NOVA SCOTIA COURT OF APPEAL
Citation: ***Imperial Oil Ltd. v. Atlantic Oil Workers Union, Local No. 1,***
2006 NSCA 100

Date: 20060818
Docket: CA 234716
Registry: Halifax

Between:

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

Appellants

v.

Imperial Oil Limited and McColl-Frontenac Inc.

Respondents

Judges:	MacDonald, C.J.N.S.; Cromwell and Saunders, JJ.A.
Appeal Heard:	May 18, 2006, in Halifax, Nova Scotia
Held:	**Appeal allowed and cross-appeal dismissed per reasons for judgment of Cromwell, J.A.; MacDonald, C.J.N.S. and Saunders, J.A. concurring.**
Counsel:	Ronald A. Pink, Q.C., Raymond F. Larkin, Q.C., and Bettina Quistgaard, for the appellants George MacDonald, Q.C., Hugh Wright and Daniel Watt for the respondents

Reasons for judgment:

I. INTRODUCTION:

[1] This appeal raises one main question: may the appellants retain two benefits they received, one under a severance package and the other from a partial wind-up of their pension plan?

[2] The appellants received a severance package from their former employer. In exchange, they released the employer from all claims arising out of their separation from employment. The appellants then obtained certain benefits under the **Pension Benefits Act**, R.S.N.S. 1989, c. 340 ("**PBA**") as a result of an application to the Superintendent of Pensions for a partial wind-up of their pension plan.

[3] The employer thought the appellants should not have both sorts of benefits. It sued the appellants, alleging breach of contract and unjust enrichment. The claim in contract was that the appellants breached their releases by applying for the partial wind-up of the pension plan. The unjust enrichment claim was that the appellants had been unjustly enriched by retaining both benefits. The law suit also raised a jurisdictional issue: some of the appellants were covered by a collective agreement and they claimed that an arbitrator, not the court, should deal with the employer's claims.

[4] Murphy, J. found that he had jurisdiction, dismissed the action based on contract but upheld the claim in unjust enrichment. On the jurisdictional point, he found that the "essential character" of the dispute did not arise from the collective agreement and that, in any event, it would not be sensible to have both an arbitrator and a court adjudicate what was essentially one claim. With respect to the claim on the release, the judge held that the appellants had not breached their releases because they did not bar an application for a partial wind-up of the pension plan. He found, however, that the employer had established each of the three elements required for its claim in unjust enrichment: the appellants obtained the partial wind-up benefits while retaining what they had received from the severance package, the employer had been deprived of the funds paid out of the plan on its partial windup and there was no juristic reason for the enrichment.

[5] The appellants appeal the judge's findings in relation to jurisdiction and unjust enrichment and the respondents (to whom I shall continue to refer as "the

employer") cross-appeal the judge's dismissal of the claim on the release. There are three issues:

1. Did the judge err in holding that the appellants had not committed a breach of contract?
2. Did the judge err in finding that the appellants were unjustly enriched by retaining the severance package benefits and applying for and receiving the partial wind-up of the pension plan?
3. Did the judge have jurisdiction to entertain the action against the employees covered by the collective agreement?

[6] I would respond to these questions as follows. In my view, the judge was right to find that the appellants' application to partially wind-up the pension plan was not barred by the release. I would, therefore, dismiss the cross-appeal. I would, however, allow the appeal. The judge erred, in my respectful view, in finding that the elements of the claim in unjust enrichment had been established in this case. As for the jurisdictional issue, I do not see that there is now any point in addressing it.

II. THE FACTS AND THE JUDGE'S DECISION:

[7] The focus of the case is the benefits received by approximately 79 former employees who, at the relevant time, were under 50 and whose age and years of service equalled at least 55. They received benefits from two sources: under a severance package and from the partial wind-up of their pension plan as provided for in the **PBA**.

[8] A "wind-up" of a pension plan refers to its termination in whole or in part and the distribution of its assets: **PBA**, s. 2(ao). A partial wind-up is a creature of statute. Its effect is to divide a pension plan into two parts: one which continues to operate as before and another which is terminated and the accrued pensions of those employees and corresponding assets associated with them separated from the rest of the plan and liquidated: see, Ari N. Kaplan, *Pension Law* (2006) at 510-511.

[9] The partial wind-up pension benefits to which these employees were entitled under the **PBA** were more generous than those provided for in the pension plan

itself. The key question was whether the severance payment, which could be used to buy additional pension credits, was intended to be given in substitution for this difference. The employer says it was while the employees say that it was not. The employer's claim against these employees, both in contract and unjust enrichment, is based on a single premise: by receiving both benefits, these employees received double compensation on account of their pension entitlements.

[10] To provide the necessary factual background for the consideration of this issue, I must set out the events which gave rise to the severance package, refer to its precise terms, review the proceedings in relation to the partial wind-up of the pension plan, and finally, set out the main points of the judge's reasons.

A. <u>The severance package</u>:

[11] The appellants were employees at the former Texaco Refinery and Marine Terminal in Dartmouth. In the late 1980's, Texaco Canada's U.S. parent decided to sell its Canadian subsidiary. In anticipation of that sale, the Texaco Canada Board of Directors adopted a special severance package for all Texaco Canada employees, including the appellants, which they called the Texaco Canada Severance Allowance Program ("TCSAP"). It had a two-fold purpose: to provide adequate compensation in the event of termination of employment and to encourage the employees to stay even though their future was uncertain. These purposes are explained in the following excerpt from the original TCSAP text:

> It is recognized by the Corporation that the special circumstances of a Change in Control could give rise to Terminations which will cause hardship to Eligible Employees beyond what should be expected from a termination of employment in the normal course. It is also recognized by the corporation that **uncertainties about the future of the Corporation may cause Eligible Employees to seek alternative employment and that the premature departure of such Eligible Employees will not be to the advantage of the Corporation.**
>
> **In order to persuade the Eligible Employees of the Corporation to continue their employment with the Corporation and to ensure the adequate compensation of Eligible Employees in such special circumstances,** the Corporation wishes to establish this Program for the benefit of its Eligible Employees in the event of Terminations arising because of a Change in Control. [emphasis added]

[12] TCSAP applied to all "Eligible Employees" who suffered a "Termination" within twenty-four months following a "Change in Control". These terms were defined as follows in the original TCSAP text:

> "Termination" means the dismissal from employment of an "Eligible Employee" by the Corporation for reasons other than "Cause" or death, and includes "Constructive Dismissal".
>
> ...
>
> "Eligible Employee" means an employee of the Corporation who is a regular full-time employee of the Corporation or a regular part-time employee of the Corporation (being an employee who qualifies for notice under the termination of employment or severance pay provisions of the applicable employment standards legislation of the province in which the employee is employed) at the time of the "Change in Control", and who remains in the employ of the Corporation until the Termination.
>
> ...
>
> "Change in Control" means:
>
> 1. the acquisition of the majority of the shares of Texaco Canada Inc.;
>
> 2. the acquisition of all or substantially all of the assets of Texaco Canada Inc.; or
>
> 3. the merger of Texaco Canada Inc.;
>
> unless the acquirer or other party to the merger is Texaco Inc.

[13] TCSAP benefits included a severance allowance of one month's salary or wage per year of service up to certain maximum amounts and certain pension benefit enhancements. These pension enhancements included the following:

i) additional pension service credits under the Pension Plan by the amount of severance allowance period for all employees;
ii) for Eligible Employees who were at least 50 years of age but less than 55 on the date of Termination, the right to elect to receive a deferred

pension commencing on an early retirement date with preferred early retirement discounts;

iii) subject to regulatory approval, the option to use the severance allowance to buy additional pension benefits under the Pension Plan that would increase the member's basic pension under the Plan as determined using conversion tables prepared by the Plan's actuary.

[14] For employees under 50, there were no specific enhancements to the pension plan, although along with all other employees, they could, if eligible, take advantage of item (iii) above, by using their severance allowance to buy additional pension credits. TCSAP pension enhancements were provided through amendments to the Pension Plan.

[15] To receive the severance allowance, Eligible Employees were required to sign a release. The actual form of release was not part of the original TCSAP text. There, the release was described as follows:

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

[16] The TCSAP text also stated the following:

> Under the Texaco Severance Allowance Program, the Corporation will pay a severance allowance and will provide other benefits in full satisfaction of all claims of an Eligible Employee on Termination **on account of salaries and wages, Merit Awards, pension entitlements and all other benefits of employment.** [emphasis added]

B. The Texaco Pension Plan:

[17] Texaco Canada was the sponsor and administrator of a Pension Plan for its employees. The appellants were members of this Plan. A defined benefit plan, it had initially been contributory, but became non-contributory in the early 1970's.

[18] The Plan provided for a pension payable at Normal Retirement Date, or a discounted pension on voluntary early retirement. The level of benefits was determined by a formula based on years of service and earnings in the three years preceding retirement.

[19] Under Article III-3 of the Plan, Texaco Canada assumed the following funding obligations:

> Employer Contributions
>
> ... the Company shall contribute to the Plan each year on behalf of each Member amounts as shall from time to time be recommended by the Actuary **as required in order that the benefits under the Plan may be properly funded**. [emphasis added]

[20] The Pension Plan was subject to provincial pension benefits legislation. In particular, the Plan stated as follows:

> Article I - Definitions
>
> ...
>
> 24. "Pension Benefits Act" means The Pension Benefits Act of the Province of Ontario as amended from time to time and the regulations issued thereunder, and such other similar legislation and the regulations thereunder as may have been or be enacted by a province of Canada and which are applicable to the Plan.
>
> ...
>
> Article XIV - General
>
> ...

> 4. This Plan shall be construed, administered and enforced in accordance with the laws of any applicable Canadian Province and any Federal legislation which may be applicable to the Plan.
>
> ...
>
> Article XV - Administration & Procedures
>
> 5. Notwithstanding anything in the Plan to the contrary, no cash settlement shall be paid under the terms of the Plan where such payment would be contrary to the provisions of the Pension Benefits Act or the statutory requirements of any other competent jurisdiction. ...

[21] The Plan could only be discontinued in accordance with applicable pension legislation, as acknowledged in Article XII - 2.F as follows:

> F. ... THE PLAN MAY BE DISCONTINUED ONLY IN ACCORDANCE WITH THE REQUIREMENTS OF THE PENSION BENEFITS ACT OF ONTARIO AND/OR THE LEGISLATION AND REGULATIONS OF ANY COMPETENT AUTHORITY.

[22] The Pension Plan was registered in Ontario. At the material times, both the Ontario **Pensions Benefits Act** and the Nova Scotia **PBA** required that pension benefits on plan termination (or "wind-up"), in whole or in part, include "grow-in" benefits. Section 78 and 79 of the Nova Scotia **Act** in force at the material time provided, in part, as follows:

> **Determination of amount of benefits on wind up**
>
> 78(1) For the purpose of determining the amounts of pension benefits on the winding up of a pension plan, in whole or in part,
>
> ...
>
> (c) provision shall be made for the rights pursuant to Section 79.
>
> **Pension Rights of member on wind up**

> 79(1) A member of a pension plan whose combination of age plus years of employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan, in whole or in part, has the right to receive
>
> ...
>
> (c) a reduced pension beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

[23] These provisions mean that, on the termination of a pension plan, in whole or in part, plan members whose age plus years of service equal at least 55 are entitled to have included in their pension benefits any early retirement benefit provided by the pension plan to which the member would have been entitled if the plan had not been wound up. These members receive the value of any early retirement benefit under the pension plan and thereby are said to "grow into" their pensions.

