Date: 20090909

Docket: A-453-08

Citation: 2009 FCA 258

CORAM: **NOËL J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

ROGERS COMMUNICATIONS INC.

Appellant

and

SANDRA BUSCHAU, SHARON M. PARENT, ALBERT POY, DAVID ALLEN, EILEEN ANDERSON, CHRISTINE ASH, FREDERICK SCOTT ATKINSON, JASPAL BADYAL, MARY BALFRY, CAROLYN LOUISE BARRY, RAJ BHAMBER, EVELYN BISHOP, DEBORAH LOUISE BISSONNETTE, GEORGE BOSHKO, COLLEEN BURKE, BRIAN CARROLL, LYNN CASSIDY, FLORENCE K. COLBECK, PETER COLISTRO, ERNEST A. COTTLE, KEN DANN, DONNA DE FREITAS, TERRY DEWELL, KATRIN DOLEMEYER, ELIZABETH ENGEL, KAREN ENGLESON, GEORGE FIERHELLER, JOAN FISHER, GWEN FORD, DON R. FRASER, MABEL GARWOOD, CHERYL GERVAIS, ROSE GIBB, ROGER GILODO, MURRAY GJERNES, DAPHNE GOODE, KAREN L. GOULD, PETER JAMES HADIKIN, MARIAN HEIBLOEM-REEVES, THOMAS HOBLEY, JOHN IANNANTUONI, VINCENT A. IANNANTUONI, RON INGLIS, MEHROON JANMOHAMED, MICHAEL J. JERVIS, MARLYN KELLNER, KAREN KILBA, DOUGLAS JAMES KILGOUR, YOSHINORI KOGA, MARTIN KOSULJANDIC, URSULA M. KREIGER, WING LEE, ROBERT LESLIE, THOMAS A. LEWTHWAITE, HOLLY LI, DAVID LIDDELL, RITA LIM, BETTY C. LLOYD, ROB LOWRIE, CHE-CHUNG MA. JENNIFER MACDONALD, ROBERT JOHN MACLEOD, SHERRY M. MADDEN, TOM MAKORTOFF, FATIMA MANJI, EDWARD B. MASON, GLENN A. MCFARLANE, ONAGH METCALFE, DOROTHY MITCHELL, SHIRLEY C.T. MUI, WILLIAM NEAL, KATHERINE SHEILA NIMMO, GLORIA PAIEMENT, LYNDA PASACRETA, BARBARA PEAKE, VERA PICCINI,

INEZ PINKERTON, DAVE PODWORNY, DOUG PONTIFEX, VICTORIA PROCHASKA, FRANK RADELJA, GALE RAUK, RUTH ROBERTS, ANN LOUISE RODGERS, CIFFORD JAMES ROE, PAMELA MAMON ROE, DELORES ROSE, SABRINA ROZA-PEREIRA, SANDRA RYBCHINSKY, KENNETH T. SALMOND,

MARIE SCHNEIDER, ALEXANDER C. SCOTT, INDERJEET SHARMA, HUGH DONALD SHIEL, MICHAEL SHIRLEY, GEORGE ALLEN SHORT, GLENDA SIMONCIONI, NORM SMALLWOOD, GILLES A. ST.DENNIS, GERI STEPHEN GRACE ISOBEL STONE, MARI TSANG, CARMEN TUVERA, SHEERA WAISMAN, MARGARET WATSON, GERTRUDE WESTLAKE, ROBERT E. WHITE, PATRICIA JANE WHITEHEAD, AILEEN WILSON, ELAINE WIRTZ, JOE WUYCHUK, ZLATKA YOUNG

Respondents

Heard at Vancouver, British Columbia, on May 12, 2009.

Judgment delivered at Ottawa, Ontario, on September 9, 2009.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: NOËL J.A.
NADON J.A.

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Respondents

REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] This appeal is the latest instalment in a long running dispute between Rogers Cablesystems Inc. (now Rogers Communications Inc.) (Rogers) and the employees and former employees (the Employees) of a Vancouver cable company, Premier Communications Ltd., (Premier), which Rogers acquired in 1980. When it acquired Premier, Rogers also acquired the rights and obligations of the employer under the pension plan (the Premier Plan or the Plan), which Premier established for the benefit of its employees in 1974. Shortly after Rogers acquired Premier, it became known that there was a significant actuarial surplus in the Plan. Rogers tried to appropriate that surplus. The Employees claimed it as their own. Rogers and the Employees have been fighting over that surplus ever since.

[2] This appeal arises from the decision of the Acting Superintendent of Financial Institutions dated April 27, 2007 (the Decision), which approved amendments to the Plan to revoke a merger of

the Plan with other Rogers' pension plans and to re-open the Premier Plan to new members. The Acting Superintendent has since been appointed Superintendent and so, I will refer to her as such.

[3] The Superintendent dismissed the Employees' application to terminate the Plan and to distribute the actuarial surplus. The Employees' application for judicial review of the Decision was allowed by O'Keefe J. of the Federal Court in a decision reported as *Buschau v. Canada (Attorney General) and Rogers Communications Inc.*, 2008 FC 1023, [2008] F.C.J. No. 1283.Rogers now appeals to this court from the decision of O'Keefe J. Quite apart from the merits of the Decision itself, one of the major issues is the extent to which the Superintendent's discretion was limited by the decisions of the courts which have considered the case in the course of the long and acrimonious litigation involving this pension plan.

[4] For the reasons which follow, I would allow the appeal and set aside the order of the Federal Court. I would award Rogers its costs in this Court and in the Federal Court.

THE BACKGROUND

[5] In order to understand the context in which the Superintendent's Decision was made, it is necessary to review the history of this litigation in the courts of British Columbia and in the Supreme Court of Canada.

[6] The following exposition of the material facts is taken from the reasons of Bastarache J. (concurring) in the Supreme Court:

65 The corporate predecessor of RCI [Rogers] established the Premier Pension Plan as a non-contributory defined benefit plan in January 1974 by means of two documents, a trust agreement and a plan document. Eventually, as a result of corporate acquisitions and mergers, the Premier Plan was one of several pension plans administered by RCI for the benefit of employees of RCI and its corporate affiliates.

