Date: 20080911

Docket: T-898-07

Citation: 2008 FC 1023

Ottawa, Ontario, September 11, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

**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,
CLIFFORD 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

Applicants

and

ATTORNEY GENERAL OF CANADA and ROGERS COMMUNICATIONS INCORPORATED

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application by the above named applicants under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 for judicial review of a decision dated April 27, 2007 by the Acting Superintendent of the Office of the Superintendent of Financial Institutions (the Superintendent) which refused the applicants' request dated June 30, 2006 to terminate the Premier Pension Plan (the Plan) pursuant to the *Pension Benefits Standards Act 1985*, RSC 1985 c. 32 (2nd Supp), (the Act).

[2] The applicants requested the following relief from the Court:

1. An order quashing the decision of the Superintendent;

2. An order directing the Superintendent not to approve the amendment to open the Premier Pension Plan up to new members;

3. An order directing the Superintendent to issue an order that the Premier Pension Plan is terminated;

4. In the alternative to (3), an order remitting this matter to the Superintendent for re-determination subject to such directions that this Court considers appropriate and just;

5. An order for costs of the proceedings on a substantial indemnity scale.

Background

[3] The Premier Pension Plan (the Plan) was established in 1974 for the employees of Premier Cablevision Ltd. The successor to the original employer is currently Rogers Communications Inc. (Rogers Inc.). The Plan provided that upon termination, the balance of assets remaining in the Plan's trust fund would be distributed amongst the remaining members, after all liabilities to retired members had been satisfied.

[4] Due to a high actuarial surplus in 1983, Rogers Inc. did not make current service contributions in 1984 or thereafter taking what is referred to as contribution holidays. Beginning in 1982, the then actuary for the Plan, Crawford Laing, recommended to Rogers Inc. that it use the emerging surplus to increase pension benefits or provide bonus pensions for Plan members. Rogers

Inc. chose not to accept the recommendations. In 1984, Rogers Inc. closed the Plan to new employees by simple amendment; existing employees continued to accrue benefits under the Plan in respect of their continued service.

[5] It appears that on July 11, 1984, Rogers Inc. wrote to the then trustee, Canada Trust, requesting that some of the surplus in the Plan be paid out to Rogers Inc. The amount requested was $245,646.40. In response, Canada Trust informed Rogers Inc. that it could not do so without a legal opinion from Rogers Inc.'s counsel indicating that the contributions were made in error and that there was no particular problem under trust law in allowing the repayment of the contributions made in error. It appears that on August 31, 1984, the then trustee was replaced with a new trustee, National Trust. In or about October 1984, it appears that Rogers Inc. also replaced the actuary Mr. Laing with a new actuary, T.I. Benefits. It appears that in March 1985, T.I. Benefits recommended that a balance of the surplus be refunded to Rogers Inc. Rogers Inc. then made a request to the new trustee for a refund of $968,285. National Trust appears to have paid the surplus to Rogers Inc. without requiring a legal opinion.

[6] In 1992, Rogers Inc. amended the plan to merge it with four other pension plans in the Rogers Inc. pension plan. The applicants claimed that at the time, the Plan had a significant surplus, while several of the other merged pension plans were in a deficit position. The merged plan unlike the Premier Pension Plan had a provision that allowed for the removal of surplus by Rogers Inc. on an ongoing basis.

[7] In 1995, the applicants brought an action alleging that Rogers Inc. had (a) acted in bad faith for failing to increase pension benefits for members of the Plan, (b) improperly removed Plan surplus in 1985, (c) improperly taken contribution holidays, and (d) improperly merged the Plan with other Rogers Inc. plans. The action and its resulting court decisions are referred to as *Buschau No. 1* (*Buschau* v. *Rogers Communications Inc.* 2001 BCCA 16, (2001), 83 B.C.L.R. (3d) 261). Just before going to trial in *Buschau No. 1,* Rogers Inc. paid back the surplus removed from the Plan. The amount was paid back under the new plan that existed since the merger. Under Article 20.4(d) of the new plan, Rogers Inc. was entitled to remove surplus from the ongoing pension plan. Rogers Inc. appears to have admitted thereafter that Article 20.4(d) of the new plan was invalid as against members of the Premier Pension Plan.

