Federal Court

Cour fédérale

Date: 20110721

Docket: T-2006-10

Citation: 2011 FC 911

Ottawa, Ontario, July 21, 2011

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

SANDRA BUSCHAU, SHARON M. PARENT,
ALBERT POY, DAVID ALLEN,
EILEEN ANDERSON, CHRISTINE ASH,
FEDERICK 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

Applicants

and

ROGERS COMMUNICATIONS INCORPORATED

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application arises in the context of a long-running dispute between Rogers Communications Inc. (the respondent) and a group of former employees (the applicants) over an actuarial surplus that has accumulated in a defined benefit employee pension plan. The applicants claim that they are entitled to it. The respondent disagrees and argues that they have the right to open the pension plan to new members and rely upon the actuarial surplus to take contribution holidays with respect to those new members.

[2] The dispute, at various stages and in various forms, has been before the Supreme Court of British Columbia, the British Columbia Court of Appeal, the Supreme Court of Canada, this Court and the Federal Court of Appeal.

[3] The applicants are now applying for judicial review of a decision, dated November 4, 2010, of a senior supervisor in the Private Pension Plans Division of the Office of the Superintendent of Financial Institutions Canada. The applicants had requested that eight questions be answered regarding their dispute with the respondent. The senior supervisor found, in essence, that the bulk of

the arguments submitted by the applicant had already been decided and that the Superintendent did not have legislative authority to re-open or reconsider the matter.

I. Background

[4] The applicants are members of a defined benefit pension plan that was initially created in 1974 by their former employer Premier Cablevision Ltd. (which later became Premier Communications Ltd. – referred to below as "Premier"). The pension plan (the Premier Plan) was established by way of two documents: a trust agreement between Premier as settler and Canada Trust as trustee, and a plan document which consisted of a series of rules attached as an exhibit to the trust agreement. The relevant terms of the Premier Plan can be summarized as follows:

- Premier was to "contribute to the Plan such amounts calculated by the Actuary as being required… to fund the benefit earned by Members under the Plan". While employees could make voluntary contributions to increase their benefits, the necessary contributions were to come entirely from Premier.

- Premier reserved the right to amend the plan, however the right to amend the plan did not include the right to "authorize or permit any part of the Fund to be used for or diverted to purposes other than for the exclusive benefit of" individuals designated in the plan.

- In the event of an actuarial surplus in the associated trust fund, the plan indicated that "the said surplus may be used to allocate additional pensions and pension entitlements to existing Retired Members and/or Members respectively".

- Premier indicated that it expected to continue the plan indefinitely. However, in the event of plan termination, member benefits were to be continued and the "balance of assets remaining in the Trust Fund", after all liabilities were satisfied, was to be "distributed by the [Pension Plan] Committee among the remaining Members".

[5] In 1980, Rogers Cablesystems Inc. (which later became Rogers Communications Inc. – referred to below as “Rogers”) acquired Premier. When it acquired Premier, it also acquired Premier’s rights and obligations under the Premier Plan.

[6] In 1983, the Premier Plan’s actuary reported that the plan had a surplus of approximately $800,000. In April of 1984, the actuary recommended that some of the surplus be used to improve member benefits. Rogers rejected this recommendation and the actuary was replaced one month later.

[7] In July of 1984, Rogers closed the plan to new members and began to take contribution holidays. Rogers considered the plan’s surplus to be so large that, beyond taking contribution holidays, it felt that it was entitled to a refund of some of its past contributions. Canada Trust, the plan’s trustee, indicated that it would only permit a refund if Rogers could provide a legal opinion indicating that the requested refund was related to contributions that had been made in error and indicating that the refund was permissible under trust law.

[8] Rogers replaced Canada Trust as trustee with National Trust in October of 1984. By this point, the Premier Plan’s actuarial surplus had grown to approximately $1.7 million.

[9] In June of 1985, the Premier Plan’s new actuary requested approval from the federal Department of Insurance for Rogers to remove $968,285 from the plan’s trust fund (the Premier Trust). The actuary indicated that a “rewrite” of the plan text was underway that would permit refunds. The Department, based on this information, approved the withdrawal by letter dated June

14, 1984. However, four days later, the Chief of the Pension Benefits Division of the Department wrote to the actuary and expressed some concern over the proposed withdrawal:

> While we do not feel that there is any legal barrier to the withdrawal of surplus at this time, we feel that the plan sponsor has a moral commitment to provide updating of past service benefits and to provide bonus pensions as outlined in the original employee booklet and we are somewhat dismayed that the sponsor has had a change of heart in this regard.
>
> In addition the plan states that, in the event of termination of the plan, after all liabilities to retired members have been satisfied, the balance of the assets will be distributed by the Committee among the remaining members.
>
> Thus, if the plan were to be wound up in the near future, the plan members may have a right to recover some of the surplus that was withdrawn.

[10] In July of 1985, National Trust transferred $968,285 from the Premier Trust to Rogers without requiring a legal opinion.

[11] In December of 1992, Rogers amended the Premier Plan to merge it with four other pension plans, three of which were in loss positions, to create a new merged plan which I will refer to as the Rogers Plan. The terms of the Rogers Plan were different from the terms of the Premier Plan. The Rogers Plan, for one thing, provided that Rogers was entitled to any surplus on termination (as opposed to the Premier Plan which provided that the members were entitled to the surplus on termination). In fact, it allowed Rogers access to any actuarial surplus on an ongoing basis (as opposed to the Premier Plan which prohibited the diversion of funds for purposes other than the exclusive benefit of plan members).

[12] An internal Rogers memo dated April 22, 1993 indicated that Rogers' objective with respect to the Premier Plan had been "to get at the surplus" associated with the plan and to minimize administration of the plan. The memo concluded, "We were able to accomplish the objectives above by the amalgamation of all of the defined benefit plans into one plan."

