ITA also requires that, unless permission is sought to do otherwise, books and registers be kept in Canada. According to the Agency, this requirement also applies to documents that are stored on a server, which must also be located in Canada.

Any enterprise that fails to comply with these rules may be forced by the Agency to enter into an agreement stipulating the manner in which its registers must be maintained and including a digitization program. Failure to honour the agreement will result in administrative penalties, or even criminal proceedings.

2) Electronically Created Documents

With the growing number of transactions being conducted on the Internet, many documents used by businesses are created electronically. Here, too, tax authorities have established standards. The Agency issued the following requirements:[4]

1. Information recorded electronically must be able to be used to establish income taxes that businesses owe;

2. Information recorded electronically must also be able to be used to track recorded transactions;

3. Internal controls integrated into the system must guarantee the accuracy and record the entirety of each transaction recorded;

4. The system must guarantee the integrity and safety of recorded transactions;

5. Information the Agency needs to conduct audits must be recorded in its entirety;

6. The system must ensure that all information needed in an audit can be easily accessed;

7. The system must have an adequate backup and information restoring system;

8. The system must allow information to be exported in a widely-used medium.

The measures listed above draw their inspiration from a large portion of the document digitization requirements and share the common goal of ensuring the integrity and reliability of information created and stored in electronic format.

Obviously, this is only a summary of the Agency standards that apply to documents created electronically or converted into electronic format. The standards are extremely detailed and highly restrictive, and will require considerable planning of anyone who wants to create such a system, keep detailed logbooks that record conversions and implement control measures that will ensure that the standards are respected. Enterprises that want to implement a system that records and retains electronic documents had better consider its advantages and disadvantages.

1) *See the* Excise Tax Act *and the* Act respecting the Québec sales tax*, which respectively establish for Goods and Services Tax and the Québec Sales Tax;*

2) Information Circular IC78-10R4*, Books and Records Retention/Destruction, Canada Revenue Agency, June 2005 (http://www.cra-arc.gc.ca/E/pub/tp/ic78-10r4/ic78-10r4-e.pdf);*

3) *The standards established by the Canadian General Standards Board are published in a document entitled* Microfilm and Electronic Images as Documentary Evidence*, CAN-CGSB-72.11.93;*

4) Information Circular IC05-1, *Electronic Record Keeping, Canada Revenue Agency, June 2005 (http://www.cra-arc.gc.ca/E/pub/tp/ic05-1/ic05-1-05e.pdf).*

REAL ESTATE LAW

BILL 83 AND THE VOLUNTARY CERTIFICATION OF SENIOR CITIZENS' HOMES

By Richard Clare and Elias Retsinas

December 10th 2004, the Québec Government tabled Bill 83 titled "*Loi modifiant la Loi sur les services de santé et les services sociaux et d'autres dispositions législatives*" ("An Act to amend the Act respecting health services and social services and other legislative provisions").[1] Since its tabling, Bill 83 has left many operators of senior citizens' homes ("SCH's") wondering whether, and if so, to what extent, their daily operations will be affected by the impending enactment of this bill, and if so, to what extent.

1) Bill 83

Although the broader purpose of Bill 83 is the reorganization of the provision of health services in the province of Québec, Article 128 of Bill 83 introduces the notion of the voluntary certification of SCH's or, as they are referred to in the *Act Respecting Health and Social Services*[2] (the "Act"), "residences for the elderly". Specifically, the intention of Article 128 is to improve the overall quality of the services provided at SCH's and in particular, to prevent further abuses the like of which have been revealed over the past few years, by establishing a series of minimum requirements and quality standards which operators of SCH's must adhere to as a precondition to being certified and thus receiving client referrals from public health establishments.

2) What is a SCH or "residence for the elderly"?

The Act defines a residence for the elderly as follows:

> "A residence for the elderly is a congregate residential facility where rooms or apartments intended for elderly persons are offered for rent along with a varied range of services relating, in particular, to security, housekeeping assistance and assistance with social activities, except a facility operated by an institution and a building or residential facility where the services of an intermediate resource or a family-type resource are offered".[3]

It should be noted that SCH's differ from nursing homes in that the former cater to a more autonomous clientele and thus, do not provide health or social services *per se*. It should also be noted that nursing homes or other residences offering health or social services are subject to a wider variety of regulatory requirements and, unlike SCH's, are subject to mandatory certification.

3) Current regulatory limitations on SCH's

Currently, SCH's located in the province of Québec need not be certified by a regulatory authority. What is required, is that the operator of a SCH provide the

"The benefit of certification will be the increase in the client base of participating SCH's, as only certified SCH's will be eligible to receive client referrals from public health establishments."