[8] The trial judge in *Buschau No. 1* found that the contribution holidays were legal, that the repayment of the withdrawal was correctly repaid to the trustee with interest and that the merger was legal because the Plan's trust continued to exist despite the merger. As such, the trial level court dismissed the action. The applicants appealed the decision.

[9] The Court of Appeal agreed with the trial level court in *Buschau No. 1*. The appeal was dismissed except to the extent of ordering that the merger of the Plan with the other Rogers Inc.'s plans did not affect the existence of the Plan trust as a separate trust for which separate accounting was necessary, and in respect of which the members of the Plan could undertake proceedings to terminate the Plan under either the rule in *Saunders* v. *Vautier* (1841) 4 Beav. 115, 49 E.R. 282,

aff'd (1841), Cr. & Ph. 240, 41 E.R. 482 or the *Trust and Settlement Variation Act*, R.S.B.C. 1996, c. 463, to the extent either were applicable. There was no further appeal of this decision.

[10] In 2001, the applicants brought a petition to terminate the Plan or the surplus portion of the Plan pursuant to the rule in *Saunders* v. *Vautier*. The applicants alleged that at this point, the members of the Plan no longer worked for Rogers Inc., they were either retired or deferred vested and wanted to be divorced from Rogers Inc. For its part, Rogers Inc. appears to have argued in these proceedings that they were considering reopening the Plan to new members and thus termination was not appropriate. This proceeding and its relevant court decisions are referred to as *Buschau No. 2* (*Buschau* v. *Rogers Communications Inc.*, 2004 BCCA 282, (2004), 27 B.C.L.R. (4th) 17).

[11] At the trial level, the Court rejected Rogers Inc.'s re-opening argument and held that the Court of Appeal in *Buschau No. 1* had determined that the rule in *Saunders* v. *Vautier* applied to the termination of pension trusts. This decision was appealed.

[12] The Court of Appeal held that although the trial level decision was erroneous, the rule in *Saunders* v. *Vautier* did apply to pension trusts and an amendment to reopen the Plan to new members would interfere with the members' rights to invoke the rule in *Saunders* v. *Vautier*. This decision was granted leave to appeal to the Supreme Court of Canada.

[13] In its decision, the Supreme Court held that the rule in *Saunders* v. *Vautier* did not apply to pension trusts and the members could not terminate the Plan's trust, nor could they terminate the

Plan according to the rule in *Saunders* v. *Vautier*. The majority of the Supreme Court found that the Superintendent of the Office of the Superintendent of Financial Institutions (OSFI) had the discretion to terminate the Plan.

[14] On June 30, 2006, the applicants applied to the Superintendent to terminate the Plan pursuant to the Act. Rogers Inc. opposed this request and made its own request to have the Superintendent declare that reopening the Plan was not contrary to the Act or the terms of the Plan. Both parties made submissions to the Superintendent. In a decision dated April 27, 2007, the Superintendent rejected the applicants' request to terminate. This is the judicial review of the Superintendent's decision.

Superintendent's Decision

[15] The Superintendent began by noting that both parties had presented submissions and requests. The applicants requested that the Superintendent either consider the Plan already terminated, terminate the Plan under section 29 of the Act, or direct Rogers Inc. to terminate the plan under section 11 of the Act. Moreover, they requested that after termination, the present administrator (Rogers Inc.) would be replaced with Albert Poy and there would be a wind-up of the Plan allowing the pension fund to be used to buy annuities to cover existing pension benefits and the balance of the surplus to be distributed to the members in cash. For their part, the respondents sought assurance that revocation of the merger and the opening of the Plan to new members did not contravene the terms of the Plan or the Act.

[16] The Superintendent's ultimate decision on both requests read as follows:

> After careful consideration of the submissions, I have decided that the decision by [Rogers Inc.] to revoke the merger of the Plan with the RCI Plan and the reopening of the Plan by [Rogers 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 that employer is continuing to provide the promised benefits and complying with solvency requirements.

[17] With regards to the amendments and reopening of the Plan, the Superintendent noted the following:

- While the Plan has been closed to new membership since 1984, no submissions were made that the amendment closing the Plan was irrevocable;
- The Plan (including the Trust Agreement) allows Rogers Inc. to amend the Plan and Trust Agreement, but does not provide a right of amendment to members of the Plan; and
- Amendments could not provide that the fund be used for or diverted to purposes other than for the exclusive benefit of such persons as may be designated in the Plan as amended from time to time.