[24] The terms of the pension plan itself, even after the TCSAP amendments, did not confer this benefit. The question was whether the severance payment, coupled with the option of using it to purchase pension credits, had been provided as a substitute for the "grow in" benefits under the **PBA**.

C. <u>The Sales to Imperial Oil and Ultramar</u>:

[25] On January 20, 1989, Imperial Oil agreed to purchase all Texaco Canada shares. As part of this agreement, Imperial Oil was required to retain all employee benefit plans in their aggregate, including TCSAP, for a period of two years (i.e., from February 24, 1989 to February 23, 1991). Imperial Oil also committed to offering employment to all Texaco Canada employees. The purchase of the Texaco Canada shares by Imperial Oil constituted a "Change in Control" and activated TCSAP.

[26] Imperial Oil's acquisition of Texaco Canada shares led to an investigation under the **Competition Act**, R.S. 1985, c. C-34.

[27] As part of this investigation, Imperial Oil initially gave an undertaking to the Director, Investigation and Research, to hold the Texaco Canada operations "separate and apart" pending a determination under the **Competition Act**. This undertaking extended to all Texaco Canada assets, including the Refinery and the Pension Plan. Further to the undertaking, the Texaco Canada operations were re-named McColl-Frontenac Inc. ("MFI"). As the investigation proceeded, the requirement to "hold separate and apart" was applied only to certain Atlantic Canada operations, including the Refinery. The other Texaco Canada operations became part of Imperial Oil.

[28] On July 24 of 1989, the Competition Tribunal issued a Consent Interim Order that required Imperial Oil to maintain the Refinery and other Texaco Canada assets as a fully maintained on-going business operation pending a final decision by the Tribunal. Under the Order, Imperial Oil was prohibited from discharging any Refinery employees, except for cause, without approval from the Director.

[29] By Consent Order of the Competition Tribunal dated February 6, 1990, Imperial Oil was required to sell certain Atlantic Canada assets of the former Texaco Canada, including the Refinery.

[30] On August 15, 1990, employees were advised that Imperial Oil had reached an agreement with Ultramar Canada Inc. for the purchase of the Refinery and other assets. The sale was conditional on approval from the Director of Investigation and Research. Employees were told that they would be offered employment with Ultramar and were expected to transfer with the divested assets. They were also assured that: "All regular McColl-Frontenac employees who were on the payroll Feb. 23, 1989 and who are on the payroll on the closing date of the purchase, will receive a severance payment under the Texaco Canada Severance Allowance Program (TCSAP)."

[31] In October of 1990, Imperial Oil wrote to all employees to advise that the sale of assets to Ultramar had been given regulatory approval and that the employees' employment with MFI would terminate effective October 14, 1990. (This was, accordingly, a dismissal from employment by the Corporation for reasons other than cause within 24 months of a change in control.) Employees were provided with a package detailing the benefits being made available on termination or retirement. The package listed various employment benefits,

including both TCSAP and the Pension Plan. The TCSAP and Pension Plan benefits were described as follows:

> **TCSAP**
>
> Employees entitled to TCSAP under the terms of the plan will be required to sign a release. Upon completion, the full severance will be issued as soon as possible (hopefully no later than four weeks) following receipt of the release or the date of separation, whichever is later.
>
> The following is a summary of the status of benefits upon an employee's separation. As this is a summary of all the benefits programs, some may not be applicable to you. Please be guided only by those in which you have participation.
>
> **PENSION PLAN**
>
> **In accordance with the terms of the Pension Plan, which is subject to government regulation**, you may choose a Certificate covering the vested pension accrued to your separation date, payable at age 65, or a lump-sum representing the Present Value of that pension transferred to a locked-in RRSP or the new employer's pension plan where permissible (sic). (The deferred pension may be commenced at any time from age 55 on subject to actuarial discounting.) Full details of your settlement options are attached. [emphasis added]

D. The Partial Wind-up and the Releases:

[32] The appellants consist of two groups of employees: unionized employees represented by the Atlantic Oil Workers Union, Local No. 1 and Non-unionized employees represented the Atlantic Refinery and Marketing Employees' Association (ARMEA). The union and ARMEA formed another association, known as the Atlantic Region Employees Coalition (Coalition) for the purpose of working jointly on issues facing their respective members.

[33] On October 1, 1990, counsel for the Coalition wrote to the Nova Scotia Superintendent of Pensions to request a partial wind-up of the Pension Plan.

[34] In a letter to the President of Esso Petroleum Canada dated October 15, 1990, which was copied to MFI and Imperial Oil representatives, ARMEA made it

clear that employees were "... still trying to achieve at least the minimum standard of pension as required by Nova Scotia Pension Legislation", including a partial wind-up of the Plan.

[35] On October 25, 1990, the President of Esso responded to this letter, stating as follows:

> ... in regard to the pension issue. The company has already indicated its final position. All Atlantic MFI employees who were on the payroll on the day of closing of the sale (October 15) will be eligible for the Texaco Canada Severance Allowance Program (TCSAP), despite the fact that almost all employees will be offered employment by Ultramar. Pension eligibility is determined by the terms of TCSAP and the Pension Plan. Those below the age of 50 are eligible for termination annuities or transfer of the commuted value of their earned pension to outside locked-in RRSP's in accordance with the terms of the pension plan. In addition, Imperial Oil has, as it committed to do, negotiated the best possible deal with Ultramar, which includes that all transferred employees are eligible for a pension plan registered with the Province of N.S.

[36] The Union and ARMEA continued to pursue a partial wind-up of the Pension Plan. On November 14, 1990, the Nova Scotia Superintendent of Pensions issued an order under the **Pension Benefits Act** for a partial wind-up of the Pension Plan.