66 Membership in the Premier Plan was compulsory for all full-time employees over the age of 25 having completed one year of service. In 1984, RCI amended the Premier Plan to close it to employees hired after July 1, 1984. The following year, RCI withdrew $968,285 from the Plan surplus and began taking contribution holidays on the recommendation of their actuary, T.I. Benefits. In 1992, RCI merged the Premier Plan with four other RCI plans by amending the plan documents to create a common plan text. No steps were taken to amend the separate Premier Trust agreement or formally merge the Premier Trust with the trusts established for the other RCI plans, but the amendments provided that any surplus funds remaining on termination would revert to RCI instead of the members. The respondents say that the merger was a device to use the Premier Plan surplus to compensate for deficits in some of the other merged plans.

67 Pursuant to the provisions of the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) ("P.B.S.A."), and the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), the merged pensions plan (the RCI Plan) was registered with the Superintendent and the Canada Customs and Revenue Agency.

68 The respondents sued RCI in 1995 seeking various forms of relief, including a declaration that the merger of the Premier Plan with other plans forming the RCI Plan was unlawful and the return of the money taken out of the Trust. This action came to trial in 1998 and the merger was held to be lawful. The trial judge found that the members were entitled to the benefits they were promised under the original Plan, including the right to any surplus existing on termination of the merged plan: *Buschau v. Rogers Cablesystems Inc.* (1998), 54 B.C.L.R. (3d) 125. On January 11, 2001, the Court of Appeal upheld the finding that the merger was valid but held that the merger of the pension plans did not affect the existence of the Premier Trust as a separate trust. The court ordered that "the members of the Premier Plan shall be at liberty to undertake proceedings in the Supreme Court of British Columbia to terminate the Premier Trust, based either on the rule in *Saunders v. Vautier* or on the *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463 to the extent either may be applicable". The Court of Appeal held that RCI had no "interest" in the Trust and that its consent was therefore not necessary under the rule in *Saunders v. Vautier* (see Buschau #1 [*Buschau v. Rogers Communications Inc.* 2001 BCCA 16, (2001) 83 B.C.L.R. (3d) 261]). RCI paid back the surplus that it had removed before judgment was delivered. While the decision of the Court of Appeal on this issue is not under appeal, I would note at the outset that the court's finding in Buschau #1 that the Plan (and fund) and Trust can be severed and dealt with independently is no doubt responsible in large part for the difficulties posed in this appeal.

69 On May 24, 2001, the respondents petitioned the Supreme Court of British Columbia for an order terminating the Premier Trust. This was the commencement of the present proceeding. The respondents sought, inter alia, an order "that the Premier Pension Plan be terminated or, alternatively, that the surplus portion of the Premier Pension Plan be terminated".

70 Loo J. heard the petition in two stages. Following the first hearing in November 2001, she held that the applicability of the rule in *Saunders v. Vautier* was decided by the previous decision of the Court of Appeal, and that the rule was applicable. She ordered RCI to provide to the respondents information pertaining to the plan "so they can obtain the necessary consents to terminate the Plan" ((2002), 100 B.C.L.R. (3d) 327, 2002 BCSC 624, at paras. 12 and 33).

71 On January 7, 2003 the respondents came to court with consents executed by the 144 members of the plan. The respondents lacked, however, the consent of approximately 25 of the beneficiaries designated by the members pursuant to the plan provisions. The respondents could not rely on the rule in *Saunders v. Vautier* to terminate the Premier Trust because it requires the consent of all possible beneficiaries. They therefore sought to have the court consent to the termination, on behalf of the designated beneficiaries, pursuant to s. 1 of the *Trust and Settlement Variation Act*.

72 In reasons issued on May 1, 2003 ((2003), 13 B.C.L.R. (4th) 385, 2003 BCSC 683, Loo J. held that the respondents were entitled to terminate the Premier Trust and gave the court's consent on behalf of the designated beneficiaries to such termination.

73 Newbury J.A. issued reasons for judgment on behalf of the Court of Appeal on February 20, (Buschau #2 2004 [*Buschau v. Rogers Communications Inc*. 2004 BCCA 80, (2004) 24 B.C.L.R. (4th) 85]). She held, at paras. 11 and 22 of Buschau #2, that:

> (a) Loo J. erred in holding that the applicability of the rule in *Saunders v. Vautier* was decided by the previous judgment of the Court of Appeal. The conclusion that *Saunders v. Vautier* applied was, however, correct;
>
> (b) The respondents were not entitled to terminate the Premier Trust under the rule in *Saunders v. Vautier* because they lacked the consent of all designated beneficiaries;
>
> (c) Loo J. erred in holding that the court had jurisdiction, under the *Trust and Settlement Variation Act*, to consent to a termination of the Premier Trust on behalf of capacitated designated beneficiaries;
>
> (d) It was not possible that RCI could reopen the Premier Plan to new members "since such a step could not, in the particular circumstances

> of this case, be taken in good faith by this employer vis-à-vis the existing beneficiaries".

74 The court held that "normally" the appeal would be allowed but, in this case, the court would withhold entering judgment for three months to give the respondents an opportunity, as suggested by the court, to revoke the designations of existing beneficiaries (who were not before the court), gather further consents and make further submissions (paras. 11 and 103).

75 Subsequently, the Court of Appeal received motions for judgment from RCI and the respondents. In an order issued by the Court of Appeal on May 18, 2004 in Buschau #3, the court held that the appeal should be allowed but made, inter alia, the following orders:

> THIS COURT ORDERS that the appeal is allowed, that the order of Loo, J. be set aside, and that the petition brought pursuant to the *Trust and Settlement Variation Act* be dismissed;
>
> THIS COURT FURTHER ORDERS that the appellant, Rogers Communications Inc. ("RCI"), does not have an "interest" in the Trust that would make its consent to the termination under *Saunders v. Vautier* necessary;
>
> THIS COURT ORDERS that, provided the consents of all Members and those persons who are now designated beneficiaries have been obtained for the termination of the Trust, the petitioners shall be at liberty to proceed to invoke the rule in *Saunders v. Vautier*;
>
> ...
>
> THIS COURT FURTHER ORDERS that RCI cannot amend the Premier Pension Plan to permit the addition of new members.

