

Rogers Communications Inc. v. Buschau

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Another chapter has been added to saga of the long-running surplus dispute between Rogers Communications Inc. and the members and former members of the pension plan that had been established by Premier Communications Ltd., by the decision of the Federal Court of Appeal released on September 9 of this year.

Rogers acquired the rights and obligations of the employer under the Premier Plan with its acquisition of Premier Communications Ltd. in 1980. Rogers sought to utilize the surplus in the plan, beginning with a withdrawal of surplus in 1985 (subsequently repaid), contribution holidays, and an attempted plan merger in 1992, at which time the actuarial surplus amounted to \$11 million. In turn, the members and former members of the plan have sought to set aside the merger, have the plan wound up and the surplus paid to them.

The litigation first went up to the Supreme Court of Canada, then back down to the Superintendent of Financial Institutions in British Columbia and from there to the Federal Court of Appeal.

In the result, Rogers failed in its attempt merge the trust that had been established for the Premier Plan; however, the members also failed to have the Plan wound up and the surplus distributed. In the most recent go around, the B.C. Superintendent accepted Rogers' revocation of the proposed merger, refused to wind up the Plan, and accepted a plan amendment adding a new class of members. The Federal Court of Appeal agreed that Superintendent exercised her jurisdiction properly, and awarded costs in the proceedings in the trial court and the Court of Appeal against the members.

What we have learned from the Buschau decisions:

- The standard of review of the decisions of a pension regulatory authority or tribunal is reasonableness in matters of fact, the exercise of discretion, and as to interpretation of the pension statute.
- Members cannot force a wind up of a pension plan by virtue of the common law rule in *Saunders v. Vautier*.
- Trust law applies to mergers of pension trusts. The merger of pension plans does not affect the existence of separate pension trusts.
- Closed plans may be reopened to new members where the plan documents permit even if the employer's purpose of adding new members is to utilize the surplus in the plan. Member's rights have not been violated nor it bad faith on the part of the employer to do so since members' rights are to the pension that is promised, not to the surplus while the plan is ongoing.
- The Superintendent is obliged to act where members request his or her intervention; but it is the decision of the Superintendent as to what action to take.
- It is within the discretion of the Superintendent to determine whether a plan should be terminated but that discretion must be exercised within the purview of the legislation.
 - A plan should not be wound up only in order to confer surplus upon the members.
 - A plan should not be wound up only because of a cessation of contributions where the employer is taking contribution holidays with the actuarial surplus.
 - In deciding whether to terminate a plan, the Superintendent must take the views of the employer into account.
- Pension benefits legislation and the objects of pension plans favour the continuation of pension plans.

The foregoing principles will undoubtedly be re-litigated in other jurisdictions and with other facts. But they stand as useful points of reference for the time being.

The actual end result in *Buschau*, if indeed the parties have arrived at the end result, is reminiscent of the strategy in Ontario in the 1990's in Ontario. At that time, regulatory consent to plan mergers was difficult or impossible to obtain. The end run was to add to a plan with surplus new members for future service from another plan with a deficit, then at some later time when the funding was fairly flat between the plans, merge the plans. This strategy is obviously offensive to the plan member side of the continuing struggle for surplus, and is obviously artificial from the employers' side. It is to be hoped that the amendments to pension legislation that are to be introduced in various jurisdictions clearly address surplus issues to preclude a repetition of the *Buschau* litigation. The costs of such litigation are clearly an issue, for both parties, and particularly for the members and their counsel.

Leave to appeal the decision of the September, 2009 decision of the Federal Court of Appeal has been applied for to the Supreme Court of Canada.

This article is intended for general information purposes only and should not be relied upon as legal advice.

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