[37] The majority of the employees signed releases after the partial wind-up order was issued. The form of the release was as follows:

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

[38] The partial wind-up order resulted in some confusion with respect to the payment of pension benefits to retiring and terminating employees, because, under the **PBA**, nothing could be paid out of a pension fund except in accordance with a wind-up report approved by the Superintendent. To facilitate the payment of pension benefits, the Nova Scotia Superintendent withdrew his request for a partial wind-up of the Pension Plan on February 1, 1990. However, he made it clear that this withdrawal was "... on the condition that the benefit entitlements under the Pension Plan for Nova Scotia members affected by the sale of the refining and marketing assets of McColl-Frontenac Inc. to Ultramar Canada Inc. not be less than what the members would have received had a partial wind-up taken place as of October 14, 1990".

[39] Imperial Oil did not extend grow-in benefits to Plan members who met the "55 point" rule. However, it did proceed to pay the appellants both their TCSAP severance benefits and pension entitlements. The Coalition pursued a further partial wind-up order. On October 17, 1991, the Minister of Finance for Nova Scotia directed the Nova Scotia Superintendent of Pensions to issue a proposed order for a partial wind-up of the Pension Plan. On the same date, the Superintendent issued the order pursuant to ss. 74(1)(d) and (e) of the **PBA**.

[40] Imperial Oil challenged the order. A hearing was held before the Superintendent who found that the requirements of ss. 74(1)(d) and (e) of the **PBA** had been met: that is, (1) a significant number of members of the Pension Plan ceased to be employed by Imperial Oil as a result of the discontinuance of all or part of its business in Nova Scotia; (2) all or a significant portion of the business carried on by Imperial Oil at the Refinery was discontinued; and (3) Imperial Oil had refused to provide benefits and entitlements as if the Plan had been partially wound up. In these circumstances, the Superintendent ordered a partial wind-up of the Pension Plan for MFI employees in Nova Scotia effective October 14, 1990. This order triggered an entitlement for approximately 79 employees to receive "grow-in" pension benefits under s. 79 of the **PBA**. The total value of these additional benefits was $937,044 as of September 30, 1990.

[41] Imperial Oil challenged the order unsuccessfully in the Supreme Court and the Court of Appeal and leave was denied for a further appeal to the Supreme Court of Canada.

[42] On May 1, 1997, the Superintendent of Pensions approved a partial wind-up report, and grow-in benefits were provided from the Pension Plan.

E. <u>The Employer's Law Suit</u>:

[43] On September 30, 1996, Imperial Oil commenced an action against the former Texaco/MFI employees at the Eastern Passage Refinery. Imperial Oil asserted the following:

> (1) The release was consideration for the receipt of TCSAP benefits, and the pursuit of the partial wind-up of the Pension Plan constituted a breach of the release;
> (2) The employees had been unjustly enriched by being paid twice on account of pension benefits.

[44] The parties applied under **Civil Procedure Rule** 25.01(1)(a) for a determination of questions of law based on an agreed statement of facts. The questions of law included the following:

> 1. Have the [appellants] breached the terms of the Release by seeking or obtaining a partial wind-up order and grow-in benefits under the **PBA**?
> 2. Have the [appellants] been unjustly enriched by obtaining grow-in benefits under a partial wind-up of the Pension Plan?
> 3. Does the Court have jurisdiction to entertain the action as against employees covered by the collective agreement?

F. <u>The Judge's Decision</u>:

[45] The application came before Murphy, J.

[46] He rejected the employer's contention that the release barred the partial wind-up application. The release applied only to claims that were, (a) against the releasee companies, and (b) in relation to individual employees' separation from employment. The application for the partial wind-up was neither. He concluded that, while the release related to claims arising out of the employee's separation from employment, the partial wind-up order was not triggered by such separation

but by the discontinuance of the employer's business in Nova Scotia. In short, the judge found that "... the plain meaning of the Release confines prohibited claims to those brought directly against companies named and related or affiliated entities arising from an individual releasor's claim for personal benefit resulting from that person's own separation from employment. The [employees'] pursuit of partial pension plan wind-up is not a prohibited claim against a protected party."

[47] The judge found, however, that the employees under 50 who had received partial wind-up benefits and the severance package had been unjustly enriched.

[48] On the first two elements of the unjust enrichment claim, the judge found that the appellants had received a benefit and the employer had suffered a corresponding deprivation:

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

[49] Central to this conclusion was his view that "benefits equivalent to those under the **PBA** were given by the Plaintiffs under TCSAP, and had the employees chosen to commute the benefits to pension benefits, they would have been better off under TCSAP than under the **PBA**.": para. 110 He noted that the employer's claim was not that the appellants had been unjustly enriched by receiving the partial wind-up benefits, but by retaining the TCSAP payments and seeking and receiving the pension amounts.

[50] Turning to the third element, the judge found that there was no juristic reason for the enrichment. This conclusion was based primarily on his interpretation of the TSCAP document:

> [125] ... Double recovery by Employees [under 50] was contrary to the terms of a contract to which they were a party. The TCSAP documents indicate that the Defendants were not intended to receive pension beyond what TCSAP provided, and although the release did not prohibit an application to the Superintendent of Pensions, it was not intended that the parties receive further pension benefits outside TCSAP after signing the release.
>
> [126] Employees [under 50] have been unjustly enriched by obtaining both "grow-in" benefits under the Wind-Up Order and TCSAP benefits - the retention of that enrichment is not fair in all of the circumstances.
> (Emphasis added)

III. ANALYSIS:

A. Standard of Appellate Review:

[51] In my view, the appeal and cross-appeal turn solely on the proper construction of the relevant provisions and the application of the legal principles relating to unjust enrichment. These are all questions of law with respect to which the standard of appellate review is correctness. This means simply that this Court is to act in accordance with its own understanding of the law should it differ from that of the learned judge at first instance.

