

CANADA / JUDGMENT

Buschau v. Rogers Communications Inc.

2003 BCSC 683

COURT

Supreme Court of British Columbia

DECIDED

1 May 2003

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Buschau v. Rogers Communications Inc.,

2003 BCSC 683

Date: 20030501

Docket: L011138

Registry: Vancouver

Re: In the matter of a pension plan established by Premier Cablesystems Ltd. in February 1974; and ss. 30, 31, 36 and 39 of the Trustee Act R.S.B.C. 1996 c. 464, s. 8 of the Pension Benefits Standards Act R.S.C. 1985 c. 32, and s. 1 of the Trust and Settlement Variation Act R.S.B.C. 1996 c. 463

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 Tavera, Sheera Waisman,
 Margaret Watson, Gertrude Westlake, Robert E. White,
 Patricia Jane Whitehead, Aileen Wilson, Elaine Wirtz, Joe
 Wychuk, Zlatka Young

Petitioners

And

Rogers Communications Incorporated and

National Trust Company

Respondents

Before: The Honourable Madam Justice Loo

Reasons for Judgment

Counsel for the Petitioners

J. N. Laxton, Q.C. and

R. D. Gibbens

Counsel for the Respondents

I. G. Nathanson, Q.C. and

S. R. Schachter, Q.C.

Date and Place of Hearing:

7 & 8 January 2003

Vancouver, B.C.

Introduction

- [1] The petitioners are members of a company pension plan known as the Premier Plan. They apply for an order terminating the Plan. The application is opposed by the respondent Rogers Communications Incorporated ("RCI"), successor to Premier Communications Ltd. which established the Plan for its employees. The Plan's trustee, the respondent National Trust Company, takes no position.
- [2] All of the members of the Plan consent to terminating the Plan. Under the Plan terms, members may designate a beneficiary to whom benefits are payable on the death of the member. The primary issue is whether it is necessary to obtain the consent of all of the designated beneficiaries in order to terminate the Plan under the Trust and Settlement Variation Act, R.S.B.C. 1996, c. 463. Section 1 reads:

Court approval of variation

1 If property is held on trusts arising before or after this Act came into force under a will, settlement or other disposition, the Supreme Court may, if it thinks fit, by order approve on behalf of

- (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting,
- (b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of a specified description or a member of a specified class of persons,
- (c) any person unborn, or
- (d) any person in respect of an interest of the person that may arise by reason of a discretionary power given to anyone on the failure or determination of an existing interest that has not failed or determined,

any arrangement proposed by any person, whether or not there is any other person beneficially interested who is capable of assenting to it, varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

[Emphasis added.]

- [3] The members maintain that under s. 1(b) the court may provide its consent on behalf of those designated beneficiaries whose consent has not been obtained. RCI maintains that s. 1(b) does not apply as the designated beneficiaries have a present contingent interest, whereas s. 1(b) applies to future contingent interests. I will return to this argument later.

Background

- [4] The history of the Plan is set out in the 2001 decision of the Court of Appeal, *Buschau v. Rogers Cablesystems Inc.* (2001), 195 D.L.R. (4th) 257, 2001 BCCA 16 which gave liberty to the members to undertake proceedings in this court to terminate the trust based either on the rule in *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 or the Trust and Settlement Variation Act to the extent either was applicable. The members are unable to satisfy the requirements under the common law rule in *Saunders v. Vautier*, as it requires not only that the beneficiaries be adult and of full mental capacity, but that all of the possible beneficiaries must consent to vary or terminate the trust even if that is contrary to the wishes of the settlor. They therefore bring this application under s. 1 of the Trust and Settlement Variation Act.
- [5] On April 25, 2002 I ordered RCI to provide certain information and documents to the petitioners so that they could determine all of the members of the Plan: see *Buschau v. Rogers Communications Inc.* (2002), 100 B.C.L.R. (3d) 327 (S.C.), 2002 BCSC 624.
- [6] In May 2002 RCI delivered its sixth list of Plan members. It lists 148 members. Of those, two have died, and two persons named are not members, so the total membership is 144. The first list of Plan members produced by RCI in December 1996 disclosed 109 members. Even though the Plan has been closed to new members since July 1984, each time a new list has

been produced by RCI, the list has either disclosed names of additional members, deleted names of persons who had previously been disclosed as members, provided names of persons who were not members, listed at least 15 members with no addresses, several members with only a last name and a first initial, or "unascertained", and in one instance, a wrong name.