76 As of March 31, 2002, the portion of assets in the master trust allocated to the Premier Trust was approximately $11 million greater than the actuarial liabilities for the Premier Plan members. (RCI's factum, at para. 24).

77 The Court of Appeal further decided that the Trustee would have to satisfy itself that the conditions under the rule in *Saunders v. Vautier* had been met and that all statutory requirements had been complied with before distribution. If necessary, the Trustee could seek direction under s. 86 of the *Trustee Act*, R.S.B.C. 1996, c. 464. The court also rejected the submission that proceedings under the *Trust and Settlement Variation Act* would be required, given that the Trust could be terminated under the rule in *Saunders v. Vautier* itself (Buschau #3).

Rogers v. Buschau, 2006 SCC 28, [2006] 1 S.C.R. 973 (*Rogers*)

[7] In fairness to the Employees, this statement of facts should be supplemented by the following facts upon which they place considerable emphasis. This summary is taken from the reasons of Deschamps J. (for the majority) in the Supreme Court:

> 5 In 1980, Rogers Cablesystems Inc. (which later became Rogers Communications Inc. ("Rogers")) acquired Premier Communication. In September 1983, the Plan's actuary was of the view that a surplus evaluated at approximately $800,000 could be used for improvements to improve benefits for members. On April 12, 1984, the actuary actually recommended improvements to the benefits. The actuary was replaced on May 22, 1984. On July 1, 1984, the Plan was closed to future employees. On July 11, 1984, Rogers asked the then trustee, Canada Trust, for a refund of part of its contributions. Canada Trust required a legal opinion before doing so. On October 31, 1984, Canada Trust was replaced by National Trust. On July 15, 1985, Rogers requested that the new trustee, National Trust, refund $968,285 to it, which National Trust did. By December 31, 1986, Rogers had also taken contribution holidays evaluated at $842,000. In December 1992, Rogers amended the Plan to merge it retroactively with four other pension plans in the Rogers Communications Inc. Pension Plan ("RCI Plan"). The views of the employees with respect to such a merger were known to Rogers, as can be seen from an internal memorandum dated July 16, 1990:
>
> > It is clear that [the Premier employee representative] is not in favour of folding the Premier Plan into the RCI plan unless we can show clear benefit (unlikely scenario).
>
> 6 The long-term goal pursued by Rogers with respect to the Plan is stated in another internal memorandum dated April 22, 1993:
>
> > You asked for an update on the status of the Premier Pension Plan. As you are aware, our objectives related to this plan were (i) to get at the surplus the plan had and (ii) minimize our administration (i.e. eliminate an audited statement and an annual regulatory filing, etc).
> >
> > We were able to accomplish the objectives above by the amalgamation of all of the defined benefit plans into one plan. Therefore, the need to do anything further was redundant.
>
> *Rogers, supra*, paragraphs 5-6

[8] Both Rogers and the trustee National Trust appealed the British Columbia Court of Appeal's decision in *Buschau #2* to the Supreme Court. (The application for leave to appeal with respect to *Buschau #1* was dismissed: see [2004] S.C.C.A. No. 350). The Supreme Court of Canada was unanimous in deciding that the rule in *Saunders v. Vautier* could not be invoked to terminate the trust containing the assets of the Premier Plan but the Court split 4/3 over the issue of the Superintendent's authority to terminate the Premier Plan.

[9] Deschamps J., writing for the majority of the Supreme Court, found that since the Plan did not provide for its termination at the request of Plan members, the Superintendent "could order a distribution if she were faced with circumstances falling within the parameters of the PBSA." (the *Pension Benefits Standards Act*, R.S.C. 1985, c. 32 (2nd Supp.): see *Rogers*, *supra* at paragraph 39. I take this to mean that the Superintendent could order a distribution of the surplus if she found that the facts justified terminating the Plan and distributing the surplus in the Trust to the Plan members. The question then was whether that state of affairs existed.

[10] Deschamps J. recognized that one factor which would militate against the termination of the Plan was if Rogers were entitled to amend the Plan to open it to new members. She expressed some doubt on this issue based on the reasons in *Buschau #1* and *Buschau #2*. *Buschau #2* was an appeal from the decision of Loo J. (reported at 2002 BCSC 624, 100 B.C.L.R. 3(d) 327) to whom the Employees had applied for an order under the rule in *Saunders v. Vautier*. In the course of her reasons, Loo J. held that Rogers did not have the right to amend the plan to include new members:

> 29 The Court of Appeal could only have granted liberty to the Members to terminate the trust on the basis that the trust was closed and that no further beneficiaries would be added. In my view, based on the evidence before me, the first time RCI gave any thought to re-opening the Plan to allow new members was in response to efforts by the Members to terminate the Plan and have the surplus paid to them. For these reasons, RCI's argument that the rule cannot apply because it may amend the Plan to allow new members, must fail.

[11] In *Buschau #2*, the appeal from Loo J.'s decision, the British Columbia Court of Appeal returned to this issue. It held that, in the circumstances of this case, Rogers could not, in good faith, exercise its right to amend the Plan to open it to new members because doing so would amount to another stratagem to allow Rogers to obtain the benefit of the actuarial surplus: see *Buschau #2* at paragraph 61. It is important to note that the in *Buschau #2*, the British Columbia Court of Appeal agreed with Loo J.'s conclusion that Rogers could not amend the Plan to allow new members, but did not adopt her reasoning. It proceeded on a different ground, namely that Rogers could not, in good faith, exercise the powers given to it by the Plan documents. This distinction acquires a certain importance in the decision of the Supreme Court.

[12] After having reviewed these findings from the prior litigation, the Supreme Court said:

> If Rogers could amend the merged RCI Plan to open it to new members, it is questionable whether the Premier Trust fund could be used to fund benefits owed to new members without infringing the judgment that is binding on Rogers. Using the Premier Trust fund to fund benefits for new members or to fund benefits owed to members of a merged plan have been considered analogous by the courts below. I do not need to give a definite answer on the possibility of amending the Plan because, except to the extent that Rogers is bound by *Buschau #1*, the matter is best left to the Superintendent.
>
> *Rogers, supra*, paragraph 44

[13] If the Superintendent were to find that Rogers could not open the Plan to new members, then there might be no point in continuing the Plan if the pension benefits provided for in the Plan could be provided by the purchase of annuities.