B. The Employer's Claim on the Release:

[52] As noted, the judge dismissed the claim on the release, finding that its terms did not bar the appellants from pursuing the partial wind-up of their pension plan.

[53] The employer's cross-appeal challenges this conclusion. It is submitted that the plain meaning of the release, particularly when read in light of the surrounding circumstances and commercial reality, show that the release prevented the employees from benefiting both from the severance package and the partial wind-up order.

[54] I do not accept these submissions and would affirm the judge's conclusion: the plain meaning of the release did not prevent the employees from pursuing a partial wind-up of the pension plan.

[55] For ease of reference, the release states as follows:

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

[56] In a nutshell, the release related to claims against the employer arising from "my" [that is, the individual employee's] separation from employment. The partial wind-up application did not arise from any individual employee's separation from employment and was not a claim against the employer. The release, therefore, did not bar the application. Moreover, the individual releasors agreed to "release and discharge" Imperial Oil and its affiliates. There is nothing in the language of the release that could be construed as a promise by the individual releasors that neither they nor their representatives would pursue a partial wind-up order.

[57] Each individual releasor agreed to release and discharge Imperial Oil and its affiliates from claims "arising out of my separation from employment". The judge concluded, in my view correctly, that these words did not apply to the pursuit of a partial wind-up of the Pension Plan. The partial wind-up of the Pension Plan was ordered by the Superintendent of Pensions pursuant to his authority and discretion under ss. 74(1)(d) and (e) of the **PBA**, which state as follows:

> 74(1) The Superintendent may, by order, require the wind up of a pension plan in whole or in part if
>
> . . .
>
> (d) a significant number of the members cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;

> (e) all or a significant portion of the business carried on by the employer at a specific location is discontinued; ...

[58] As the text of the statute makes clear, an individual whose employment was terminated could not make a claim or application for the partial wind-up of the Pension Plan and grow-in benefits. The partial wind-up order did not arise out of an individual releasor's termination from employment. Rather, it arose from the discontinuance of Imperial Oil's business in Nova Scotia and the resulting termination from employment of a significant number of employees.

[59] The employer submits that even though the individual separation of any one employee could not be said to independently trigger the wind-up of the Pension Plan, each separation provided an essential piece of the foundation for the wind-up. While that may be the case, the release dealt only with claims arising out of the termination from employment of the individual employee who signed it. If it was intended to address claims arising out of a group termination on the discontinuance of Imperial Oil's business in Nova Scotia, it could and should have said so. It did not.

[60] The judge also correctly found that an application to the Superintendent of Pensions for a partial wind-up order did not come within the meaning of the release because it was not a claim against Imperial Oil or its named affiliates. An application for a partial wind-up order is a request that the Superintendent of Pensions exercise a statutory authority and discretion to wind-up a pension plan.

[61] The employer argues that the surrounding circumstances support its interpretation of the release, relying in particular on three letters written on behalf of the appellants. The employer submits that these letters show that the appellants clearly understood the release to include the release of pension rights, including the right to pursue a partial wind-up order and grow-in benefits.

[62] I do not accept this submission. The letters do nothing more than show the employee's concern about the scope and effect of the releases. The letters are not evidence of any agreement to accept TCSAP in satisfaction of their pension entitlements under the Pension Plan and the **PBA**. (This submission assumes that such an agreement could be valid, a point I need not consider further.) I will briefly review these letters to explain my conclusion.

[63] First, the employer refers to the letter from counsel for the Coalition dated September 24, 1990, in which counsel requested that the form of release be amended to expressly exempt an individual's claim to surplus or any other cause of action pertaining to the pension plan. Counsel did not make any reference in the letter to partial wind-up of the Pension Plan. The request to amend the release seems to have been directed primarily at a possible action with respect to the Pension Plan surplus. In any event, there is nothing in the letter that could be construed as an agreement to accept TCSAP in satisfaction of pension entitlements and grow-in benefits.

[64] The second letter is one dated May 31, 1990 from the President of the Union. That letter expressed the Union's "very serious concerns" about the form of release, and particularly about the waiver of their right to pension claims. There is nothing in the letter to suggest that the appellants agreed that TCSAP and the release satisfied and settled all claims under the Pension Plan and the **PBA**.

[65] The third letter referred to is one dated October 22, 1990 from the Union to the Ontario Pension Commission. In that letter, the Union requested that a decision be made on the partial wind-up of the Pension Plan before employees accepted TCSAP and signed the release, because: "The release form may remove any claims we may have for further pension plan entitlements". This letter does not express any agreement on the part of the Union that pension benefits, including grow-in benefits, were satisfied by TCSAP, or that the release was a bar to the pursuit of a partial wind-up order.

[66] In my view, these letters do not support the conclusion which the employer asserts.

[67] The judge also decided in the alternative that the release was ambiguous and should therefore be interpreted *contra proferentum*. In light of my conclusion about the interpretation of the release, I do not need to consider this alternative ground.

[68] To sum up, the release did not bar the pursuit by the appellants or their representatives of a partial wind-up order. The partial wind-up of the Pension Plan was neither a claim against the releasee companies nor a claim arising out of an

individual releasor's termination from employment. It was a statutory right arising from the discontinuance of the employer's business in Nova Scotia.

[69] I would dismiss the cross-appeal.

C. Unjust Enrichment:

[70] The judge upheld the employer's claim in unjust enrichment. He found that each of the three elements of the claim had been proved: the employees had received a benefit, the employer had suffered a corresponding detriment and there was no juristic reason for that result. The appellants challenge the second and third of these conclusions.