[18] The Superintendent was satisfied that the general purpose of the Plan was continuing and that the Plan met the prescribed tests and standards for funding. The Superintendent also noted that the decision to reopen was made in conjunction with a decision to close another pension plan, but that there was no merger involved. The existing rights or entitlements of the members of the Plan

remained intact. The Superintendent found that Rogers Inc. was not acting contrary to safe and sound financial or business practices and was not jeopardizing the pension benefits of the members and thus not contravening the Act, or the terms of the Plan.

[19] With regards to the request for termination, the Superintendent noted that as the employer was a key participant in the plan, their position must be considered. The Superintendent rejected the applicants' request that the Plan be considered terminated. The Superintendent considered the definition of "termination" under the Act and noted that there remained two members being credited benefits and that there were potential new members upon reopening. The Superintendent also refused to terminate the Plan under subsection 29(2) of the Act. The Superintendent stated that as the Plan meets the prescribed tests and standards for solvency, termination under paragraph 29(2)(c) was not applicable. Moreover, the Superintendent was also of the view that the business operations of Premier Cable Vision Ltd. were being continued by the current employer and thus paragraph 29(2)(b) did not apply. Finally, the Superintendent considered whether she should exercise her discretion to terminate under paragraph 29(2)(a) which allows termination where there is any suspension or cessation of employer contributions in respect of all or part of the plan members. The Superintendent was of the opinion that the suspension of employer contributions was the result of contribution holidays taken in accordance with the Act. The Superintendent noted that termination of the Plan would not result in the protection of the Plan's purpose or the pension benefits of all members of the Plan. The Superintendent further noted that the employer opposed termination and that a possible surplus to the current members of the Plan was not a sufficient basis for termination.

The Superintendent stated: “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.”

[20] In closing, the Superintendent found that Rogers Inc. was not currently administering the Plan and fund in contravention of the terms of the Plan (and trust) or the Act and thus, refused the request to replace the administrator.

Issues

[21] The applicants submitted the following issues for consideration:

1. What is the appropriate standard of review for a decision of the Superintendent?
2. Does the decision in *Buschau No. 1* prevent the reopening of the Plan?
3. Did the Superintendent err in law in not terminating the Plan under section 29 of the Act and not properly applying the provisions of subsection 29(2) of the Act?
4. Did the Superintendent err in law by misinterpreting the definition of termination?
5. Did the Superintendent fetter her discretion by stating that termination is an extreme measure?
6. Did the Superintendent err in law in failing to recognize that RCI is in a conflict of interest?

[22] I would rephrase the 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?

Applicants' Written Submissions

[23] The applicants submitted that the appropriate standard of review for all issues raised is one of correctness, but regardless of the appropriate standard, the Superintendent's decision was so unreasonable that the Court must intervene. The applicants submitted that the Supreme Court of Canada's standard of review analysis in *Monsanto Canada Inc.* v. *Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] S.C.J. No. 51, was applicable to the present case. It was submitted that although there is no statutory right of appeal from the Superintendent's decision,

there is also no privative clause to insulate these decisions. Where there is no privative clause in the Act and no right of appeal, less deference is warranted (*Tenaska Marketing Canada, a Division of TMV Corp.* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 583, [2006] F.C.J. No. 751 (F.C.T.D.) at paragraph 20). With regards to the nature of the problem, it was submitted that issues are questions of pure law and jurisdiction and thus no deference is owed. The applicants submitted that the Court's relative expertise on the issues is greater than that of the Superintendent's. The applicants noted that the Superintendent was not a lawyer. Moreover, the applicants submitted that OSFI is a multi-disciplinary regulator with no specific expertise in pensions (*Monsanto* above at paragraph 10). The breadth of the Superintendent's authority, being very broad and under several federal acts, belies any specific expertise in pension matters. Finally, with regards to the purpose of the legislation, the applicants submitted that it militates against deference. The applicants argued that the decision in this matter is hardly polycentric as it relates directly to the rights and interests of the class beneficiaries *vis a vis* the employer.