[14] Relying on the definition of "termination" under the PBSA, which includes "cessation of crediting of benefits to plan members", Deschamps J. asked if the Plan could be considered as terminated because of Rogers' failure to make contributions since 1984. Having raised the question, Deschamps J. left it to the Superintendent to decide whether, in the circumstances, Rogers' contribution holiday resulted in the Plan being "terminated".

[15] Deschamps J. then considered whether the Superintendent could terminate the Plan under subsection 29(2) of the PBSA, which provides as follows:

29 (2) The Superintendent may declare the whole or part of a pension plan terminated where (a) there is any suspension or cessation of employer contributions in respect of all or part of the plan members; (b) the employer has discontinued or is in the process of discontinuing all of its business operations or a part thereof in which a substantial portion of its employees who are members of the pension plan are employed; or (c) the Superintendent is of the opinion that the pension plan	29 (2) Le surintendant peut, dans les cas suivants, déclarer la cessation totale ou partielle d'un régime de pension : a) la suspension ou l'arrêt de paiement des cotisations patronales relativement à plusieurs ou à l'ensemble des participants; b) l'abandon total ou progressif de tout ou partie des secteurs d'activité de l'employeur où travaillent un nombre important de ses salariés qui participent au régime; c) le surintendant est d'avis

has failed to meet the prescribed tests and standards for solvency in respect of funding referred to in subsection 9(1)	que le régime n'est pas conforme aux critères et normes de solvabilité réglementaires, relativement à la capitalisation prévue au paragraphe 9(1).

[16] The first question was whether Rogers' contribution holiday was an issue under paragraph 29(2)(*a*) of the PBSA. The Court reasoned that since paragraph 29(2)(*c*) dealt with insolvency, paragraph 29(2)(*a*) must refer to a cessation of contributions which did not jeopardize the solvency of a pension plan. The Court noted that, while contribution holidays may be legitimate, they may be illegitimate if they conceal an improper refusal to terminate a plan. Once again, the determination of whether termination was warranted was left to the Superintendent.

[17] In summary, the majority of the Court was of the view that the Superintendent had the authority to provide the Employees with a remedy:

> … I do not need to deal with the members' allegations that Rogers acted in bad faith, which the lower court judges stopped short of finding. Rogers did indeed attempt to appropriate the surplus. Its resistance to the actuary's recommendation to improve employee benefits, its replacement of the less malleable actuary and trustee, the internal notes, and the improper amendments to the Plan amply demonstrate that Rogers did what it could to get at the surplus. However, past conduct is relevant only if it helps to answer the forward looking question: is there any legitimate purpose in keeping the Plan or should it be terminated and wound up? The Superintendent can rule on questions of both fact and law, and all parties can make appropriate recommendations to him. The provisions of the PBSA and the regulations concerning the duties of the employer are well within the Superintendent's interpretative jurisdiction.
>
> *Rogers*, *supra*, paragraph 53

[18] That said, the majority of the Court also considered that the Superintendent was under some obligation to the Employees:

> I agree with the Ontario Court of Appeal, and it is my view that the Superintendent's powers under s. 29(2)(*a*) of the PBSA becomes almost a duty when employees ask him to act. His power must be exercised in conformity with the remedial purposes of the provisions of the PBSA.
> *Rogers*, *supra*, paragraph 56

[19] Bastarache J., writing for the concurring minority, agreed that *Saunders v. Vautier* did not apply to the case of a modern pension plan. However, he was of the view that the Superintendent did not have a general discretion to terminate a pension plan:

> There is no provision in the PBSA for plan beneficiaries to terminate a pension plan. Furthermore, there is no provision in the PBSA for any party (employer, administrator, trustee, Superintendent, plan members, or other beneficiaries) to terminate the Trust under which the pension fund contributions are held as security for the payment of plan benefits, prior to, and independent of, the termination of the Plan. Beneficiaries may request that the Superintendent exercise his discretionary powers under s. 29(2), but the Superintendent's power to terminate a plan is available only where the stipulated pre-conditions are met. The Superintendent does not have a general discretion to terminate pension plans.
>
> *Rogers, supra*, paragraph 84

[20] As for the application of *Saunders v. Vautier,* Bastarache J. wrote, referring to a defined benefits pension plan, such as is in issue here, that:

> … The employer assumes the risk in such a plan; when interest rates and investment returns are high, a surplus will be realized, and when the economy changes, unfunded liabilities will often result. The goal is to require contributions by the employer that are sufficient to provide the defined benefits over long periods of time in spite of market fluctuations. To

> permit termination of the Plan when a surplus has been realized independently of the terms of the Plan is not consistent with its object or the applicable statutory regime. The contract clearly contemplated a continuing plan supported by a permanent Fund; segregation of the Fund by "closing" the Premier Plan was not possible. It is therefore an error to infer that the rule in *Saunders v. Vautier* can in effect create a manner of realizing on the actuarial surplus (the Fund) in violation of the terms of the Plan. In the case of this pension Plan, absolute entitlement to the surplus would only occur once the surplus becomes real, that is, once the Plan and Trust had been terminated.
>
> *Rogers, supra*, paragraph 90

[21] On the issue of Rogers' power to amend the Plan, Bastarache J. took issue with the British Columbia Court of Appeal's reasoning in support of its conclusion that Rogers could not, in good faith, exercise its power of amendment to open the Plan to new members:

> It seems clear to me that the conclusion of the Court of Appeal on the issue of good faith is premised on its earlier decision that the amendment would deprive the beneficiaries of the Premier Trust of their right to terminate it under the rule in *Saunders v. Vautier*.I have found that the respondents cannot terminate the Trust pursuant to *Saunders v. Vautier*. But of course the parties could not ignore the Court of Appeal's decision in Buschau #1. As a result of that decision, a separate accounting was required for the Premier Trust. RCI then considered the possibility of making the Plan eligible to new membership so that similarly situated employees who were members of non-contributory defined benefit plans could be integrated into the Premier Plan. This is what the Court of Appeal rejected. Its reasoning however is driven by the idea that the Plan members were promised more than their pensions under the Plan i.e. the right to ask for distribution of the Trust surplus, providing they satisfied the conditions set out in *Saunders v. Vautier*. The decision regarding bad faith cannot stand where it is without a foundation.
>
> *Rogers, supra*, paragraph 103

[22] Bastarache J. went on to consider the kind of conduct which would result in a forfeiture of the employer's powers of amendment of the Plan. He was of the view that such a result would flow from conduct, which was an abuse of the employer's power or which would offend community standards of reasonableness in the contemplated use of Trust assets for the benefit of present and

future employees. In effect, the standard is set out in paragraph 8(10)(*b*) of the PBSA, which provides that where there is a conflict of interest between the interests of the employer and the employer *qua* administrator, then the employer shall act in the best interests of the members of the pension plan: see *Rogers*, *supra*, paragraph 103.