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Regional Board (*i.e.* the entity presently authorized to oversee the operation of SCH's) with the name and address of the operator, the address and physical description of the building, a list of all relevant permits held by the operator and a description of the services provided at the SCH. However, SCH's may only be established in zones where such use is permitted under municipal zoning by-laws. In addition, municipalities may impose limitations on the types of buildings in which SCH's may be operated and require that specific fire prevention and construction standards be respected.

4) Voluntary certification

Bill 83 proposes to dramatically alter the existing regulatory framework for participating SCH's by (i) replacing the Regional Boards with the "*Agence de la santé et des services sociaux*" (the "Health and Social Services Agency") (the "Agency"), which will have the broader mandate of managing and overseeing the provision of health and social services in a given geographic area as well as having the authority to inspect participating SCH's and revoke or suspend certification, and (ii) by authorizing the Agency to issue "certificates of conformity" to SCH's seeking such certification.[4] The benefit of certification will be the increase in the client base of participating SCH's, as only certified SCH's will be eligible to receive client referrals from public health establishments.

To be certified by the Agency, a SCH must satisfy a series of socio-sanitary requirements to be established by government regulation and receive a certificate of recognition from any organization authorized to oversee the certification process.

Once a certificate of conformity is granted, the Agency will be entitled to revoke or suspend the certificate if, in the opinion of the Agency, the SCH fails to respect the requirements established by regulation. In such event, the SCH shall no longer be eligible to receive client referrals from public health establishments.

5) Assessment and conclusion

Although the advantages of voluntary certification include the non-coercive implementation of minimum quality standards and the expansion of the client base of participating SCH's, the regime of voluntary certification established under Bill 83 has been severely criticized by the "*Association des Résidences et CHSLD privés du Québec*" (an association representing over 500 SCH's and nursing homes in the province of Québec) for: 1) likely increasing average rental rates of participating SCH's (by not granting operators of SCH's tax benefits or other means of absorbing the costs of conforming to certification requirements), and: 2) encouraging conformity to the public health model and thereby preventing product and service innovation as well as decreasing the availability of specialized services. As higher priced SCH's generally do not rely on public health establishments for client referrals, their daily operations will likely not be greatly affected by Article 128 of Bill 83.

1) *See: http://www.assnat.qc.ca/eng/37 legislature1/Projets-loi/Publics/04-a083.htm. No date has been set for the enactment of the bill and the bill is still subject to modification;*

2) *R.S.Q., c. S-4.2;*

3) *Section 346.0.1 of the Act;*

4) *Section 346.0.4. "To obtain a certificate of compliance, an operator of a residence for the elderly must apply in writing to the agency for the territory where the residence is situated, using a form provided by the agency, and meet the following conditions:*
(1) comply with the health and social criteria determined by regulation;
(2) hold an assessment certificate issued by an organization recognized by the Minister."

CLASS ACTIONS / PENSION FUNDS AND ACTUARIAL SURPLUSES
THE HYDRO-QUÉBEC CASE

By André Durocher and Dominique Monet

Earlier this spring, the Court of Appeal of Québec dismissed a class action that the Association provinciale des retraités d'Hydro-Québec instituted with respect to the use of actuarial surpluses of an ongoing pension plan.[1]

"Finally, the court decided that the pension plan surpluses were, by their very nature, conditional and uncertain; it necessarily follows that retirees are not entitled to surpluses throughout the life of the plan."

The Association argued that Hydro-Québec was not entitled to use surpluses to finance improvements to the pension fund that favour active participants – employees – after negotiations between their unions without also applying those improvements to retirees. It added that the unions and Hydro-Québec were not entitled to grant pension contribution decreases or holidays without the consent of retirees.

Here is a brief summary of the facts.

1) Actuarial surpluses and pension funds

In the 1980s, Hydro-Québec's actuaries noted a surplus in the pension fund.

Given the situation, Hydro-Québec and its unions agreed to amend the pension plan by:

- reducing the contributions of Hydro-Québec employees;
- adopting the "85 rule", which allows employees over 55 with 30 years of service to retire without any actuarial reduction in their annuities;
- implementing a new indexation mechanism that is more generous than the existing one.

It was later agreed to change the "85 rule" to the "80 rule", with no minimum age. The unions and Hydro-Québec agreed to reduce employer contributions.