[71] Before turning to the specific submissions, it will be helpful to set out briefly the governing legal principles.

[72] To succeed on an unjust enrichment claim, the employer had to establish three things: an enrichment of the employees, a corresponding deprivation of the employer and the absence of any juristic reason for the enrichment: **Rathwell v. Rathwell**, [1978] 2 S.C.R. 436 *per* Dickson, J. at 455 adopted in **Pettkus v. Becker**, [1980] 2 S.C.R. 834 at 844; **Garland v. Consumers' Gas Co.**, [2004] 1 S.C.R. 629 at para. 38. The enrichment and deprivation are to be assessed on a "straightforward economic approach". The absence of a juristic reason is to be assessed in two steps. First, the claimant must show that there is no juristic reason to deny recovery based on an established category. These include a contract, a disposition of law, a donative intent and other valid common law, equitable or statutory obligations: **Garland** at para. 44. Second, the defendant may be able to rebut the claimant's *prima facie* case established in accordance with the first step by showing that there is another reason to deny recovery. This is a residual defence in which courts may take into account all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery: **Garland** at para 45.

[73] I should note that some commentators have argued that the Supreme Court of Canada could not have intended that the "no juristic reason" branch of the test would supplant the traditional grounds of restitutionary relief: see, for example, Peter D. Maddaugh and John D. McCamus, The Law of Restitution (looseleaf

edition, updated to September, 2005) para 3.200.30. The parties in the present case have not pursued this point and it is therefore not necessary for me to do so either.

[74] The appellants submit that the judge erred both in finding that there had been any deprivation suffered by the employer and in concluding that there was no juristic reason for the benefit obtained by the appellants. In my view, the appellants are entitled to succeed on this second point and I do not need to address the first one. There were, in my respectful view, juristic reasons to retain both the TCSAP severance payments and the "grow-in" benefits provided for under the **PBA**.

[75] To begin, one must be clear about the precise basis of the employer's claim in unjust enrichment. The judge found that the unjust enrichment was not the receipt by the appellants of the partial wind-up benefits, but rather their retention of the TCSAP payments and seeking and receiving the partial wind-up benefits: para. 123. The employer made it crystal clear on appeal that this is the theory of the case which it advances. As the employer put it in its factum:

> 85. ... The payment of grow-in benefits under the Pension Plan had no impact on benefit and deprivation; it only resulted in there being no juristic justification for retention of the TCSAP benefit to the extent of the amount of the individual partial wind-up payments. The deprivation was always present and incurred by the Respondents, not the Pension Plan, once the TCSAP payments were made. It became wrongful or unjustified after the partial wind-up.
>
> 80. At the time the payments were made, they were made under TCSAP because the Respondents had decided on a gratuitous basis to apply TCSAP, even though none of the individual appellants were subject to a termination as defined in TCSAP. These reasons were affected by subsequent events, namely the pension proceedings and payment of grow-in benefits. These events, however, are not relevant to the proof of the question of benefit and deprivation. They were established at the time the TCSAP payments were made.
>
> 88. As noted, the cause of action in unjust enrichment did not crystallize at the time of the initial benefit/deprivation. At the time those payments were made, there was a juristic reason for the enrichment and deprivation. That juristic reason, however, evaporated when the grow-in benefits were paid out.

[76] I should say that I do not agree with the employer's position that the payments under TCSAP were gratuitous because there had been no termination of employment. The employer notified the employees that their employment with it

was terminated effective October 14, 1990. If that is not a termination, I do not know what would be. The fact that the employees were hired by the successor company is, in my view, irrelevant. Moreover, I do not understand the significance, at the end of the day, of whether the payment was gratuitous or contractual. A donative intent – that is, a gift, is just as much a juristic reason to retain the benefit as is a contractual payment.

[77] The basis of the judge's decision was that TSCAP included pension entitlements and that therefore, once the appellants sought and received the grow-in benefits under the partial wind-up of the plan, there was no juristic reason for the retention of the TCSAP payments. Fundamental to this line of reasoning is the conclusion that TCSAP included payments for pension entitlements. As the judge put it, "[t]he TCSAP documents indicate that the Defendants were not intended to receive pension beyond what TCSAP provided ... it was not intended that the parties receive further pension benefits outside the TSCAP after signing the release." : para. 125. It is on this fundamental point that I respectfully part company with the judge at first instance.

[78] I will focus on the situation of the under 50 employees whose age and years of service equalled at least 55. The judge's reasoning depends on the notion that the option which these employees had (in common with any other eligible employee) to use their severance pay under TCSAP to buy additional pension benefits was intended to and did provide a substitute for the "grow-in" benefits provided for in the **PBA**. As the judge put it:

> ... each of the Employees [under 50] could have elected to apply TCSAP benefits to increase their pension benefits above the level which resulted from the partial Pension Plan wind-up, without foregoing any other severance benefit to which they were entitled at law, and without exceeding the maximum pension prescribed by Revenue Canada. The commuted value of the Employees [under 50] TCSAP severance payment which could be used to purchase a pension benefit under TCSAP exceeds the **PBA** "grow-in" benefit. Employees [under 50] had a choice - if they elected to apply TCSAP payment as a pension benefit, their financial position would have been better than if they had chosen to forego TCSAP and obtain "grow-in" under partial wind-up of the pension plan together with any other statutory benefits available to them. Each Employee [under 50] could have elected to apply TCSAP so that TCSAP benefits paid would exceed what the employee was entitled to receive pursuant to a combination of all severance and other benefits available under applicable legislation together with "grow-in" benefits received under the partial Pension Plan wind-up.

[79] With respect to those of a contrary view, I cannot subscribe to this line of reasoning.