- [7] Part of the difficulties in compiling an accurate list of members has been caused by the Plan's administrator, and various plans of RCI or its affiliates changing over time. Many records are incomplete, inaccurate, or simply out of date.
- [8] With what can only be described as great effort, including countless telephone calls as far away as Spain and Hong Kong, Albert Poy, a Plan member, has incurred thousands of dollars in gas mileage, postage, long distance telephone calls, and photocopying in the effort to locate all of the members and obtain their written consent on consent forms.
- [9] The consent forms have a space for the written consent of the member, as well as a space for the written consent of the member's spouse or designated beneficiary. Mr. Poy deposes that the consent of all of the designated beneficiaries have been obtained, "where applicable". RCI submits that a comparison of the consent forms with the forms by which the members designated a beneficiary or change of beneficiary discloses that approximately 25 of the members have not obtained the consent of their designated beneficiaries. RCI contends that the lack of these consents precludes not only the termination of the pension trust under the common law, but also under s. 1 of the Trust and Settlement Variation Act.

Position of the Petitioners

- [10] The petitioners contend that under s. 1(b) of the Trust and Settlement Variation Act the court can provide its consent on behalf of those designated beneficiaries whose consent has not been obtained. In *Sandwell and Co. v. Royal Trust Corp. of Canada* (1985), 17 D.L.R. (4th) 337 (B.C.C.A.) the employer proposed amending a company employee pension plan by converting it from a defined benefit plan to a defined contribution plan. All active, retired, and deferred members of the plan consented to the proposed amendments. The issue was the power of the court to consent to the proposed amendments on behalf of the contingent beneficiaries. Carrothers J.A. (Nemetz C.J.B.C. and Anderson J.A. concurring) at pp. 341-343 stated:

In my view, the potential interests of the contingent beneficiaries are so remote and uncertain that it is unreasonable and unnecessary that an attempt be made to consult them about the new plan. The consent of the participants in whose shoes they may ultimately stand is enough. So far as infant and unborn contingent beneficiaries are concerned, notice was served upon the Public Trustee as required by s. 3 of the Trust Variation Act and the Public Trustee has raised no objection.

To say that these existing provisions are binding and unalterable is to deny the very purpose and intent of the Trust Variation Act, which is to approve, if the court sees fit, an amendment even though it offends the original terms of the trust. At common law, the rule that a trust may be varied by all beneficiaries of the trust, actual and contingent, provided they are sui juris and consent, was established by *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482. In this case some of the deferred beneficiaries are not located and some of the contingent beneficiaries are not identified, perhaps not even born, and are not of full legal capacity. Hence the Trust Variation Act extends the common law rule and empowers the court in its discretion to approve the amendment of the trust on behalf of such persons, in this case the deferred participants and the contingent beneficiaries. The only impediment or fetter on the court's discretion is contained in the above-quoted s. 2 to the effect that the court shall not approve an arrangement on behalf of such persons unless the carrying out of that arrangement appears to be for the benefit of those persons.

I would apply the third test enunciated by Pennell J. in the case of *Re Irving* (1975), 66 D.L.R. (3d) 387, 11 O.R. (2d) 443, and cited with approval by Ruttan J. in *Kunater et al. v. Royal Trust Corp. of Canada* (1980), 23 B.C.L.R. 287 at p. 289. I would ask: "Is the benefit to be obtained on behalf of those for whom the court is acting such that a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made, would be likely to accept?" In this case I would answer that test in the affirmative and allow the appeal.

[11] *Sandwell and Co.* was applied in *Continental Lime Ltd. v. Canada Trust Co.* (1998), 25 E.T.R. (2d) 128 (B.C.S.C.) where the employer applied to retain two-thirds of the surplus pension funds and future surplus funds and distribute the remaining one-third to plan members by a cash payment or pension enhancement. All but one of the 90 plan members consented. The Public Trustee, on behalf of the unascertained or minor beneficiaries, opposed the proposal. The court, however, approved the proposal on behalf of all of the contingent members. Shaw J. at ¶ 43, 45 and 46 stated:

43 Where a member elects to take cash rather than an increased pension, that should, in most if not all cases, benefit the member's family and as such, benefit the contingent beneficiaries.