THE SUPERINTENDENT'S DECISION

[23] With the Supreme Court's decision in hand, Rogers and the Employees approached the Office of the Superintendent.

[24] The Employees asked the Superintendent to declare that the Premier Plan was terminated or to terminate the Plan immediately under the terms of section 29 of the PSB or to order Rogers to terminate the Plan under section 11 of the PBSA. In addition, the Employees sought to have Rogers replaced as the Administrator of the Plan, and to have the Plan wound up and any surplus distributed to members of the Plan in cash.

[25] In its application, Rogers made submissions to the Superintendent seeking approval of amendments to the Plan. It proposed that the merger of the Plan with other Rogers' pension plans be revoked. In addition, Rogers proposed to open the Plan to new employees of the successor employer to Premier, Rogers Cable Communications Inc. (Cable Inc.), which had been spun off as a separate employer.

[26] The Superintendent dealt with both applications in a single decision. She summarized her conclusion as follows:

> After careful consideration of the submissions, I have decided that the decision by [Rogers] to revoke the merger of the Plan with the [Rogers] Plan and the reopening of the Plan by Cable Inc. do not contravene the terms of the Plan or the PBSA. I also find as a matter of fact that the Plan has not been terminated under the PBSA or by the employer. In addition, I have decided not to exercise my discretion to declare the Plan terminated and not to issue a direction pursuant to section 11 of the PBSA. I am satisfied, after reviewing all the evidence and submissions of the parties, that the continued existence of this pension plan is a worthy goal and that the employer is continuing to provide the promised benefits and complying with solvency requirements.
>
> Appeal Book, p.47

[27] The Superintendent justified her decision by first referring to the legislative scheme of the PBSA which, she noted, aims to ensure minimum standards for pension plans and "presumes that the continued existence of a pension plan is a worthy goal": see Appeal Book, p. 47. The PBSA requires that pension plans be sufficiently funded so as to provide the pension benefits promised to plan members. The mandate of the Office of the Superintendent of Financial Institutions (OSFI) reflects the objectives of the PBSA. In particular, paragraph 4(3*)(b*) of the *Office of the Superintendent of Financial Institutions Act*, R.S.C. 1985,c. 18 (3rd Supp.) requires the OSFI to strive "to protect the rights and interests of members of pension plans, former members and any other persons who are entitled to pension benefits or refunds under pension plans.": see Appeal Book, p. 47.

[28] The Superintendent then noted that an actuarial surplus simply indicates that if a plan were terminated as at a given valuation date, the assets of the plan would cover or exceed the cost of providing the pension benefits owing under the plan as of that date. However, the Superintendent observed that in this case, plan members were not entitled "to make a claim to share in an actuarial surplus unless or until a plan is terminated": see Appeal Book, p. 48.

[29] The Superintendent then went on to note that pension plans are generally established as long term arrangements to provide pension benefits for a defined class of employees. Termination of a plan is seen by the OSFI as an extreme measure which is invoked only after other regulatory intervention measures have failed. Examples of situations where termination might be indicated include those where pension benefits are jeopardized, the plan's funding cannot be put on a sound footing, or the purpose of the plan is being frustrated.

[30] The Superintendent then turned to the facts of the case before her. She drew two important conclusions. First, she accepted the submissions of Rogers and Cable Inc. "that the current amendments are being made by the 'Company' as defined in the Plan, and the 'employer' as defined in the PBSA." In other words, she accepted that Cable Inc. was the successor to Premier. Second, she found that "in reopening the Plan, Cable Inc. is not acting contrary to the PBSA or contrary to the terms of the Plan and terms of the Trust Agreement establishing the funds." In addition, the Superintendent was satisfied that "the general purpose of the Plan is continuing and the Plan meets prescribed tests and standards for funding.": see Appeal Book, p. 48.

[31] The Superintendent summarized her conclusion on these issues as follows:

> The terms of the Plan, Trust Agreement, and PBSA do not prevent Cable Inc. from making these amendments opening membership to new Cable Inc. employees. The decision by Cable Inc. to reopen the Plan was also made in conjunction with a decision to close another pension plan established for Cable Inc. employees ("Cable employees"). There is no merger of the newly closed Cable Inc. plan and the reopened Plan. Pension benefits that have accrued in that other plan remain in that other Cable Inc. pension plan. The amendments implementing these decisions do not take away existing rights or entitlements. The reopened Plan will be funded by Cable Inc. I am of the opinion that in deciding to revoke the merger and to reopen the Plan to new employees, [Rogers] and Cable Inc. are not acting contrary to safe and sound financial or business practices, are not jeopardizing the pension benefits of the Members, and are not contravening the PBSA nor the terms of the Plan.
>
> Appeal Book, p. 49

[32] The Superintendent then considered the Employees' application to declare the Plan terminated, or to force its termination. The Superintendent noted that since the employer is a key participant in a pension plan, she must consider the employer's position. In this case, the employer did not wish to terminate the Plan.

[33] The Superintendent then dealt with the Employees' argument that since there are no further accruals in the Plan and since there has been a general cessation of the crediting of benefits to members, the Plan should be considered "terminated" within the meaning of the PBSA.

[34] In that regard, the Superintendent accepted that there were two members of the Plan still being credited with benefits and that Cable Inc. has chosen to continue the Plan for new Cable Inc.

employees. As a result, the Superintendent found that there had not been a cessation of crediting of benefits to plan members and the Plan had not "terminated".