[13] Members of the Premier Plan initiated litigation against Rogers in 1995. They claimed that: a) the withdrawal of funds in 1985 had been improper; b) the contribution holidays taken by Rogers up to that point were not permitted under the terms of the plan; c) Rogers had acted in bad faith when it failed to use the surplus to improve member benefits, and d) the 1992 plan merger had been illegal and should be undone.

[14] During the course of the trial, Rogers conceded that the withdrawal of the $968,285 from the Premier Trust had been improper. It agreed to pay the money back into the trust fund with interest.

[15] Justice P.D. Lowry of the Supreme Court of British Columbia (BCSC) rendered his decision on the remaining issues in *Buschau v Rogers Cablesystems Inc,* (1998),[1998] BCJ No 2252, 82 ACWS (3d) 1014 (SC). On the question of contribution holidays, he found that the Premier Plan's text did, in fact, permit them, but that the holidays taken prior to 1987 were, in any event, improper because the regulations in force at the time under the *Pension Benefits Standards Act*, RSC 1970, c P-8 did not allow for them. Despite making this finding, he nonetheless held that the plaintiffs were statute barred from compelling payment of the missing 1984, 1985 and 1986 contributions because the applicable limitations period had lapsed. With respect to the allegation of bad faith, the Court found that the terms of the Premier Plan were permissive and, as such, there was no requirement for

Rogers to use the actuarial surplus to improve member benefits. Finally, the Court found that the 1992 merger which resulted in the Rogers Plan was valid. The members appealed to the British Columbia Court of Appeal (BCCA).

[16] In *Buschau v Rogers Cablesystems Inc*, 2001 BCCA 16, [2001] BCJ No 50 [*Buschau I*], the BCCA upheld Justice Lowry's decision on all issues with the exception of the 1992 merger. On this issue, the Court of Appeal found that although the merger of the pension plans had been valid, it did not affect the existence of the Premier Trust as a separate trust that continued in equity. The reason for this, it explained, was that the members of the Premier Plan had retained rights that were distinct from the rights of the members of the other plans involved in the merger, and that those rights could not be done away with by the unilateral action of the employer.

[17] In particular, the BCCA was of the view that because the Premier Plan had been closed to new beneficiaries since 1984, the members had the right to invoke the rule from *Saunders v Vautier* (1841), Cr & Ph 240, 41 ER 482 (Ch D) [*Saunders v Vautier*] to terminate the Premier Trust, on consent of all members, and receive the trust's surplus on termination, as permitted in the Premier Plan's terms. The Court essentially found that the members retained two rights with respect to the Premier Trust that were distinct from the rights of members of the other merged plans and which resulted in the Premier Trust continuing as a separate entity: a) the right to invoke *Saunders v Vautier*, and b) the right to receive the plan surplus on termination.

[18] The members applied to the BCSC for an order terminating the Premier Trust under the rule from *Saunders v Vautier*. Rogers opposed the application and argued, among other things, that it

had the right to re-open the Premier Plan to new members. This, it submitted, would keep the class of beneficiaries open, making it impossible for the members to invoke *Saunders v Vautier*.

[19] In *Buschau v Rogers Communications Inc*, 2002 BCSC 624, [2002] BCJ No 865, the Court rejected Rogers' argument. It found that the 1984 amendment to close the Premier Plan did not suggest any intention to re-open it in the future and that, in fact, Rogers was only proposing to re-open the plan as a way to prevent the members from terminating the trust and accessing its surplus. The Court ordered Rogers to disclose the complete membership of the Premier Plan so that the members could obtain the required consent. In *Buschau v Rogers Communications Inc*, 2003 BCSC 683, [2003] BCJ No 1025, the Court found that consent from all 144 plan members had been obtained and it ordered the Premier Trust terminated. The actuarial surplus was believed to have been approximately $11 million at the time.

[20] Rogers appealed the decision. In *Buschau v Rogers Communications Inc*, 2004 BCCA 80, [2004] BCJ No 297 [*Buschau II*], the Court of Appeal upheld the lower court's finding that Rogers could not re-open the plan. In this regard, it indicated:

> 61 The particular circumstances of this case make it impossible in my view that [Rogers] could now exercise its right to "re-open" the Plan to new Members, entitling them to share with the existing Members in the benefits of the Trust, including the surplus. The Plan was declared closed in 1984 and as the Chambers judge found, "the first time [Rogers] gave any thought to re-opening... was in response to efforts by the Members to terminate the Plan and have the surplus paid to them." Any move now to re-open the Plan to other [Rogers] employees would, given what has gone on before, rightly be regarded as no different from the stratagem adopted by [Rogers] some years ago to avail itself of the benefit of the actuarial surplus in the Premier Trust - the purported "merger" of the Plan with other

> plans that were not in surplus positions. A similar result would ensue: because of its breach of trust or obligation of good faith, the employer would be required to account to the existing Members as if the Plan had not been re-opened…

[21] While the Court of Appeal agreed that the *Saunders v Vautier* rule could be invoked, it found that consent from certain designated beneficiaries had still not been obtained. The members set out to collect the outstanding consents. Once they had been collected, the members returned to the Court of Appeal and the Court ordered that the Premier Trust be terminated and that the assets of the trust, after payment of all necessary debts and expenses, be paid to the members (*Buschau v Rogers Communications Inc*, 2004 BCCA 282, 27 BCLR (4th) 17). Rogers appealed these decisions to the Supreme Court of Canada.