45 One way or the other, whether by way of cash payments or by increased pensions, the families or beneficiaries of the members stand to be benefited by the proposal. There is, however, a remote possibility that an individual contingent beneficiary may not get an increased benefit, either directly or indirectly. In my view, that is too remote a risk to be allowed to stand in the way of the prospective benefits to be gained by the members and all who stand to gain through them.

46 A similar contention was addressed in *Sandwell & Co. v. Royal Trust Corp. of Canada* (1985), 17 D.L.R. (4th) 337 (B.C.C.A), in which court approval was sought for the distribution of surplus pension funds. Although the Public Trustee raised no objection to the proposal, the court nonetheless addressed the situation of contingent beneficiaries, including infants and persons as yet unborn. Carrothers J.A. for the court expressed the following views at p.341:

The interest of a contingent beneficiary is dependent upon participation in the plan by the participant through whom that uncertain interest is derived. By the same token, the uncertain interest of the contingent beneficiary is perforce enhanced along with the enhancement of the pension benefits to the participant through whom the interest derives. The interest of a contingent beneficiary is in succession to the participant and is for the most part the result of a designation by that participant. The interest of a contingent beneficiary is dependent upon an uncertain event or condition which may never happen or be performed, or which may not happen or be performed until after the exhaustion or extinction of the pension benefits.

In my view the foregoing words of Carrothers J.A. in Sandwell apply equally to the present case.

Position of Rogers Communications Incorporated

- [12] RCI contends that the court cannot consent on behalf of any of the designated beneficiaries under s. 1(b) because that section deals with future interests which may arise on the happening of a future event or at a future date in respect of persons who are as yet unascertained, either because it is not yet known whether they meet the specified description or are members of a specified class. Only at a future date or on the happening of a future event can it be ascertained who the persons are who meet the specified description or are members of this specified class. An example RCI gives of this as-yet-unascertained person is the new member that would arise if RCI decided to or was able to re-open the Plan and add new members.
- [13] In support of its position, RCI relies on *Knocker v. Youle*, [1986] 2 All E.R. 914 (Ch.D.) which held that the court had no power under the English Variation of Trusts Act, 1958 (U.K.), 6 & 7 Eliz. II, c. 53 to consent on behalf of persons who had a contingent interest. In that case, the settlor gave the income from a share in a trust fund to his daughter for life, if she reached the age of 21, and on her death, to such person she appointed under her will. In default of appointment, her share would go to the settlor's son. In the event of failure or determination of the trusts for the daughter and son, the income was to go to the settlor's wife for life or until her remarriage, and then to the settlor's four sisters living and over the age of 21. If any of the sisters had died, then her share was to go to her issue then living and over the age of 21, in equal shares.
- [14] The settlor's son and daughter brought applications seeking the court's approval for a proposed variation of the trust. The settlor's wife and four sisters were all deceased, but there were 17 issue of the dead sisters (cousins to the son and daughter), none of whom were parties to the applications. Some of the cousins lived in Australia and it was not practical to obtain their consent to the proposed variation.
- [15] Section 1(1)(b) of the English Variation of Trusts Act, 1958, is almost identical to s. 1(b) of the Trust and Settlement Variation Act, except that the clause continues with what is known as the proviso to the section:

Section 1(1)

- (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court,

[Emphasis added.]

- [16] Warner J. found that 'interest' must be used in its technical, legal sense; otherwise, the words 'whether vested or contingent' in the preceding paragraph (similar to s. 1(a) of the British Columbia legislation) would be out of place. Therefore the cousins did not come within s. 1(1)(b), as the section refers to those who may become entitled, not those who were entitled to an interest, albeit a contingent or "doubly contingent" interest in the case of the cousins under the age of 21. It did not matter that the contingent interests were remote and could be defeated by the testamentary power of appointment by the settlor's son and daughter who had already executed wills to that effect. Warner J. also found that the cousins were excluded by the proviso to s. 1(1)(b).