In May 1997, the Association filed a motion for authorization to institute a class action on behalf of "[TRANSLATION] all retired participants, their surviving spouses and beneficiaries, within the meaning of the *Supplemental Pension Plans Act* (R.S.Q., c. R-15.1.), of the Hydro-Québec Pension Plan." The Association wanted to force the distribution of the $377.5 million actuarial surplus generated by the ongoing pension plan. The recourse was based on the contractual and fiduciary nature of the plan itself.

In 1998, Hydro-Québec reached an agreement with its unions to improve the pension benefits of its retirees.

The following year, in 1999, Hydro-Québec and its unions agreed to grant participants a contribution holiday until the plan was fully capitalized.

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The class action was authorized that year by Justice Denis Durocher of the Superior Court.

The Superior Court heard the trial on the merits in the fall of 2001; in a judgment handed down on September 5, 2002 by Justice Carol Cohen, the Superior Court dismissed the Association's suit.

2) The Association's grounds of appeal

In their grounds of appeal, the retirees claimed before the Court of Appeal that:

1. They were entitled to any excess of assets upon termination of the plan;
2. They had as much right to those assets as active participants (employees);
3. In the period preceding the termination of the plan, it was the employer's duty to act as a "reasonable person";
4. In this case, the employer failed to execute the agreement under which it was bound to the retirees in good faith;
5. The pension fund trustee was not entitled to use the surplus for its own benefit, nor could it allow active employees to benefit from the surplus without making sure that retirees were given their fair share;
6. Any amendment to the pension plan affecting the rights of active participants and retirees required the latter's consent;
7. Hydro-Québec violated the provisions of article 1439 of the *Civil Code of Québec* by not obtaining the retirees' consent; [2]
8. The appealing Association is entitled to remedy under article 1590 of the *Civil Code of Québec* and, as a result, could force specific performance of Hydro-Québec's obligation; in other words, force it to add $377.5 million to the retirement plan as at December 31, 1999. [3]

3) Court of Appeal decision

The Court of Appeal ruled that the amendments to the plan were legal, and that the retirees' consent was not necessary. The court concluded that the retirement plan was a component of employee remuneration, and that the amendments to the plan had been agreed to by the company and the unions. The court also ruled that only the consent of the unions, not the retirees, was required, and added that the retirees' vested benefits were protected. Finally, the court decided that the pension plan surpluses were, by their very nature, conditional and uncertain; it necessarily follows that retirees are not entitled to surpluses throughout the life of the plan. As for the scope of Hydro-Québec's trust obligation, the Court of Appeal ruled that the company had none. As Justice Dalphond writes:

1) Association provinciale des retraités d'Hydro-Québec v. Hydro-Québec, *2005 QCCA 304 (CanLII); 2005-03-10; CAM 500-09-012724-027; 500-06-000039-970; Justices Chamberland, Forget, Dalphond, J.S.C.; See: http://www.canlii.org/qc/jug/qcca /2005/2005qcca304.html;*

2) *Article 1439 of the* Civil Code of Québec*: "A contract may not be resolved, resiliated, modified or revoked except on grounds recognized by law or by agreement of the parties";*

3) *Article 1590 of the* Civil Code of Québec *reads as follows: "An obligation confers on the creditor the right to demand that the obligation be performed in full, properly and without delay. Where the debtor fails to perform his obligations without justification on his part and he is in default, the creditor may, without prejudice to his right to the performance of the obligation in whole or in part by equivalence, (1) force specific performance of the obligation; (2) obtain, in the case of a contractual obligation, the resolution or resiliation of a contract or the reduction of his own correlative obligation; (3) take any other measure provided by law to enforce his right to the performance of the obligation";*

4) *[1994] 2 S.C.R. 611;*

5) *[Appeal # 30926.*

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> [Translation] If such an obligation did indeed exist, why would it be limited to the interests of the trust's retirees? How do we explain that a unionized employee is represented by his union until the day of his retirement, but that the day after, this obligation of representation falls on the shoulders of the former employer? (Par. 89)

4) Employer contribution holidays

The Court of Appeal based its ruling on the Supreme Court of Canada's *Schmidt v. Air Products Canada Ltd.*[4] After citing the case, Justice Dalphond writes:

> [Translation] In other words, when an applicable statute authorizes the use of surpluses when computing an employer's contributions, a contribution holiday is not prohibited by the rules of trust laws, as such holidays do not impinge on the funds held in trust. (Par. 94)

Finally, the court dismissed the Association's appeal in the end, but without costs given the novelty of the issues.

In closing, note that, on May 9, 2005, the Association filed a motion for permission to appeal before the Supreme Court of Canada.[5] However, the Supreme Court refused to authorize the appeal last October 20. This makes the Court of Appeal decision *res judicata.*