[22] In *Buschau v Rogers Communications Inc*, 2006 SCC 28, [2006] 1 SCR 973 [*Buschau III*], the Supreme Court determined that the rule from *Saunders v Vautier* did not apply to pension trusts. It set aside the decision of the BCCA. However, the Supreme Court also indicated that the Premier Plan members were free to apply to the Superintendent of Financial Institutions (the Superintendent), who had been given an important role of control and supervision under the *Pension Benefits Standards Act, 1985*, RSC 1985, c 32 (as amended) [*PBSA*], to have the Premier Plan portion of the Rogers Plan terminated, thus triggering a distribution of the Premier Trust. In this regard, the Court pointed out, at para 41, that "one circumstance that could justify delaying the termination of the Plan… would be if Rogers had a right to amend the Plan to open it to new members." Although the Court stated that the finding of such a right might be problematic, given the binding decision of the BCCA in *Buschau I*, it ultimately left the question open:

> 44 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 No. 1*, the matter is best left to the Superintendent.
>
> 45 The members can ask the Superintendent to partially terminate the RCI Plan insofar as it relates to the Plan. The Superintendent can assess the facts and deal with any new arguments Rogers or the members may raise. He is in the best position to monitor the orderly termination of the part of the RCI Plan that relates to the members.
>
> 46 If the Superintendent decides that Rogers cannot amend the Plan to open it to new members, there may be no point in continuing the Plan if pension benefits can be provided by a third party such as an insurance company through annuities of the kind provided for upon termination of any plan under the PBSA.

[23] On June 30, 2006, the Premier Plan members applied to the Superintendent, requesting that she find that the Premier Plan portion of the Rogers Plan had already been terminated, or, in the alternative, asking her to either declare the plan terminated under subsection 29(2) of the *PBSA* or direct that the plan be terminated under subsection 11(2) of the *PBSA*. Furthermore, the members requested that Rogers be removed as administrator of the plan. Rogers opposed the members' requests and submitted its own request. Rogers indicated that it had revoked the merger of the Premier Plan with the Rogers Plan and had decided to re-open the Premier Plan to new Rogers employees. It sought the Superintendent's approval.

[24] On April 27, 2007, the Superintendent (then, Acting Superintendent) rendered a decision on both requests (2007 Decision). She started her decision by providing an overview of private pensions and the Office of the Superintendent of Financial Institutions. As part of this overview, she

indicated that “no member is entitled to make a claim to share in an actuarial surplus unless or until a plan is terminated”. She further noted that termination by the regulator was an “extreme measure”.

[25] With regards to Rogers’ request, the Superintendent highlighted the fact that the Premier Plan documents permitted Rogers to amend the plan and trust and found that in deciding to revoke the merger and reopen the plan, Rogers was not acting contrary to the *PBSA*, the terms of the plan or the trust, or safe and sound financial or business practices. She stated that she was, “satisfied that the general purpose of the Plan [was] continuing and [that] the plan [met] prescribed tests and standards for funding.”

[26] With respect to the members’ requests regarding termination, the Superintendent made the following findings. As to whether the Premier Plan fit within the *PBSA* definition as having been “terminated”, the Superintendent found that it did not. There were still two members being credited with benefits and, in any event, Rogers had chosen to continue the plan for new employees.

[27] As to whether the Superintendent would exercise her discretion to declare the plan terminated under paragraph 29(2)(*a*) of the *PBSA*, on account of there having been a “suspension or cessation of employer contributions”, the Superintendent decided that she would not. The Superintendent noted that the suspension of contributions to the plan was the result of Rogers taking contribution holidays as permitted under the *PBSA*. She indicated, “The Plan meets the prescribed standards for solvency, the pension benefits of the Members are not being jeopardized, the Plan meets the requirements of the *PBSA* and the purpose of the Plan has not been frustrated.” She

further found that termination would not result in the protection of the Premier Plan's purpose or the protection of the pension benefits. She concluded:

> 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.

[28] The Superintendent decided, similarly, to decline to issue a direction to Rogers to terminate the plan, as it was her opinion that Rogers was complying with the plan's terms and the provisions of the *PBSA*.

[29] On the issue of whether to replace Rogers as the administrator, the Superintendent decided as follows:

> While issues concerning [Rogers'] administration of the Plan in the past have come under question, I do not find that [Rogers] is currently administering the Plan and fund in contravention of the terms of the Plan (including those applicable to the Plan's fund) or the PBSA or acting contrary to safe and sound financial or business practices. I am therefore of the view that it would not be in the best interest of the Plan members to replace the administrator of the Plan and I decline to remove the current administrator and appoint a replacement administrator.

[30] The members applied to the Federal Court for judicial review of the 2007 Decision. In *Buschau v Canada (Attorney General)*, 2008 FC 1023, [2008] FCJ No 1283, my colleague Justice John O'Keefe decided that the determinative issue for consideration was whether or not the Superintendent had erred in refusing to exercise her discretion under subsection 29(2) of the *PBSA*. He answered this question in the affirmative, allowed the application, and referred it back to the Superintendent for re-determination.

[31] Justice O'Keefe explained that the Superintendent had failed to appreciate the extent of her discretion as set out by the Supreme Court of Canada in *Buschau III* and, as such, had rendered a decision that was unreasonable given the evidence before her. In particular, he found, at para 51, that she had failed to realize 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." In this regard, he pointed to the evidence that Rogers had improperly amended the Premier Plan, had improperly withdrawn funds from the Premier Trust, and had replaced the uncooperative actuary and trustee – all with the improper purpose of getting at the plan surplus. Furthermore, Justice O'Keefe found that the Superintendent had failed to appreciate her duty to the employees under paragraph 29(2)(*a*).

[32] Rogers appealed this decision to the Federal Court of Appeal, and in *Buschau v Canada (Attorney General)(Appeal by Rogers Communications Inc)*, 2009 FCA 258, [2009] FCJ No 1119 [*Buschau IV*], the Court of Appeal reversed the lower court decision and upheld the Superintendent's decision as being reasonable. The Court of Appeal, at para 43, saw the key issue as being "whether the Superintendent either improperly exercised her discretion or made a reviewable error of law when she allowed [Rogers] to revoke the merger of the Plan and to amend the Plan to open it to new employees". It indicated that if she was entitled to permit the re-opening of the Premier Plan, then it was not unreasonable for her to find that the continued existence of the plan was a worthy goal.