[80] I do not accept the premise of the employer's argument (and the judge's decision) that there is any element of "windfall" or "double recovery" in the circumstances. The severance payments provided for in TCSAP were not funded by the Pension Plan. Other employees, including those who received specific pension enhancements that were at least equal to the benefits payable on a partial wind-up, received these severance payments. All were given the option, if eligible, to apply some or all of that severance payment to the purchase of additional pension benefits. For example, the group of employees between 50 and 55 years of age received pension entitlements under the pension plan amendments resulting from TCSAP that were comparable to those required by statute on a partial wind-up of the plan under the **PBA**. In other words, under TCSAP and the consequential pension plan amendments, these employees received both their severance pay and, separately, pension enhancements that were at least equal to the statutory requirements on partial wind-up under the **PBA**. The under 50 group did not. To suggest that their severance pay could be used to purchase pension enhancements seems to me to be comparing apples and oranges. The other employees obtained and retained both sorts of benefits. The partial wind up put the under 50 employees in the same position. I do not see any element of "windfall" in that.

[81] This is clearest when one looks at the partial wind up report prepared in April of 1997 and approved by the Superintendent in May. In that report, the consultant compared the benefits required by the partial wind-up provisions of the **PBA** with those available under the terms of the pension plan as amended by the TCSAP enhancements. Wind up benefits were paid only to those members of the plan who had not received benefits under it that were at least as extensive as those required by the **PBA**. The consultant commented on the groups of employees who were not to receive additional benefits as follows:

> 1. Members age 55 or more who elected immediate retirement. These members already received a subsidized early retirement pension. There are no additional benefits to be provided for these members due to the partial wind-up.

> 2. Members between age 50 and 55. As part of the TCSAP benefits, these members have received a subsidized early retirement pension beginning at age 55 at 75% of the unreduced pension. Some of these members elected to take the deferred pension while others elected a commuted value of this pension transferred to a locked-in RRSP. In each case there are no additional benefits for these members due to the partial wind-up.
>
> 3. Members who were vested on the partial wind-up date who did not have age plus years of continuous employment equal to 55 or more. These members are entitled to their pension beginning at the normal retirement date under the Plan (age 65). All elected to transfer the commuted value of their pension to a locked-in RRSP. There are no additional benefits for these members due to the partial wind-up.
>
> Members who are not entitled to any additional benefits under the partial wind-up will not receive a settlement beyond the original settlement transfer to a locked-in RRSP.

[82] The consultant noted that there were only two categories of employees entitled to additional benefits on the partial wind-up. One of those categories consisted of employees who were under age 50 with age plus years of continuous employment equal to 55 or more at the partial wind-up date. The consultant described the benefits under the plan, including the TCSAP enhancements, noting that under the plan as amended, employees over 50 and under 55 (and who had been members of the plan for at least two plan years) were entitled to a pension on a similar basis to an employee who had reached 55 years of age. The consultant pointed out, however, that the **PBA**, on a partial wind-up, required similar benefits to be extended to employees whose age and years of service equalled at least 55. He concluded, therefore, that employees who were under 50 (and thereby not entitled to the TCSAP enhancement applying to those between 50 and 55 years of age) but whose age and years of service equalled at least 55, were entitled under the **PBA** to benefits in addition to those provided for in TCSAP. As the consultant said:

> 2. Members who were under age 50 with age plus years of continuous employment equal 55 or more at the partial wind-up date. These members received the value of a pension beginning at the normal retirement date under the Plan. However, these members, under the partial wind-up rules, were, as a result of the Order dated October 17, 1991, of the Nova Scotia Superintendent of Pensions, to receive their regular benefits beginning at age 55 at 75% of the unreduced pension. Their TCSAP notice period and

> buyback benefits are not affected. Since the regular benefit is more valuable than the previous settlement provided to them, the difference between these two values will be transferred to the members' locked-in RRSP's. All members elected to transfer their regular and TCSAP benefits to locked-in RRSP's. (Emphasis added)

[83] From the consultant's perspective, TCSAP did not provide the under 50 employees whose age and years of service equalled at least 55 with benefits comparable to those required under the **PBA** partial wind-up provisions and, on that basis, he found that benefits in addition to TCSAP were payable under the **PBA**. This does not support the employer's contention that there was any element of windfall or double recovery resulting from the partial wind-up benefits being paid in addition to the entitlements under TCSAP.

[84] The employers' broad assertion (adopted by the judge) that TCSAP included pension entitlements is, with respect, inaccurate. TCSAP, to be sure, included some pension enhancements. These were then included in the pension plan by amendment and became payable under the amended terms of the plan. But there is nothing in TCSAP that provided employees with some substitute for the pension benefits to which they were otherwise entitled under the plan and TCSAP was not a substitute for the employees' pension entitlements under the plan as it existed before the amendments resulting from TCSAP. The employer repeatedly told the employees that their pension entitlements were governed by the text of the plan and the requirements of the **PBA**. And so they were.

[85] The judge found that two passages from the TCSAP text supported the employer's position that TCSAP severance payments were a substitute for pension entitlements under the plan and the **PBA**. With respect, he erred in doing so.

[86] The trial judge referred to the following provisions of the original TCSAP text:

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

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

[87] In the opinion of the trial judge, these statements clearly express the intention of the parties that the TCSAP benefits included pension benefits, including statutory pension entitlements. With respect, this cannot be the case.

[88] TCSAP was a severance package that was intended by its terms to reward and compensate employees for their service to the company as well as to induce them to stay with the company notwithstanding the looming change of control. However, it was structured on the basis of the common law requirements of reasonable notice of termination or pay in lieu of notice and the severance pay provisions of the collective agreement. This is clear in the TCSAP Administrative Guidelines, which described TCSAP benefits as being related to the "hypothetical notice period". It has been held, for example, that a dismissed employee is entitled to the pension benefits that would have accrued during the notice period: **Taggart v. Canada Life Assurance Co.**, [2006] O.J. No. 301 (Q.L.)(C.A.). The "severance" nature of TCSAP is also clear in the collective agreement, which indicated that payments made under TCSAP were in satisfaction of rights under the severance pay provisions of the collective agreement. The option of using this money to buy additional pension credits – an option extended to all eligible employees – cannot be seen as changing the nature of those payments and somehow converting them into the pension benefits required under the **PBA**.