[24] The applicants submitted that the Federal Court has reviewed the Superintendent of OSFI's decision in two previous cases. In *Syndicat des Journalistes de Radio-Canada* v. *Canadian Broadcasting Corp.*, [1997] F.C.J. No. 551 (F.C.T.D.), the Court did not expressly consider the standard of review, but in its decision gave no deference to the Superintendent's interpretation of the relevant statute. Moreover, in *Cousins, Keith and McNally* v. *AG Canada and Marine Atlantic Inc*., 2007 FC 469, [2007] F.C.J. No. 635, the Court found that the appropriate standard of review was one of correctness.

[25] The applicants' first argument was that in considering the issue of the reopening, the Superintendent failed to consider the applicants' submissions on the principles of *res judicata* and the issue of estoppel. It was submitted that the Supreme Court in *Buschau No. 2* noted that Rogers Inc. was bound by *Buschau No. 1*, which prevented the reopening of Plan. The applicants argued that the Supreme Court in *Buschau No. 2* pointed out that:

- *Buschau No. 1* gave members of the Plan a distinct right to the surplus and prevented Rogers from using its power to amend to reopen to new members;
- *Buschau No. 1* only granted the members of the Plan the ability to terminate on the basis that the trust was closed and no further beneficiaries would be added; and
- If the trust could be opened to new members, it could not be used to fund benefits owed to new members without infringing *Buschau No. 1*.

[26] The applicants' second argument was that as the Plan could not be reopened, the Superintendent erred in deciding not to use her discretion to terminate under paragraph 29(2)(a). As expressed by the Supreme Court of Canada's decision in *Buschau No. 2*, the Superintendent's power under paragraph 29(2)(a) becomes almost a duty when employees ask them to act; this discretion must be exercised in conformity with the remedial purpose of the Act. The applicants also submitted that the Superintendent erred by turning her mind to irrelevant considerations like the solvency of the Plan and the employer's views on termination. Moreover, it was submitted that the Superintendent failed to consider relevant facts such as Rogers Inc.'s past conduct as it relates to the forward-looking question as to whether there is any legitimate reason for keeping the Plan. Failure to take into account a highly relevant consideration is just as erroneous as the improper importation

of irrelevant considerations (*Oakwood Developments* v. *St. Francois Xavier Rural Municipality*, [1985] 2 SCR 164).

[27] The third issue raised by the applicants was that the Superintendent erred in interpreting "termination" under the Act. It was submitted that the Superintendent provided two reasons as to why termination was not met in the present case: (1) two members of the 147 still were being credited with benefits, and (2) Rogers Inc. had chosen to reopen the Plan to new employees. The applicants noted that the definition of termination under subsection 2(1) of the Act defines termination as "the cessation of crediting of benefits to plan members generally; and includes the situations described in subsections 29(1) and (2)." It was submitted that the Superintendent failed to give meaning to the word "generally". The inclusion of this word means that the crediting of benefits under the Plan did not have to be completely stopped. Thus, the fact that two employees (one on disability since 1999 and one currently working for Rogers Wireless) were still receiving benefits under the Plan should not have led to a finding that the definition of termination was not met. Moreover, the applicants noted that all members of the Plan, including the two referred to, have consented to its termination.

[28] The applicants' fourth argument was that the Superintendent fettered her discretion by stating that termination is an extreme measure. The existence of discretion implies the absence of a rule dictating the result in each case. The applicants noted that the Act is the guiding principle and no where in the Act does it state that termination is an extreme measure. The Superintendent's comments are an irrelevant consideration and as a result, she fettered her discretion.

[29] And finally, the applicants submitted that the Superintendent erred in refusing to replace Rogers Inc. as administrator as they were clearly in a conflict of interest. It was noted that pursuant to section 10 of the Act, where an employer becomes involved in a material conflict of interest between its role as an administrator and as an employer, the employer must act in the best interests of the members. Rogers Inc.'s failure to terminate the Plan is evidence of a material conflict of interest, and as such, Rogers Inc. is in breach of its fiduciary and statutory obligations to the applicants as members of the Plan.