[33] The Federal Court of Appeal (FCA) explained that the Supreme Court of Canada had left open the question of whether the BCCA decision in *Buschau I* prevented Rogers from re-opening the Premier Plan. The FCA pointed out that the comments in *Buschau II*, that Rogers was prevented from re-opening the plan, were premised on the erroneous belief that the plan members had the right to invoke *Saunders v Vautier* to terminate the Premier Trust. Given that no such right existed, the Court of Appeal found that there was nothing in the binding decision of *Buschau I*, or in general, to prevent Rogers from re-opening the Premier Plan to new members.

[34] Furthermore, the FCA found nothing unreasonable about the Superintendent's determination "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."

[35] The Court indicated, at para 53, that, "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." Given the existence of a viable plan with a growing membership, the Court concluded that there was nothing unreasonable about the Superintendent's conclusions with regards to termination.

[36] The members sought leave to appeal the FCA's decision to the Supreme Court of Canada. Leave was denied on April 8, 2010.

[37] On June 30, 2010, the members wrote to the Superintendent with a list of eight questions that they claimed had either not been addressed by the Superintendent in her 2007 Decision, or had arisen since that decision:

> (1) Whether Rogers has forfeited its right to amend the Premier Pension Plan to add new Cable Inc employees as members of the Plan because of its breach of fiduciary duty under s 8(3) P.B.S.A. or because of its conflict of interest under 8(10)(b) P.B.S.A. pursuant to para 38 of the S.C.C. decision herein…
>
> (2) Whether Rogers is bound by the decision in Buschau (1) (res judicata) that the existing members of the Premier Pension Plan have retained exclusive rights to the benefit of the surplus in their pension plan…
>
> (3) Whether Rogers can use the surplus in the Premier Pension Plan to fund benefits for new members or to take contribution holidays in respect of new members, especially given the re-statement of the law by the S.C.C. in Nolan v. Kerry...
>
> (4) Whether any part of the surplus should be shared with the existing members of the Premier Pension Plan before Rogers can use the Surplus for its own contribution holidays, given that the original purpose of the plan was to use the surplus to improve pension benefits and given the factual findings of the courts regarding Roger's conduct and the Superintendent's decision dated June 18, 1985 that Rogers has a moral obligation to provide bonus pensions in this case…
>
> (5) Whether the Premier Pension Plan funds should be used to pay for the Premier Pension Plan members reasonable legal costs…
>
> (6) Whether Rogers should be obliged to disclose the employment and pension data of any new members it proposes to add to the Premier Pension Plan…
>
> (7) Whether Rogers should be obliged to provide the information it has, or should have, as to which members of the Premier Pension Plan it has offered a "buy-out", the value of such "buy-out" and the members' acceptance or rejection of such offers…
>
> (8) Whether Rogers is obliged to continue to keep the Premier Trust Funds "in a separate trust for which a separate accounting is to be made," further to para 73 in Buschau (1).

[38] In answering these questions, the members asked that the Superintendent consider two decisions from the Supreme Court of Canada: *Nolan v Kerry (Canada) Inc*, 2009 SCC 39, [2009] SCJ No 39 [*Nolan*] and *Burke v Hudson's Bay Co*, 2010 SCC 34, [2010] SCJ No 34 [*Burke*]. These decisions were released subsequent to the Superintendent's 2007 Decision and the members argued that they "strongly fortified [their claim] to be given at least a share of the surplus in which they continue to own an equitable interest." Both parties provided written submissions to the Office of the Superintendent.

II. The decision under review

[39] By letter dated November 4, 2010, (2010 Decision) a senior supervisor in the Private Pension Plans Division of the Office of the Superintendent of Financial Institutions Canada, responded to the parties' submissions. The supervisor responded on behalf of the Superintendent pursuant to section 10 of the *Office of the Superintendent of Financial Institutions Act*, RSC 1985, c 18. For the sake of simplicity, I will treat the 2010 Decision as though it was signed and decided by the Superintendent herself.

[40] The Superintendent found that "most of the questions… raised concern or relate to the decision issued on April 27, 2007. There is no legislative authority to re-open or reconsider a past decision."

[41] She addressed the individual questions as follows. Regarding the first three questions, she stated:

> We direct you to the Superintendent's letter dated April 27, 2007 (attached). Under the PBSA, the plan will be required to meet the prescribed tests and standard for solvency. The regulations permit the taking of contribution holidays if the conditions set out in the regulations are met.

[42] In response to question four, she indicated that it was up to Rogers to decide whether or not they wanted to engage in surplus sharing negotiations. She further provided that any proposed refunds would require her consent.

[43] As to question five, she found that the *PBSA* did not address the issue of using pension funds to cover reasonable legal costs. She further said, "nor are we aware of any provision of the plan text that provides for the payment of members' legal costs from the fund."

[44] On questions six and seven, the Superintendent pointed out that there was no requirement under the *PBSA* for an employer or administrator to provide members with access to the employment and pension data of potential new members. Furthermore, the employer and administrator were required to abide by the provisions of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [*PIPEDA*].

[45] As to the final question, the Superintendent responded, "it is our understanding that the Premier Trust Funds have been and will continue to be kept separate and apart from the [Rogers] Plan. This has been confirmed by the Plan administrator."

[46] The members filed a Notice of Application for judicial review of the Superintendent's decision on December 1, 2010. This is the application that is currently before the Court.

III. Issues

[47] The issues arising for consideration on this judicial review are:

a) Did the Superintendent err in determining that most questions had already been considered and decided?
b) Did the Superintendent err in determining that there was no legislative authority to re-open or reconsider the questions that had already been considered and decided?
c) Did the Superintendent err in her determination as to legal costs?
d) Did the Superintendent err in her determination as to disclosure?

IV. Standard of review

[48] Although decisions of the Superintendent on questions involving the interpretation of the *PBSA* are generally owed deference, I find that this review involves two questions of true jurisdiction which are reviewable using the correctness standard. The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 59, [2008] SCJ No 9 [*Dunsmuir*] explained that "true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter." Such is the case with the second and third issues under review. The determination in this case that there was "no legislative authority to re-open or reconsider a past decision" and the determination that there was no authority to award

costs out of the Premier Trust fund are both questions of true jurisdiction reviewable against the correctness standard.