[35] As for the Employees' demand that the Superintendent declare the Plan terminated, the latter noted that the only relevant provision of the PBSA is paragraph 29(2)(*a*) which applies when there is any suspension or cessation of employer contributions in respect of all or part of the plan members. The cessation in this case is the contribution holiday taken by the employer. The Superintendent found that the contribution holiday was taken in accordance with the terms of the PBSA, that it did not jeopardize the Plan's solvency or the payment of pension benefits. In her view, the contribution holiday did not lead to the purpose of the Plan being frustrated.

[36] The Superintendent expressed her conclusions on the Employees' application in the following terms:

> Termination of the Plan in this case will not result in the protection of the Plan's purpose or the protection of the pension benefits of all members of the Plan. In these circumstances, in deciding whether to terminate the Plan I must also consider the views of the employer, another party to the contract. Cable Inc. opposes the termination of the Plan. The Plan reserves the decision to amend and terminate to the employer, and Cable Inc. has not taken any steps, and there is no indication that it plans to take any steps, to terminate the Plan. The fact that the Plan's fund might be wound up following a termination and the Members receive surplus is not a sufficient basis for me to decide to terminate the Plan. Termination is an extreme measure and there are not sufficient reasons for me to interfere in the administration and operation of the Plan by declaring the Plan terminated.
>
> Appeal Book, p. 50

[37] In keeping with the logic of the position she had taken on the question of the termination, the Superintendent also refused the Employees' application to issue a direction pursuant to subsection 11(1) of the PBSA that the Plan be terminated. The Employees' application for ancillary relief in the form of the replacement of the Plan administrator and the winding up of the Trust was also dismissed.

[38] In the result, the Superintendent's decision put an end to the Employees' attempt to have the Plan's actuarial surplus paid to them in cash.

THE FEDERAL COURT DECISION

[39] The Employees applied for judicial review of the Superintendent's Decision, an application which O'Keefe J. (the applications judge) granted. After reviewing the Superintendent's Decision, the applications judge identified seven issues as follows:

1- What are the appropriate standards of review for each of the issues raised?

2- Was the issue of reopening *res judicata* when the Superintendent made her decision?

3- If not, did the Superintendent err in finding that Rogers Inc. had the right to reopen the Plan to new members?

4- Did the Superintendent err in her interpretation and application of the definition of termination?

5- Did the Superintendent err in refusing to exercise her discretion under subsection 29(2) of the Act?

6- Did the Superintendent fetter her discretion by stating that termination was an extreme measure?

7- Did the Superintendent err in failing to recognize that Rogers Inc. was in a conflict of interest?

Reasons for Judgment, paragraph 21

[40] After summarizing the parties' submissions on these issues, the applications judge conducted a standard of review analysis and concluded that the standard of review for questions of law and jurisdiction was correctness while, in the case of questions of mixed law and fact, the standard was reasonableness. The applications judge then went directly to the fifth issue, the exercise of the Superintendent's discretion under subsection 29(2) of the PBSA, and disposed of the application for judicial review as follows:

> [51] In my opinion, the Superintendent failed to appreciate the extent of her discretion under paragraph 29(2)(a) and rendered a decision that was unreasonable given the evidence before her. I am of this opinion for two reasons. Firstly, the Superintendent failed to recognize that even legitimate contribution holidays that are valid under the Act can be considered illegitimate for the purposes of paragraph 29(2)(a) if they are used to hide an improper refusal to terminate on the part of the employer. The evidence before the Superintendent included that in the past, Rogers Inc. had replaced an uncooperative actuary and trustee, had improperly amended the Plan, and had improperly withdrawn funds from the Plan all with the objective of getting at the Plan's surplus. In my opinion, this evidence, coupled with the fact that Rogers Inc. had closed the Plan in 1984, had stopped making contributions to the Plan, and had no intention to reopen the Plan until the applicants filed their petition for termination, makes the Superintendent's findings unreasonable.
>
> [52] Secondly, the Superintendent failed to appreciate her duty to the employees under paragraph 29(2)(a). As mentioned by the Supreme Court of Canada, the powers delegated under the Act must be exercised in light of its remedial purpose. This duty is not to be taken lightly as it provides Plan members with a much needed remedy. In light of these failures on the part of the Superintendent, I am of the opinion that her decision not to exercise her discretion under paragraph 29(2)(a) was unreasonable. I would allow the judicial review on this ground.
>
> Reasons for Judgment, paragraphs 51 and 52.

[41] Accordingly, the applications judge allowed the application for judicial review and remitted the matter to the Superintendent for re-determination.

[42] The difficulty with the applications judge's decision is that it does not engage the Superintendent's reasoning in support of her conclusions. Without that analysis, it is difficult to say on what basis a Court would be justified in intervening to set that Decision aside.

ISSUES

[43] The key issue in this appeal is whether the Superintendent either improperly exercised her discretion or made a reviewable error of law when she allowed Rogers/Cable Inc. to revoke the merger of the Plan and to amend the Plan to open it to new employees of Cable Inc. In particular, if the Superintendent was entitled to allow Rogers/Cable Inc. to reopen the Plan to new members, then it was not unreasonable for her to find that the "continued existence of the Plan is a worthy goal and that the employer is continuing to provide the promised benefits and complying with solvency requirements." If, on the other hand, the Superintendent was not entitled to allow the amendment to reopen the Plan, then the argument that the continued existence of the Plan serves any of the purposes of the Plan or of the PBSA is harder to sustain.

ANALYSIS

[44] In *Cousins v. Canada (Attorney General)*, 2008 FCA 226, [2008] F.C.J. No. 1011 at paragraph 22, this Court held that the standard of review of a decision of the Superintendent of

Financial Institutions, on a question involving the interpretation of the PBSA, was reasonableness. This is consistent with the Supreme Court of Canada's view that "The provisions of the PBSA and the regulations concerning the duties of the employer are well within the Superintendent's interpretative jurisdiction": see *Rogers, supra*, paragraph 53.

