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Highlights

Buschau v. Rogers Communications Inc. addresses whether pension plan members can invoke trust law to terminate a pension plan in order to access a pension fund surplus.

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Supreme Court Considers Trust Law in the Pension Context

On June 22, 2006, the Supreme Court of Canada (“SCC”) released its decision in *Buschau v. Rogers Communications Inc.* (“Buschau”). The decision, among other things, addresses whether pension plan members can invoke trust law to terminate a pension plan in order to access pension fund surplus.

Background

The Respondents were members of a non-contributory defined benefit pension plan established in 1974 and subsequently acquired by Rogers Communications Inc. (“RCI”) in 1980. The plan document specified that surplus would be distributed to members in the event of plan termination. In 1981, the plan was amended so that any surplus on termination would instead revert to RCI. The plan was in a surplus position when it was closed to future members in 1984. In 1992, RCI merged the plan retroactively with other RCI pension plans and had attempted to re-open the plan to new members. In an attempt to access the surplus, the plan members pursued an action to terminate the pension trust and have surplus distributed directly to them relying on the common-law trust doctrine of *Saunders v. Vautier*. The doctrine dictates that terms of a trust can be varied or the trust can be terminated if all the beneficiaries of the trust, being of full legal capacity, consent. Ultimately, the case made its way to the SCC.

The Decision

The SCC disallowed the plan members’ attempt to acquire the surplus holding that in the heavily regulated pension environment, there are extensive rules for termination of plans and distribution of assets. The common law rule in *Saunders v. Vautier* is applicable in a completely different environment and not necessarily appropriate in the complex of rights and obligations between employers and employees. The Court summarized by saying that “the members wanted the Trust

fund to be collapsed and distributed directly to them. A trust can in fact be automatically terminated and distributed in this way pursuant to the rule in *Saunders v. Vautier*...however, such a distribution does not accord with the terms of the Plan and with the spirit of the social scheme, the purpose of which is to provide periodic payments during members' lifetimes, not to distribute the capital in a lump sum."

The SCC was clear that under the PBSA, the Superintendent is empowered to terminate a plan on specific statutory grounds. Prior to plan termination, surplus is an actuarial concept only and while the plan is in operation, individuals entitled to the surplus assets do not have a specific interest in them. The Court goes on to say that "since pension plans are usually established for indefinite terms, issues relating to surpluses are not usually relevant to plan members while the plan is in operation. The right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan."

In other words, the members lacked the legal authority to apply to terminate the plan, both in terms of their right to the surplus and because only the Superintendent of pensions has that legislated authority under the PBSA.

Hewitt Commentary

Previous Pension Decisions – The Employers' Perspective

In their past pension rulings, the SCC seemingly did not consider the unique nature of the pension environment and the employment context in which pensions are provided. In part, this may have been influenced by the positive financial environment in which they considered their decisions.

*In 1994, the SCC considered the issue of surplus entitlement in *Schmidt v. Air Products Canada Ltd.* ("Schmidt") and ruled that if a pension plan is funded through a trust, then it is subject to all traditional principles of trust law. The terms of the pension plan are relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust. The Schmidt decision appeared to expand the role of trust law in the pension context which came as a surprise to plan sponsors who had traditionally relied on the pension plan text or contract for the rules governing the pension promise.*

*In 2004 the SCC ruled on surplus distribution on a partial pension plan wind up in *Monsanto Canada Inc. v. Ontario Superintendent of Financial Services* ("Monsanto"). In that case, the SCC held that Ontario's pension legislation requires an immediate distribution of surplus on a partial wind up. Given the recent downturn in investment returns and funding deficits of many defined benefit pension plans, the Monsanto decision proved troubling from a funding perspective. Payouts when the plan had been in a positive financial situation frustrated plan sponsors now facing funding deficits.*

Given the historical context of the SCC's pension decisions, Buschau is reassuring in that it recognizes the "special" nature of pension trusts and the unique environment in which pensions are created. Rather than taking a strict legal interpretation of a common-law doctrine or strict interpretation of a statutory provision, it recognizes the "reasonable contractual expectations

(i.e. the plan document) of the parties”. Buschau recognizes that introducing the rule in Saunders v. Vautier in the context of the private pension system would “disrupt the fair and delicate balance between the interests of the employer and employees.”

The Duty of Good Faith

Despite the fact that Buschau offers positive news to plan sponsors, there are a couple of points worth noting. The lower court decision addressed the employer’s obligation to act in “good faith” in a pension plan setting. The SCC raises this issue but goes on to say that “what is permitted, and what is abusive will have to be determined in future proceedings according to the standards set out in the PBSA.” The legislation is clear that where there is a material conflict of interest between the employer’s role as plan administrator and their role in any other capacity, the employer must act in the best interest of the plan members – an important caution for plan sponsors’ to bear in mind.

Also of note is the fact that the SCC explicitly states that they do not exclude the possibility that “the common law (trust) rule might apply to very small pension plans, the kind offered to a few officers of a corporation, but in general, the fit is wrong.” Although the message in Buschau appears encouraging for plan sponsors overall, the SCC has left room for debate in some areas, which should keep good governance practices and careful administration at top of the plan sponsor agenda.

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