[49] The remaining issues, however, involve questions of either pure fact, or mixed fact and law and, as such, are reviewable using the more deferential reasonableness standard (*Cousins v Canada (Attorney General)*, 2008 FCA 226 at paras 22-23, [2008] FCJ No 1011; *Buschau IV*, above at paras 44-45). With regards to these issues, the Court will consider the existence of justification, transparency and intelligibility within the decision-making process, as well as whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above at para 47).

V. Analysis

a) Did the Superintendent err in determining that most questions had already been considered and decided?

[50] The applicants argue that the questions they submitted to the Superintendent for consideration on June 30, 2010 were all new questions which had not been previously addressed and that, as such, the Superintendent's determination to the contrary with respect to questions one to four was unreasonable. I will consider each of the applicants' questions in turn.

[51] The first question submitted by the applicants was:

> Whether Rogers has forfeited its right to amend the Premier Pension Plan to add new Cable Inc employees as members of the Plan

> because of its breach of fiduciary duty under s 8(3) P.B.S.A. or because of its conflict of interest under 8(10)(b) P.B.S.A. pursuant to para 38 of the S.C.C. decision herein?

[52] Subsection 8(3) of the *PBSA* indicates that a pension administrator must administer the associated pension plan and fund as a trustee for the beneficiaries of the plan:

Administration of pension plan and fund	Gestion du régime et du fonds
8(3) The administrator shall administer the pension plan and pension fund as a trustee for the employer, the members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan.	**8**(3) L’administrateur d’un régime de pension gère le régime et le fonds de pension en qualité de fiduciaire de l’employeur, des participants actuels ou anciens et de toutes autres personnes qui ont droit à des prestations de pension ou à des remboursements au titre du régime.

[53] Paragraph 8(10)(*b*) of the *PBSA* indicates that, in case of a conflict of interest in an employer’s role as administrator and any other role, the employer must act in the best interests of the members of the pension plan:

Other conflicts of interest	Autre conflit d’intérêts
8(10) If there is a material conflict of interest between the role of an employer who is an administrator, or the role of the administrator of a simplified pension plan, and their role in any other capacity, the administrator	**8**(10) L’employeur qui est l’administrateur et qui se trouve dans un conflit d’intérêts sérieux entre les fonctions qu’il exerce à ce double titre de même que l’administrateur d’un régime de pension simplifié qui, en raison des fonctions qu’il occupe par ailleurs, se trouve dans un tel conflit doivent :
…	…

(b) shall act in the best interests of the members of the pension plan.	*b*) agir de façon à servir les intérêts des participants.

[54] The applicants argue that the respondent abused its power as an employer and administrator and dealt with its employees in a manner that offended community standards of reasonableness and, as such, it breached subsection 8(3) and paragraph 8(10)(*b*) of the *PBSA*. As a result of this, the applicants contend that the respondent has forfeited the right to re-open the Premier Plan to new members. They submit that it is evident that this issue has not been previously considered, because neither subsection 8(3) nor paragraph 8(10)(*b*) of the *PBSA* were mentioned by the Superintendent in her 2007 Decision.

[55] The record is quite clear, however, that the applicants thoroughly canvassed the issue of bad faith and breach of trust in their submissions leading up to the Superintendent's 2007 Decision. Their June 30, 2006 submissions detailed "three acts of bad faith and 16 breaches of trust"; their September 5, 2006 submissions alleged that reopening the Premier Plan would be "a breach of trust and a breach of RCI's obligation to exercise its power of amendment in good faith" ; their September 22, 2006 submissions referred to Justice Michel Bastarache's discussion of paragraph 8(10)(*b*) in *Buschau III* and alleged a "material conflict of interest" and a "lengthy history of breaches of trust".

[56] Ultimately, despite the applicants' submissions, the Superintendent found that the respondent did, in fact, have the right to amend the Premier Plan to add new Rogers employees and that nothing in the terms of the plan, the trust agreement, <u>or the *PBSA*</u> prevented them from so doing. It is also interesting to note that, on the issue of replacing the administrator, the

Superintendent indicated that the respondent was currently administering the Premier Plan and fund in compliance with the plan terms, the *PBSA*, and safe and sound financial business practices. So, although the Superintendent did not specifically mention subsection 8(3) and paragraph 8(10)(*b*) of the *PBSA*, she had clearly decided that the respondent was in compliance with the provisions of the act and was entitled to amend the plan to re-open it to new members. The Federal Court of Appeal upheld the reasonableness of her decision.

[57] As such, I cannot find that the Superintendent erred in determining that the applicants' first question had already been considered and decided.

[58] The second question submitted by the applicants was:

> Whether Rogers is bound by the decision in Buschau (1) (res judicata) that the existing members of the Premier Pension Plan have retained exclusive rights to the benefit of the surplus in their pension plan?

[59] The applicants argue that the decision of the BCCA in *Buschau I* is still binding on the respondent and that, in that decision, the BCCA conclusively determined that the original plan members were exclusively entitled to the benefit of the surplus in the Premier Plan. In support of this, they point to the fact that the BCCA in *Buschau II* indicated that re-opening the Premier Plan could not be permitted because it would amount to a breach of trust or of good faith.

[60] Once again, however, the applicants raised the same arguments before the Superintendent in their submissions prior to the 2007 Decision. Their June 30, 2006 submissions argued that "Rogers is bound by the decision in *Buschau* (1) that it cannot use the surplus to fund benefits for new

members or employees"; their September 5, 2006 submissions indicated that "*Buschau* #1… clearly states any amendment to allow new members to be added to the Premier Pension Plan at this stage would be deemed a breach of trust and a breach of the obligation of good faith"; their September 22, 2006 submissions stated, "RCI argues that *Buschau #1* did not decide that RCI cannot amend the Pension Plan at this stage… this is simply not true".