Respondents' Written Submissions

[30] The respondents began their submissions on the appropriate standard of review by distinguishing this case from *Monsanto* above. It was submitted that the decision in *Monsanto* above, was a review of the Ontario Financial Services Tribunal which reviews decisions of the provincial superintendent, and that it was the Tribunal in that case that had no specialized policy or discretionary role. The applicants stated that by contrast, the federal Superintendent is a body directly charged with supervisory, reporting and policy-advising functions as per the Act. Moreover, the issues in *Monsanto* were pure law and did not involve the balancing of interest, whereas the issues in the present case are mixed fact and law and involved the exercise of discretion.

[31] The respondents submitted that apart from the *res judicata* issue on reopening, the appropriate standard of review for the remaining questions is one of reasonableness. The respondents submitted that the absence of a right of appeal is to be considered a neutral factor

(*Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. No. 46). The respondent submitted that apart from the interpretation of *Buschau No. 1*, the remaining issues concern the exercise of the Superintendent's discretion and engage issues of mixed law and fact. Discretionary decisions attract a high level of deference (*Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817).With regards to the expertise of the Superintendent relative to that of the Court, the respondents submitted deference is owed. The concept of expertise embraces more than knowledge and experience, but also the policy aspect of the decision-maker's role. The focus should be on the powers and the role of the tribunal at issue, rather than the individual skills or resume of the individual. Special procedures designed by the legislature may indicate that it intended the decision-maker in question to apply an expertise not held by the courts (*Dr. Q.* v. *College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] S.C.J. No. 18). And finally, with regards to the purpose of the statutory scheme, these ensure a balance between employee and employer interests, and the need to protect and safeguard the rights of members, former members and future members.

[32] With regards to the decision in *Buschau No. 1*, the respondents acknowledged that they are bound by it, but submitted that it does not stand for the proposition alleged by the applicants. The respondents submitted that in making their argument, the applicants confuse the judgment of the British Columbia courts in *Buschau No. 2* with that of the judgment of the Court of Appeal in *Buschau No. 1* and erroneously construe the judgment of the Supreme Court of Canada. The respondents submitted that *Buschau No. 1* held:

- The merger between the Plan and other pension plans was valid as there was no merger of the respective trusts;
- Although the members of the Plan did not have specific interest in the surplus before termination, Rogers Inc. had no right to that surplus, and
- Members of the Plan were at liberty to undertake proceedings to terminate based on the rule in *Saunders* v. *Vautier* or the *Trust and Settlement Act* of British Columbia, to the extent either may be applicable.

[33] The respondents submitted that it was the Court of Appeal in *Buschau No. 2* that made an order providing that RCI could not amend the Plan to admit new members, but this order was then set aside by the Supreme Court of Canada. Moreover, while Justice Deschamps did discuss the reopening of the Plan at paragraph 41 of the Supreme Court judgment, there was no definitive finding on the issue. The Court stated at paragraph 41, "However, the possibility of reopening the Plan is problematic and has been commented on by the courts below." The respondents submitted that the Supreme Court did not decide the issue of reopening, but instead left it to the Superintendent. It was submitted that the Superintendent's decision that reopening the Plan was not in contravention of the Plan or the Act adhered to *Buschau No. 1* as reopening does not affect any of the applicants' trust rights.

[34] The respondents submitted that the Superintendent did not err in refusing to terminate the Plan pursuant to section 29. It was submitted that as the applicants' argument on this issue rests on the fundamental and erroneous premise that Rogers Inc. had no right to reopen the Plan. With

regards to the applicants' argument that the Superintendent erroneously considered solvency during her consideration of paragraph 29(2)(a), the respondents submitted that the relevant section of the Superintendent's decision must be read in light of her decision to allow the amendment to reopen the Plan. It was argued that the Superintendent's comments on solvency were appropriate as she was refusing to terminate under paragraph 29(2)(a) because she had already approved the reopening which involved considering the issue of solvency. The respondents also noted that the Supreme Court of Canada in *Buschau No. 2* stated at paragraph 53 that "[d]etermining the validity of a reason given for not terminating a plan lies with the Superintendent and properly falls within [his or her] s. 29(2)(a) power." The respondents submitted that the same is true of the Superintendent's consideration of the views of the employer. While the employer's views are not listed as a factor to consider under paragraph 29(2)(a), the legislation gives the Superintendent discretion to consider relevant factors in making a decision. As to the failure of the Superintendent to consider the past conduct of Rogers Inc., the respondents submitted that it was fully set out in the applicants' submissions to the Superintendent and therefore was fully considered. And finally, the respondents submitted that the applicants' argument concerning the remedial purpose of the Act is also dependent on whether the Plan could be reopened.