[89] Having regard to TCSAP as a whole, it is in my view clear that it did not include pension benefits otherwise provided by the Pension Plan or the **PBA**. The reference to "pension entitlements" in the TCSAP text simply referred to pension benefits attributable to the "hypothetical notice period" on which TCSAP benefits were based. The release drafted by the employer made this especially clear as it is geared to severance claims by individual employees and does not touch pension benefits to which the employees would otherwise (that is, in the absence of TCSAP) be entitled.

[90] I conclude that the judge erred in finding that the employer had established that there was an absence of a juristic reason for the appellants' retention of both their TCSAP severance pay and the partial wind up benefits provided for under the **PBA**. The severance pay was in recognition of past service. The partial wind-up payment recognized that for the under 50 group whose age and years of service equalled 55, the pension plan, even as enhanced by the amendments flowing from TCSAP, did not provide the benefits mandated by the **PBA**. The fact that, in common with all other eligible employees, the severance pay could be used to purchase pension credit did not change the fundamentally different character of the two payments. These employees were entitled in law to both.

D. Jurisdiction

[91] As noted, the appellants submitted that the judge ought not to have taken jurisdiction over this action to the extent that it relates to the unionized employees covered by a collective agreement. In light of my proposed disposition of the matter, I do not see any practical point in addressing this ground of appeal.

IV. DISPOSITION

[92] I would allow the appeal and amend the order of the learned judge dated 19 July 2005 as follows:

> The answer to question 4 will be deleted and the answer "no" substituted therefor;
> The answer to question 6 will be deleted and the answer "None of the above" will be substituted therefor.

[93] The appellants are entitled to their costs at first instance and of the appeal and the cross-appeal. Costs at the first instance have not, so far as we know, been fixed. The costs of the application before Murphy, J. should be set by him if the parties are unable to agree. The costs in this court will be 40% of that amount, plus disbursements on appeal.

Cromwell, J.A.

Concurred in:

MacDonald, C.J.N.S.
Saunders, J.A.

Schedule “A”

Atlantic Oil Workers

1. Annett, A.G. Robert
2. Auby, Gary
3. Bona, John
4. Bonvi, Douglas
5. Boutilier, Donald
6. Bowlby, Neil
7. Brown, Michael
8. Carmichael, Frank
9. Cashin, Gary
10. Connellan, Brian
11. Connors, Clinton
12. Coveyduc, Wendell
13. Craft, Edward
14. Daborn, Jeffrey
15. Dalrymple, Albert
16. D’Arcy, Michael
17. Decker, Allen
18. DeYoung, Paul
19. DeYoung, Stephen
20. Eisener, Randolf
21. Flemming, Patrick
22. Frost, James
23. Grant, Jim
24. Greenough, Martin
25. Harris, Greg
26. Harris, Kenneth
27. Hartley, Ross
28. Harvey, Maurice
29. Hogan, Grant
30. Hoskin, Thomas
31. Hudak, John
32. Huff, Frederick
33. Jamison, Denis
34. Jones, Lester
35. Kalyta, Gary
36. Levangie, Phil
37. MacDonald, Andrew

38. MacLeod, Douglas
39. MacNeil, Stephen
40. MacPhee, Michael
41. Martin, Murdock
42. McCarthy, Patrick
43. McKinley, John
44. McQuillan, Leigh
45. Melbourne, David
46. Morash, David
47. Mountain, Gregory
48. Muir, Gary
49. Murphy, William
50. Myatt, Joseph
51. Nearing, Philip
52. O'Toole, Tim
53. Pashkoski, Mike
54. Pitre, Joe
55. Rendell, Raymond
56. Richardson, J. Peter
57. Roach, Laurie
58. Sanford, Earl
59. Scott, Robert
60. Shortt, Ross
61. Skinner, Rudolph
62. Sperry, Hector
63. Stackhouse, Gary
64. Stanbrook, Wilfred
65. Steele, James
66. Stone, Phil
67. Sweet, Nelson
68. Thibault, William
69. Urquhart, Kevin
70. Walford, Frank
71. Williams, Mike
72. Williams, Sinclair

ARMEA

1. Altheim, Victor
2. Bell, Ron
3. Brucha, Paul

4. Campbell, Kimberly
5. Cookson, Gary
6. Corkum, David
7. Denton, Arthur
8. Dodge, Mark
9. Ecclestone, Stephen
10. Eisener, Robert
11. Elliott, Mark
12. Farrant, Ross
13. Halliday, Grant
14. Hibberd, Kimberley
15. Higgins, Ross
16. Hiltz, Raymond
17. Hollis, Randall
18. Horne, Robert
19. Kempton, Jeffrey
20. Longard, Mike
21. MacDonald, Gregory
22. MacFeters, Dave
23. MacFeters, Patricia
24. MacIlreith, Robert
25. Martin, Dave
26. McGinley, Desmond
27. McKinnon, David
28. McLeod, James
29. McPhee, William
30. Moody, William
31. Peck, Michael
32. Pineo, Larry
33. Power, Laura
34. Praught, Dan
35. Ptolemy, Thomas
36. Purcell, Ken
37. Rogers, Claude
38. Stevens, Kenneth
39. Tower, Derek
40. Trask, Wayne
41. Upshon, Barbara D.
42. Watts, Lloyd
43. Westhaver, Stephen