[61] Although the Superintendent did not explicitly address the question of *Buschau I*, she clearly rejected the applicants' argument that the respondent was prevented from re-opening the Premier Plan. She found that re-opening the plan was not contrary to the terms of the plan, the terms of the trust agreement or the provisions of the *PBSA*. The applicants cannot now argue that the Superintendent's reasons were inadequate because they did not specifically address *Buschau I*. This Court is not sitting in judicial review of the 2007 Decision. However, the FCA was sitting in appeal of a judicial review of the 2007 Decision in *Buschau IV*, and it found that the Superintendent's decision, that the respondent was entitled to re-open the Premier Plan to new members, was reasonable – implying that the decision was justified, transparent and intelligible.

[62] In any event, the Federal Court of Appeal specifically addressed *Buschau I* and the question of *res judicata*. It indicated that because the finding in that case, that the members of the Premier Plan had the right to invoke *Saunders v Vautier* to call for the termination of the Premier Trust, was found by the Supreme Court of Canada to have been made in error, "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."

[63] As such, I cannot find that the Superintendent erred in determining that the applicants' second question had already been considered and decided.

[64] The third question submitted by the applicants was:

> Whether Rogers can use the surplus in the Premier Pension Plan to fund benefits for new members or to take contribution holidays in respect of new members, especially given the re-statement of the law by the S.C.C. in Nolan v. Kerry?

[65] The applicants argue that although the Superintendent may have approved the re-opening of the Premier Plan to new members, she did not approve using the surplus in the Premier Trust to fund pensions for new members.

[66] On the contrary, this is exactly what the Federal Court of Appeal in *Buschau IV* indicated that the Superintendent had decided. At paragraph 52 of its decision, the Court of Appeal indicated as follows: "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" [Emphasis added]. Again, the Superintendent has already answered the applicants' question.

[67] The fourth question submitted by the applicants was:

> Whether any part of the surplus should be shared with the existing members of the Premier Pension Plan before Rogers can use the Surplus for its own contribution holidays, given that the original

> purpose of the plan was to use the surplus to improve pension benefits and given the factual findings of the courts regarding Roger's conduct and the Superintendent's decision dated June 18, 1985 that Rogers has a moral obligation to provide bonus pensions in this case?

[68] Under this question, in their June 30, 2010 submissions to the Superintendent, the applicants argued that the Superintendent could order the Premier Plan to be "wound up" and direct the respondent to use the Premier Trust to purchase annuities to cover the pension benefits of the existing plan members and beneficiaries and then divide the surplus in cash between the beneficiaries and the respondent.

[69] The fact that the applicants are suggesting a surplus sharing on termination makes this question somewhat different than what was decided by the Superintendent in her 2007 Decision. Nonetheless, the substantive portion of this question has already been decided. In her 2007 Decision, the Superintendent explained that termination was an extreme measure that she was not prepared to invoke vis-à-vis the Premier Plan because: the plan met the prescribed standards for solvency, member pension benefits were not being jeopardized, the purpose of the plan had not been frustrated, and the plan terms reserved the decision to amend and terminate to the respondent. It is hard to see how the applicants' willingness to share the surplus with the respondent on termination would impact upon any of the Superintendent's considerations.

[70] To the extent that the fourth question raised a "new" question, the Superintendent provided a reasonable answer in her 2010 Decision. She indicated that it would be up to the respondent to decide "whether they want to engage in surplus sharing negotiations."

[71] For the foregoing reasons, to the extent that the Superintendent decided that questions one through four had already been answered, I cannot find that she decided unreasonably.

[72] It is not disputed that questions five through seven raised new issues for consideration. The Superintendent considered these questions and provided answers to them, the correctness/reasonableness of which will be considered later. As to the final question, regarding whether the respondent was obliged to keep the Premier Trust funds separate, the applicants do not appear to be challenging the Superintendent's response in this regard.

b) Did the Superintendent err in determining that there was no legislative authority to re-open or reconsider the questions that had already been considered and decided?

[73] The applicants argue that the Supreme Court of Canada in *Buschau III* interpreted the legislative authority of the Superintendent to be so broad that it includes "virtually unlimited" powers to protect the interests of beneficiaries. This broad jurisdiction, they submit, must include the power to re-open and reconsider a past decision.

[74] I do not think the Supreme Court's decision in *Buschau III* can be interpreted as conferring a "virtually unlimited" set of powers on the Superintendent. In fact, the Court pointed out that the *PBSA* "is not a complete code" (*Buschau III* at para 35). It indicated that <u>when recourse to the Superintendent is provided</u> under the *PBSA*, plan members should avail themselves of it (*Buschau III* at para 35).

[75] Still, the Supreme Court did instruct that "the Superintendent plays a crucial role in the protection of beneficiaries" (*Buschau III* at para 20). It held that pension plan members should be able to "alert the Superintendent and trigger action" in cases where they feel their employer has infringed the *PBSA* or the terms of their plan (*Buschau III* at para 34).

[76] While the Superintendent was correct that nothing in the *PBSA* explicitly indicates that she is entitled to re-open or reconsider one of her previous decisions (with the exception of subsection 32(2) which is not engaged in the current circumstances), nothing in the legislation explicitly prevents it either. Given the remedial nature of the legislation and the "crucial role" of the Superintendent in the protection of beneficiaries, and, in particular, given the discretion that the courts have found tribunals to have with respect to the application of the doctrine of *res judicata* (as will be discussed below), I find that the Superintendent retains some limited discretion to reconsider previous decisions.

[77] The doctrine of issue estoppel, a subset of the doctrine of *res judicata*, precludes re-litigation by the same parties of issues which have been finally determined in a previous decision (*O'Brien v Canada (Attorney General) (FCA),* 153 NR 313, [1993] FCJ No 33). It has as its underlying purpose the objective of balancing the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 33, [2001] SCJ No 46 [*Danyluk*]).