[35] The respondents submitted that the Superintendent correctly interpreted and applied the legislative definition of termination. It was submitted that a general cessation does not occur until no further benefits are being credited or will be credited under the Plan and that this definition was not met in the present case as two employees were still being credited benefits under the Plan. Moreover, the Superintendent correctly considered the interest of future members of the Plan.

[36] The respondents further submitted that the Superintendent did not fetter her discretion by stating that termination is an extreme measure. Consideration of termination as extreme is consistent with the protection of members in light of the implications of termination on both present and future members of the Plan. In light of the Superintendent's finding that the Plan could be reopened to future members, stating that termination was an extreme measure was in no way a reviewable error on the part of the Superintendent.

[37] And finally, with regards to the alleged conflict of interest, the respondents submitted that section 10 is concerned with the administrator of a plan and concerns a conflict of interests between the plan sponsor, acting in its role as administrator and the members. An employer exercising a power to terminate its pension plan is not acting in its capacity as administrator and thus the section has no application.

Analysis and Decision

[38] **Issue 1**

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

The applicants submitted that the appropriate standard of review for all issues is correctness. The respondents submitted that with the exception of the issue of whether reopening the Plan had already been decided, the remaining issues are to be assessed on a standard of reasonableness.

[39] I think it appropriate to begin with the respondents' argument that the case of *Monsanto*, above is distinguishable from the present case. While I agree with the respondents that the decision maker in *Monsanto*, above was different, I find it necessary to note the decision of this Court in *Cousins*, above wherein Justice Hughes in considering the relevance of *Monsanto* above to the judicial review of a decision of the federal Superintendent stated at paragraph 60:

> I find that there is little difference in the situation in this case and that considered in Monsanto. Neither the Ontario nor federal statutes provide for a privative clause. The nature of the problem is identical. The relative expertise is the same: the federal Superintendent is a general body having duties in respect of several financial institutions just as the Ontario Superintendent does. As earlier discussed, that Court in Buschau equated the functions performed by the Ontario Superintendent with those of the federal Superintendent. The fact that in Ontario a Tribunal reviewed the decision of the Superintendent before it was considered by the Court, is not material. The purpose of the legislation is the same. For the purposes of the issue of section 29(12) before the Court, that is an issue of law.

[40] As such, while the standard of review articulated in *Monsanto* above does not automatically apply to the present case, elements of the Court's pragmatic and functional analysis in *Monsanto* above are nonetheless relevant.

[41] Recently in *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, the Supreme Court of Canada directed courts to replace the outdated pragmatic and functional approach with the following standard of review analysis at paragraph 64:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the

> expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[42] In my opinion, all the enumerated factors are relevant and informative in the present case. There is no privative clause in the Act, nor is there any statutory right of appeal. The absence of a privative clause is understood to be a neutral factor (*Dr. Q* v. *College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226).With regards to the nature of the questions at issue, I am of the opinion that the applicants have raised both questions of pure law and jurisdiction and questions of mixed law and fact. Questions of law and jurisdiction merit less deference, while questions of mixed law and fact attract more deference. Given the number of issues raised, I will have considered the issues individually:

- Issue 2: Whether the Superintendent erred in finding that the issue of reopening had not already been decided in *Buschau No. 1* is a question of pure law.
- Issue 3: Whether the Superintendent erred in finding that reopening was possible and valid is question of mixed law and fact.
- Issue 4: The issue of whether the Superintendent incorrectly interpreted the legislative definition of termination is a question of law; however, if found to have been correctly interpreted, the application of the definition to the case is a question of mixed law and facts.
- Issue 5: The issue of whether the Superintendent erred in refusing to exercise her discretion under subsection 29(2) is a question of mixed law and fact.
- Issue 6: The issue of whether the Superintendent fettered her discretion by stating that termination was an extreme question is a question of jurisdiction.

- Issue 7: The question of whether the Superintendent erred in finding that Rogers Inc. was not in a conflict of interest is a question of mixed law and fact.