[45] As for the review of the Superintendent's discretionary decisions, this Court held that such decisions, involving as they do, "a range of policy-laden remedial choices that involved the balancing of multiple sets of interests of competing constituencies" are also entitled to deference: see *Cousins* at paragraph 24. This is consistent with the position taken by the Supreme Court of Canada in *Dunsmuir v. New Brunswick* 2008 SCC 9, [2008] 1 S.C.R. 190, where the Court held at paragraph 53, that "[W]here the question is one of fact, discretion or policy, deference will usually apply automatically (citations omitted)".

[46] Since a proper standard of review analysis has already been conducted, it is not necessary to conduct another. I find that the standard of review of the Superintendent's Decision, whether on a question of the interpretation of the PBSA or in relation to a discretionary decision in the administration of the pension plans, is reasonableness.

[47] A review of the Superintendent's Decision shows that it is grounded in her assessment of the policy and objectives of the PBSA, specifically, that the continued existence of a pension plan is a worthy goal. It is difficult to gainsay this conclusion. In particular, it is difficult to suggest that where money has been set aside to provide pensions, the objectives of the PBSA are better served

by a diversion of those funds to other purposes, whether for the benefit of the employer or the employees, than it is by ensuring the continued existence of a properly funded, properly supervised pension plan.

[48] In the present case, the key issue is the opening of the Premier Plan to new employees of the successor employer, Cable Inc. Unless the reopening is allowed, Rogers' various manoeuvres have created a stranded trust, which now exists independently of the Premier Plan, which has been merged into a consolidated Rogers pension plan. As the Supreme Court pointed out, the finding that the Premier Trust was not affected by the merger of the Premier Plan into the consolidated Rogers Plan is binding on Rogers: see *Rogers*, paragraph 11.

[49] The conclusions of the British Columbia Court of Appeal in both *Buschau #1 and Buschau #2* are premised on the existence of a valid trust to which the rule in *Saunders v. Vautier* could apply. One of the requirements of a valid trust is certainty of objects: see *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 at paragraph 45.There can be no doubt that the British Columbia Courts proceeded on the basis that the object of the Premier Trust was to benefit members of the Premier Plan, an object which was not defeated by the merger of the Premier Plan into the consolidated Rogers plan. That is the significance of the statement in *Buschau #1* that:

> … I prefer to regard trust law as importing a series of its own rules that apply in addition to, and in precedence over, the law of contract and the rules of construction of contracts. To this extent, *members of the Premier Plan retain rights that are distinct from those of members of the other plans that were merged with it into the RCI Plan*. These rights cannot be done away with by unilateral action of the employer without crystal-clear authority in the trust terms.

Buschau #1 at paragraph 66

[50] The distinct rights of the members of the Premier Plan could only be found in the terms of the Premier Trust and the Premier Plan. By revoking the merger, Rogers/Cable Inc. were simply restoring that which existed prior to the merger. The Superintendent found that the Rogers' decision to merge the Premier Plan into its consolidated plan was not irrevocable. The only possible basis for considering that the amendments to the Premier Plan were irrevocable and that Rogers/Cable Inc. could not open the Plan to new members was the view that the Employees had acquired rights to the surplus by operation of the rule in *Saunders v. Vautier*. Since both the majority and the minority in the Supreme Court agreed that the rule in *Saunders v. Vautier* did not apply to pension plans, then, subject to the argument as to good faith, there is nothing unreasonable about the Superintendent's Decision to allow Rogers to unwind its ill-considered amendments.

[51] Once the Premier Plan is made whole again by unwinding the merger of the Plan with the Rogers consolidated plan, the question which remains is whether the Plan is viable. The Superintendent found that there were still two employees who were accruing pension credits under the Premier Plan so that the Plan did not fall within the definition of "termination" under the PBSA. This is a conclusion of fact coupled with a conclusion of mixed fact and law, neither of which is unreasonable. The Superintendent then considered the proposed amendment to open the Premier Plan to new employees of Cable Inc., which she found was the "Company" as defined in the Plan and the "employer" as defined in the PBSA. Once again, the Superintendent could reasonably come to this conclusion on the basis of the material before her. Finally, the Superintendent found that

reopening the Plan was not acting contrary to the terms of the Plan, the Trust or the PBSA. Further, she found that the reopening of the Plan satisfied the general purposes of the Plan and that the Plan met all solvency and funding standards.

[52] In short, the Superintendent found that the objects of the Plan and of the PBSA were better served by using the actuarial surplus in the Plan to fund pensions for members of the Plan, including new members, than by providing a windfall to the current members of the Plan at the cost of terminating a viable pension plan. There can be no doubt that the distribution of the actuarial surplus (which stood at $11,000,000 in 2002) to the limited number of members of the Premier Plan would provide each of them with a tidy sum. But, as the Superintendent pointed out in her Decision: “The fact that the Plan’s fund might be wound up following a termination and the Members receive surplus is not a sufficient basis for me to decide to terminate the Plan.”: see Appeal Book, p.50.

[53] Once the Superintendent decided to allow the amendments to the Plan, the question of terminating the Plan had to be assessed in light of the existence of a viable Plan with a growing membership. The Superintendent canvassed the arguments raised with respect to subsection 29(2) of the PBSA and found that only paragraph 29(2)(*a*) could apply, but that it did not because Roger’s cessation of contributions was a contribution holiday which was authorized by the PBSA, did not threaten the solvency of the Plan and did not frustrate the purposes of the Plan. The Supreme Court found that the interpretation of the PBSA and the associated regulations fell within the Superintendent’s interpretative mandate. There is nothing unreasonable about her conclusions which would call for this Court’s intervention.

[54] The same is true of the Superintendent's conclusions with respect to the application of section 11 of the PBSA as well as her disposition of the Employees' application for replacement of the administrator of the Plan.

[55] Finally, there is the issue of whether the Superintendent must act when plan members ask her to do so. Assuming that this is the case, it does not follow that the action which the Superintendent takes in response to such a request must necessarily be that sought by the plan members. As the Supreme Court pointed out, the Superintendent is bound to exercise her discretion with a view to the remedial purposes of the PBSA. In this case, the Superintendent found that the amendments to the Plan satisfied the objectives of the Plan and of the PBSA. In those circumstances, it is difficult to see how winding up the Plan and the Trust would represent a more faithful adherence to the objectives of the PBSA than the measures approved by the Superintendent.