[78] While issue estoppel originated in the context of judicial decisions, it is now widely accepted that it applies to administrative decisions as well (*Danyluk*, above at para 21). Most often,

the doctrine applies in the administrative context where a tribunal decision gives rise to estoppel in a subsequent court proceeding. In *Boucher v Stelco Inc*, 2005 SCC 64, [2005] SCJ No 35, for example, a decision of the Ontario Superintendent of Pensions was seen as giving rise to issue estoppel in a subsequent proceeding in the Quebec Superior Court. However, this Court and the Federal Court of Appeal have recognized that a tribunal decision may also give rise to issue estoppel in a subsequent tribunal proceeding (*Canada (Attorney General) v Canada (Canadian Human Rights Commission)*, 43 FTR 47, [1991] FCJ No 334; *Pillai v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1417, [2001] FCJ No 1944 [*Pillai*]). That is what the respondent argued in its submissions to the Superintendent on July 20, 2010.

[79] The three preconditions to the operation of issue estoppel are: (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies (*Angle v Canada (Minister of National Revenue - MNR)* (1974), [1975] 2 SCR 248 at 254, 47 DLR (3d) 544; *Danyluk*, above at para 25).

[80] As previously discussed, the Superintendent essentially determined that questions one to four from the applicants' June 30, 2010 submissions had already been considered and decided. I have found that this determination was reasonable. As such, with regards to questions one to four, the first requirement for issue estoppel is satisfied. I am also of the view that the Superintendent's 2007 Decision was final and sufficiently judicial in nature to satisfy the second requirement. As to the last requirement, there can be no doubt that the parties to the 2007 Decision are substantially the

same as the parties to the 2010 Decision. As such, in relation to the applicants' first four questions, I am satisfied that the three requirements for issue estoppel have been met.

[81] The Supreme Court of Canada in *Danyluk*, above at para 33, indicated that after determining whether the three requirements for issue estoppel have been satisfied, it must still be determined, as a matter of discretion, whether issue estoppel ought to be applied. Although the Supreme Court was dealing with the more typical tribunal-to-court context (i.e. where a tribunal decision gives rise to estoppel in a subsequent court proceeding), the jurisprudence suggests that a similar type of discretion exists in the tribunal-to-tribunal context.

[82] At issue in *Erdos v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 419 at para 16, [2005] FCJ No 2062, for example, was whether the Refugee Protection Division (RPD) had appropriately applied the doctrine of *res judicata* with respect to a prior decision of the Convention Refugee Determination Division (CRDD). The Court of Appeal indicated, at para 16, "In this case, the application of issue estoppel would mean that the [RPD] would have to accept the findings of the CRDD as to [the applicant's] persecution prior to 1992 unless it could show that the circumstances were such that it should exercise its discretion not to apply issue estoppel" [Emphasis added]. Although the Court of Appeal ultimately found that the question of *res judicata* was not, in fact, material to the appeal, the *Erdos* decision is nonetheless an indication from the Federal Court of Appeal that the discretion referred to in *Danyluk* applies in the tribunal-to-tribunal context.

[83] The Superintendent did not explicitly address the question of issue estoppel in her 2010 Decision. Instead, she relied on her lack of authority to re-open or reconsider past decisions. Any

decision as to the application of issue estoppel, being a question of mixed fact and law, would be subject to review using the reasonableness standard.

[84] In the circumstances of this case, given the Superintendent's reasonable determination that the first four questions raised by the applicants were the same questions as had previously been determined, the only reasonable course of action available was to find that the applicants were estopped from raising the issues again. The Superintendent's 2007 Decision had been judicially reviewed and appealed up to the Federal Court of Appeal. It was only when the Supreme Court of Canada refused to grant leave that the applicants came back to the Superintendent with their re-formulations of, substantially, the same questions. This is tantamount to an abuse of process. This litigation has been ongoing, in one form or another, for over 15 years. The public interest in finality is strong. In these circumstances, a determination that issue estoppel applies to prevent the applicants from re-raising questions one to four was the only decision available to the Superintendent within the range of possible, acceptable outcomes defensible in respect of the facts and law.

[85] The applicants argue, however, that the applicable law has changed since the Superintendent's 2007 Decision in such a way that the Superintendent was required, in her 2010 Decision, to exercise her discretion not to apply issue estoppel. While it is true that a change of law may warrant dispensing with issue estoppel in certain circumstances (*Hockin v Bank of British Columbia* (1995), 3 BCLR (3d) 193, 123 DLR (4th) 538 (CA)), I do not find that there has been a change of law in the current case. Neither the decision of the Supreme Court of Canada in *Nolan*, nor the decision in *Burke*, change the law in any way that is relevant to the questions at issue here.

[86] The majority in *Nolan*, above, considered, among other things, the question of whether an employer could take contribution holidays with respect to a defined contribution component of a pension plan based on an actuarial surplus that had accumulated in a defined benefit component. The members of the defined benefit component analogized their situation to the situation at issue in *Buschau III*. They pointed to the fact that the majority in *Buschau III* had indicated that re-opening the Premier Plan to new members, and allowing contribution holidays in respect of those new members, would be "problematic". The Court found this analogy to be unconvincing. It indicated that the circumstances in *Buschau III* were different and proceeded to outline those circumstances. It explained how the respondent had unsuccessfully attempted to merge the Premier Plan into the Rogers plan and how the BCCA in *Buschau II* had found that re-opening the plan to new members would be improper. It indicated, "Deschamps J.'s remark about re-opening the plan being problematic was made in this context."

[87] *Nolan* only re-iterated what was already stated by the Supreme Court in *Buschau III*, that it was "problematic" for the respondent to re-open the Premier Plan, given the previous decisions of the BC Courts. Neither the Court in *Buschau III*, nor the Court in *Nolan* went beyond this – the question as to whether the respondent was in fact entitled to re-open the Premier Plan remained unanswered. The Superintendent did answer it, however, in her 2007 Decision and she found that re-opening the Premier Plan was acceptable based on the plan's terms and the *PBSA*. The Federal Court of Appeal, in *Buschau IV*, upheld that decision as being reasonable.