[43] In considering the relative expertise of the Commission in comparison to that of the Court, the nature of the question at issue must be kept in mind. I acknowledge the applicants' argument that the expertise of the Court on issues of law and jurisdiction is greater than that of the Superintendent's. Moreover, I note that as found in *Cousins*, above the Superintendent is a general regulatory body that has a number of duties in respect of several financial institutions. While the Superintendent's supervisory role does involve policy considerations, they are very general in nature. However, as expressed by the Supreme Court in *Buschau No. 2*, part of the Superintendent's expertise is deciding and monitoring orderly termination. In my opinion, these factors call for a mid-level of deference for questions of mixed law and fact, and a low level of deference for questions of law and jurisdiction.

[44] With regards to the purpose of the Act, the Supreme Court in *Buschau No. 2* commented at paragraph 19 that the legislation envisions a role for the Superintendent in the control, and supervision of pension plans and in the protection of beneficiaries. Moreover, the Superintendent plays "a key role at the termination and distribution stage" (Supreme Court of Canada in *Buschau No.2*). With regards to the purpose of section 29, this section gives the Superintendent a discretionary power to terminate in whole or in part a pension plan when one of the three listed requirements is met. The Supreme Court of Canada in *Buschau No. 2* at paragraph 20 referred to the role of Superintendent as being a "gatekeeper for the distribution of a pension fund"; in my opinion,

the role assigned to the Superintendent under section 29 is part of their gatekeeper function. I believe that the Superintendent's role under section 29 is somewhat polycentric in nature; in choosing whether or not to exercise their discretion, they must consider a number of factors, including the interests of members of the plan. In my opinion, these considerations call for more deference when reviewing questions of mixed law and fact, especially those involving the discretionary role of the Superintendent under section 29.

[45] In conclusion, I am satisfied that the appropriate standard of review for issues identified as questions of law and jurisdiction is correctness, whereas issues identified as questions of mixed law and jurisdiction is reasonableness.

[46] In *Dunsmuir* above, the Supreme Court of Canada provided the following insight into the standards of reasonableness and correctness:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> […]

> [50] As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[47] I propose to first deal with Issue 5.

[48] **Issue 5**

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

Subsection 29(2) of the Act delegates to the Superintendent the discretion to terminate a pension plan:

> (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 has failed to meet the prescribed tests and standards for solvency in respect of funding referred to in subsection 9(1).

[49] In the present case, the applicants requested that the Superintendent exercise her discretion to terminate the Plan. The Superintendent chose not to do so. The Superintendent quickly dismissed the application of paragraphs 29(2)(b) and (c) and then explored whether she should exercise her discretion to terminate under paragraph 29(2)(a). The Superintendent noted that the cessation of contributions by Rogers Inc. was the result of contribution holidays taken in accordance with the Act and as such, found that the situation did not warrant the use of her discretion to terminate the Plan.

[50] At paragraphs 51 to 57 of the decision in *Buschau No. 2*, the Supreme Court of Canada made lengthy comments on a superintendent's discretion under paragraph 29(2)(a) of the Act:

> […] Since s. 29(2)(c) deals with solvency requirements, s. 29(2)(a) must cover circumstances in which the cessation of contributions does not put the funding of a plan at risk.
>
> Just as mergers of plans and trust funds can properly be approved when the circumstances demonstrate their legitimacy, they can be objected to if they violate statutory, trust or plan provisions. Contribution holidays, although legitimate for funding purposes, can nevertheless be considered illegitimate if they hide an improper refusal to terminate a plan. Determining the validity of a reason given for not terminating a plan lies with the Superintendent and properly falls within his s. 29(2)(a) power.
>
> Most of the facts that the members presented to the courts in their quest to have the rule in Saunders v. Vautier applied could have been submitted to the Superintendent. 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 [page1004] 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 argues that the Superintendent's role is limited to solvency issues. This position disregards his supervisory role with respect to the protection of members and beneficiaries. It also overlooks s. 29(2)(a), which does not mention solvency and which must cover a more diverse set of circumstances than s. 29(2)(c), a provision that deals solely with solvency issues.