[56] It is worth keeping in mind that the Employees did not invoke the Superintendent's assistance at any point prior to asking her to terminate the Plan. Going forward, the Employees will be able to invoke the Superintendent's supervisory authority should Cable Inc. abuse its position as administrator or its rights as the employer. To that extent, Rogers' conduct, in the absence of regulatory supervision, is not a predictor of its conduct in the context of what will undoubtedly be attentive regulatory supervision.

[57] That said, the only remaining issue is whether the Superintendent is precluded from doing what she did by the application of the doctrine of *res judicata*. The Supreme Court identified the issues where *res judicata* was a factor in its reasons at paragraph 40:

> … Rogers conceded that the 1992 amendments entitling it to any surplus on termination were 'invalid as against the [members]' (*Buschau #1*, at para. 38). The Court of Appeal found (*Buschau #1*, at paras. 63 and 66) that the merger was incomplete as regards the Plan and that the members retained rights that were distinct from those of members of the other plans that were merged in the RCI Plan. *Buschau #1* is now binding on Rogers. Although the members do not have a specific interest in the surplus before termination, the findings in *Buschau #1* limit Rogers right to use it.

[58] In addition, the Supreme Court also referred to Loo J.'s observation that the Court of Appeal's conclusion in *Buschau #1* prevented Rogers from using its power of amendment to reopen it to new members. It noted that the British Columbia Court of Appeal appears to have accepted this finding in *Buschau #2* when it held that Rogers could not, in good faith, exercise its right to reopen the Plan to new members, so that such new members could share in the benefit of the Premier Trust, including the surplus:

> … A similar result would ensue: because of its breach of trust or obligations of good faith, the employer would be required to account to the existing Members as if the Plan had not been re-opened.
>
> *Buschau #2*, paragraph 61

[59] This led the majority of the Supreme Court to say:

> If Rogers could amend the merged RCI plan to open it to new members, it is questionable whether the Premier Trust fund could be used to fund benefits owed to new members

> without infringing the judgment that is binding on Rogers. Using the Premier Trust to fund benefits for new members or to fund benefits owed to members of a merged plan have been considered analogous by the courts below. I do not need to give a definite answer on the possibility of amending the Plan because, except to the extent that Rogers is bound by *Buschau #1*, the matter is best left to the Superintendent.
>
> *Rogers*, paragraph 44

[60] While the majority of the Supreme Court raised the issue of Rogers' power to amend the Plan to reopen it to new members, it did not decide the question, preferring it to leave it to the Superintendent, subject only to the application of *res judicata.*

[61] It is common ground that Rogers could not amend the Plan to gain control of the surplus. In fact, Rogers returned amounts which it had taken from the Trust prior to judgment being pronounced in *Buschau # 1*: see *Rogers* at paragraph 68. Similarly, it is not disputed that the purported merger of the Premier Plan with other Rogers' plans did not affect the Trust. Rogers' conduct following the decision of the Supreme Court of Canada was premised on the continuing existence of the Premier Trust. Furthermore, it is not contentious that members of the Premier Plan had rights *vis-à-vis* the Premier Trust that other members of the consolidated plan (the RCI plan) did not have. This simply flows from the fact that the object of the Premier Trust was to fund the benefits to be provided to members of the Premier Plan; those who were not members of the Premier Plan could have no equitable or legal claim against the assets of the Premier Trust, nor could they gain such rights by virtue of their membership in a consolidated plan: see *Buschau* #2 at paragraph 61.

[62] The only point of significance is whether either *Buschau #1* or *Buschau #2* precluded Rogers from amending the Plan to revoke the merger with the consolidated plan and to reopen the plan to new employees of Cable Inc.

[63] It is not, in my view, necessary to conduct a lengthy exegesis of the reasons of the British Columbia Court of Appeal in *Buschau #1* and *Buschau #2* in order to answer this question. The only form of amendment in issue before that Court was an amendment which would result in benefits being paid to members of the Rogers consolidated plan from the assets of the Premier Trust. In *Buschau* #1, the British Columbia Court of Appeal described Rogers' argument as follows:

> 65 Mr. Nathanson draws a distinction between a merger of pension plans - the validity of which is a matter of contract - and a merger of pension trusts - a matter of trust law. He contends that the merger of the plans in this case was permitted by the broad powers of amendment reserved by Premier in the predecessor plans, including the Premier Plan; and that as a result, the plaintiffs are now members of the RCI Plan *and will on its termination be entitled to share in the surplus with all other members of the RCI Plan*. The Premier trust, on the other hand, was not merged, in Mr. Nathanson's submission. Yet at the same time, he says, the Premier Fund, mingled with the funds of the other four plans, *is now held for the benefit of all 4,300 members of the RCI Plan*. After all, the employer could simply have added 4,200 new members to the Premier Plan pursuant to its express powers to do so. In Mr. Nathanson's argument, the result of the merger is similar. (emphasis added)

[64] This was the only argument on merger, which was before the British Columbia Court of Appeal and, as Bastarache J. noted, this is what the British Columbia Court of Appeal rejected. In *Buschau* #2, the British Columbia Court of Appeal's reasoning was premised on the notion that the members of the Premier Plan had certain rights under the rule in *Saunders v. Vautier*, which could not be defeated by the merger implemented by Rogers. Once the premise that the rule in *Saunders v.*

Vautier created rights in an unrealized actuarial surplus was set aside, the question of Rogers' right to reopen the Plan remained an open question. This is essentially the point made by Bastarache J. in his concurring reasons. While the majority did not adopt Bastarache J.'s reasoning, it did not reject it. In my view, it is sound and ought to be applied to this case.

[65] Consequently, I conclude that the application of *res judicata* does not prevent the Superintendent from allowing Rogers/Cable Inc. to revoke the merger of the Premier Plan into the consolidated Rogers plan and to reopen the Premier Plan to new employees of Cable Inc.

CONCLUSION

[66] As a result, I would allow the appeal with costs here and below and set aside the order of the applications judge.

"J.D. Denis Pelletier"
J.A.

"I agree.
Marc Noël J.A."

"I agree.
M. Nadon J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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