[88] Therefore, as it relates to the applicants' circumstances, the *Nolan* decision contains nothing new and, as a result, the Superintendent cannot be faulted for not addressing it in her decision.

[89] The same can be said for the Supreme Court of Canada's decision in *Burke*, above. The applicants point to paragraph 57 where the Court held, "where employees are entitled to actual surplus on termination, they have an equitable interest in the total assets of the fund." They argue that because they have a right to the Premier Plan's surplus on termination, *Burke* means that they also have an equitable interest in the Premier Trust. This equitable interest, they argue, prevents the respondent from adding any new members to the plan since the addition of new members would reduce the surplus they are entitled to. I disagree.

[90] Saying that the applicants have an equitable interest in the surplus is not the same as saying that they have an exclusive interest in the surplus. It does not mean that the respondent is prevented from adding new members who can also share in that equitable interest. To find otherwise would be tantamount to finding that all pension plans that allow for beneficiaries to share in assets on termination are automatically closed to new members whenever they find themselves in a state of actuarial surplus. Such a result would be absurd.

[91] The fact that the applicants have an equitable interest in the assets of the Premier Trust does not change anything. In fact, the applicants' interest in this regard was recognized by the BCCA in *Buschau I*. Quite apart from the issue of *Saunders v Vautier*, the applicants' right to the surplus on termination was one reason that the BCCA found that the Premier Trust continued in equity despite the merger of the Premier Plan with the other plans.

[92] The applicants are entitled to share in the surplus on termination, and although this may constitute an equitable interest in the assets of the fund, it does not change the fact that the respondent is entitled to add new members to the plan. The Supreme Court of Canada's decision in *Burke* does not add anything and, as such, the Superintendent cannot be faulted for not addressing it.

[93] As such, I find that the Superintendent did not err in finding that the applicants were prevented from re-raising questions which had been finally decided by the Superintendent, and which had been upheld on judicial review by the Federal Court of Appeal.

c) Did the Superintendent err in her determination as to legal costs?

[94] On the issue of whether the Superintendent has the authority to order that the applicants' legal costs be paid out of the Premier Trust fund, the applicants submit that since the Supreme Court has indicated that pension plan members should seek redress primarily from the Superintendent, as opposed to the courts, then this must mean that the Superintendent has the power to award costs to be paid out of pension funds. Otherwise, the applicants argue, pension plan members in general would never be able to afford to hold their employers accountable.

[95] The Superintendent rejected the applicants' request on the basis that neither the *PBSA*, nor the terms of the Premier Plan itself, provided for the payment of member legal costs from the pension fund. I find that the Superintendent was correct in reaching this determination.

[96] The Superintendent can only exercise the powers that are assigned to her by statute. Nowhere in the *PBSA* does it provide the Superintendent with authority to award costs out of a pension fund. Although it was considering a different statutory scheme, the Ontario Court of Appeal in *Nolan v Ontario (Superintendent of Financial Services)*, 2007 ONCA 416 at para 193, [2007] OJ No 2176 indicated that there are a number of valid policy considerations for not providing access to a pension fund for the purpose of funding legal proceedings:

> …One such consideration is that the causes pursued by litigating plan members may not be in the interests of the membership as a whole. In the present case, one of the reasons of the minority of the Tribunal for refusing to award costs was that there was insufficient evidence of the level of support for the actions of the Committee from the Plan membership. Another consideration is that the solvency of the pension plan could be adversely affected if such funding were permissible.
>
> [Emphasis added.]

[97] Given the competing policy considerations, I find that, in the absence of express legislative authority, the Superintendent was correct to conclude that she does not have jurisdiction to order that the applicants' legal costs be paid out of the Premier Plan's pension fund.

d) Did the Superintendent err in her determination as to disclosure?

[98] On questions six and seven, regarding the respondent's disclosure obligations, the applicants simply re-argue before me what they argued before the Superintendent in their June 30, 2010 submissions. They submit that the respondent is obliged to disclose the following information with regards to all potential new members of the Premier Plan: their employer, their age and the details of any other pension plans that they are currently beneficiaries under - including the type of plan and

whether these plans are in deficit or surplus positions. This obligation, the applicants explain, stems from the respondent's "reluctance or outright refusal to inform" them of what they were "doing or trying to do with their pension plan" in the past.

[99] The Superintendent disagreed with the applicants. She found that the respondent was not obligated to provide the requested information since section 28 of the *PBSA* set out the respondent's disclosure requirements and the requested information did not fall within it. She also indicated that the respondent was obliged to comply with the provisions of *PIPEDA*.

[100] I find that the Superintendent's decision in this regard was reasonable. Section 28 of the *PBSA* sets out the members' "Rights to Information". It also indicates that the plan members are entitled to certain information as set out in the *Pension Benefits Standards Regulations*, 1985, SOR/87-19 [*Regulations*]. Neither section 28 of the *PBSA* nor the associated *Regulations* mandate that the respondent, in the current circumstances, is obligated to disclose the type of information that the applicants are seeking.

[101] The applicants also argue that the respondent is obliged to provide them with information as to which members of the Premier Plan have been offered a "buy-out". This information, the applicants explain, is important for them to be able to determine what should happen to the surplus in this case.

[102] The Superintendent found that no such obligation existed. Given that the applicants are not entitled to the surplus until termination, and given that there is no indication that the respondent

intends to terminate the Premier Plan in the near future, I cannot find that the Superintendent's determination in this regard was unreasonable.

VI. Conclusion

[103] I have found that the Superintendent did not err in deciding that most questions submitted by the applicants had already been considered and decided in her 2007 Decision. I have further found that although the Superintendent did not directly acknowledge the doctrine of issue estoppel, in the result, she did not err in refusing to reconsider the applicants' questions. Finally, on the issue of legal costs and disclosure, I have found no reviewable error.

[104] For the foregoing reasons, this application for judicial review is dismissed. Costs are to be awarded to the respondent.

JUDGMENT

THIS COURT ADJUDGES that the application for judicial review is dismissed. Costs are to be awarded to the respondent.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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