The Superintendent's broad power under s. 29(2) is clear. It was given judicial consideration in Huus v. Ontario (Superintendent of Pensions) (2002), 58 O.R. (3d) 380 (C.A.). In that case, the employer intended to consolidate a number of plans in Canada and the United States. It asked the Superintendent for permission to transfer the assets of a plan which had a surplus of $4.2 million. The employees asked, based on a provision of the Ontario Pension Benefits Act, R.S.O. 1990, c. P.8 (s. 69(1)(a)), similar to s. 29(2)(a) of the PBSA, that their pension plan be wound up on the basis that the employer had ceased contributing to the pension plan about 20 years before the consolidation application. The facts are strikingly similar to those in the instant case. The Ontario Court of Appeal affirmed the Divisional Court's decision, stating that due to the failure to consider the employees' request for a partial wind up prior to, or in conjunction with, the decision on the transfer application, the Superintendent's consent to the transfer was unreasonable. The following note from the reasons is worth mentioning (at para. 31, note 5):

> I note in passing that none of the appellants takes the position that a wind-up order can flow only from an application by the employer. Although s. 68 of the [Pension Benefits Act] envisions a wind-up process [page1005] initiated by the employer, s. 69 is not limited in this fashion. Indeed, the steps the Superintendent took in this case, to be discussed below, indicate that the Superintendent regarded it as his duty to deal with a wind-up request from the respondent retirees.

> I agree with the Ontario Court of Appeal, and it is my view that the Superintendent's power 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 purpose of the provisions of the PBSA.
>
> In the case at bar, the contributions ceased in 1984 and the Plan has since been closed. The Superintendent can review all the circumstances and decide whether the facts warrant winding up the part of the RCI Plan that relates to the Plan, which would have the effect of terminating the Trust. He can take into account the findings of fact made in the judgment that are binding on the parties.

[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 Roger 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 finding 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.

[53] Because of my finding on Issue 5, I need not deal with the other issues.

[54] The application for judicial review is therefore allowed and the matter is referred to the Superintendent for re-determination.

[55] The applicants have asked for an award of costs on a solicitor and client basis. I am not prepared to make this award. However, the applicants shall have their costs of the application.

JUDGMENT

[56] **IT IS ORDERED that:**

1. The application for judicial review is allowed and the matter is referred to the Superintendent for re-determination.

2. The applicants shall have their costs of the application.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Pension Benefits Standards Act 1985*, RSC 1985 c. 32 (2nd Supp):

2.(1) In this Act,	2.(1) Les définitions qui suivent s'appliquent à la présente loi.
"termination" , in relation to a pension plan, means the cessation of crediting of benefits to plan members generally, and includes the situations described in subsections 29(1) and (2);	«cessation » Cessation d'un régime de pension dans le cas où il n'est plus porté de droits à prestation en faveur des participants et dans les cas visés par les paragraphes 29(1) et (2).
29.(1) The revocation of registration of a pension plan shall be deemed to constitute termination of the plan.	29.(1) La révocation de l'agrément d'un régime de pension est réputée en constituer la cessation.
(2) The Superintendent may declare the whole or part of a pension plan terminated where	(2) Le surintendant peut, dans les cas suivants, déclarer la cessation totale ou partielle d'un régime de pension :
(a) there is any suspension or cessation of employer contributions in respect of all or part of the plan members;	a) la suspension ou l'arrêt de paiement des cotisations patronales relativement à plusieurs ou à l'ensemble des participants;
(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	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) the Superintendent is of the opinion that the pension plan has failed to meet the prescribed tests and standards for solvency in respect of funding referred to in subsection 9(1).	c) le surintendant est d'avis que le régime n'est pas conforme aux critères et normes de solvabilité réglementaires, relativement à la capitalisation prévue au paragraphe 9(1).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-898-07
STYLE OF CAUSE:	SANDRA BUSCHAU ET AL - and - ATTORNEY GENERAL OF CANADA and ROGERS COMMUNICATIONS INC.
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 11 and 12, 2008
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	September 11, 2008

APPEARANCES:

John Laxton Robert Gibbens	FOR THE APPLICANTS
Irwin Nathanson Stephen Schacter	FOR THE RESPONDENT Rogers Communications Inc.

SOLICITORS OF RECORD:

Laxton Gibbens & Co. Vancouver, British Columbia	FOR THE APPLICANTS
Nathanson Schacter & Thompson LLP Vancouver, British Columbia	FOR THE RESPONDENT Rogers Communications Inc.