Analysis

- [17] As far as I have been able to determine, *Knocker v. Yule* has not been judicially considered in Canada or elsewhere. The decision has, however, been the subject of academic criticism. Professor Peter Luxton, in "An Unascertainable Problem in Variation of Trusts" (1986) 136 New L.J. 1057, states that the decision is "a salutary reminder that within paragraph (b) can come only persons with no interest in the legal sense at all."
- [18] Professor J. G. Riddall in his article, "Does It or Doesn't It - Contingent Interests and the Variation of Trusts Act 1958" (1987) 51 Conv., C.P.L. 144 at pp. 145-46, asks rhetorically, "If the section covers only persons who have no interest in trust property whatsoever, just whom does it cover? Presumably, section 1(1)(b) must cover someone, but if not someone with a contingent interest, who?"
- [19] Professor K. B. Farquhar, "Recent Themes in the Variation of Trusts" (2001) 20 E.T.P.J. 181, writes at p. 183:

Knocker v. Yule has been criticized both on theoretical and practical grounds. At a theoretical level, it is said that the decision creates a difficult and unnecessary distinction between types of contingent interest. At a practical level, it makes it impossible to vary a trust where there are adult beneficiaries who are untraceable.

The decision does not appear to have attracted any judicial attention in Canada. In *Bentall Corp. v. Canada Trust Co.* the court took jurisdiction under the British Columbia statute on behalf of adult beneficiaries of a pension plan who had contingent interests in a possible surplus of the pension fund. *Knocker v. Youle* was not referred to in the judgment of Sigurdson J., who stated that "Canadian courts now have jurisdiction to vary [a] future interest even if all beneficiaries are adult, provided that the future interest is contingent".

[20] Professor Farquhar concludes at p. 202:

First, despite *Knocker v. Youle*, Canadian courts have not sought to take a restrictive view of the classes of person on behalf of whom a consent may be given. There has been no suggestion that an individual holding a contingent interest of whatever kind is excluded from the ambit of the legislation. Since a broad view of the scope of the legislation leads to a greater ability to approve a beneficial variation, particularly where there are untraceable or unidentifiable adult beneficiaries, this seems desirable.

Second, whether or not the framers of the legislation intended that a consent could be given on behalf of adult and capacitated contingent beneficiaries who object to the arrangement, the legislation does, on its face, authorize this and the courts have ruled accordingly. In this respect, the legislation extends the principle of the rule in *Saunders v. Vautier*.

[Footnotes omitted.]

[21] In *Law of Trusts In Canada*, 2d ed. (Toronto: Carswell, 1984) Professor Waters states at p. 1070:

Clause (b) enables the court to consent on behalf of persons who may become entitled to the kind of interest already mentioned on the occurrence of a future date or event. At that time the person in question may be of a specified description ("to A and his then wife, if any, a joint life interest commencing 10 years after my death") or a member of a specified class ("remainder equally among those of my four children who shall be surviving at the death of my widow, W").

[Emphasis in original.]

[22] Dealing with the difference between the Canadian legislation, and the proviso or exception in the English legislation, Professor Waters continues at pp. 1070 to 1071:

Take a standard example. T leaves a widow, W, and three children. X and Y are 21 and 19 respectively, Z is only 12 years old. It would be in the best interests of mother, the life tenant, and children, the remaindermen, if the trust were revoked, and each acquired a capital sum. The widow and the two older children are adults and mentally competent, but Y would like the trust kept in existence because that was what father wanted. In England Y can withhold his consent, and the arrangement is therefore a paper proposition only. The exception excludes the court from consenting on his behalf. In each Canadian jurisdiction no exception exists, and therefore, as the members of the class will only be ascertained on W's death, and Z is an infant so that an application to the court is indispensable, the court has to consent on behalf of X and Y. If the

court thinks Y is being unreasonable, it can give its consent nevertheless. This may seem a far-fetched situation, but it serves to emphasize that the courts in Canada have to consent on behalf of persons who in terms of their age and mental condition are perfectly capable of consenting for themselves.

[23] In *Bentall Corp. v. Canada Trust Co.* (1996), 26 B.C.L.R. (3d) 181 (S.C.) Sigurdson J. at ¶ 18 states:

18 Donovan Waters, in his book *Law of Trusts in Canada*, 2nd ed., (Toronto: Carswell, 1984), at pp. 1070-1071, gives an example which shows that, by virtue of this section, where there is a person with a future interest on whose behalf the court could approve a variation, Canadian courts now have jurisdiction to vary that future interest even if all beneficiaries are adult, provided that the future interest is contingent. His example also shows that this is the case even where there is opposition from some of the beneficiaries. I agree with Professor Waters' analysis. As such, I am of the view that in British Columbia the language of s. 1(b) allows the court to consent to a variation on behalf of beneficiaries whose interest is contingent.

[24] I disagree with RCI's contention that the interest at issue in *Bentall Corp. v. Canada Trust Co.* was a future potential interest that fell within s. 1(b) and the decision is therefore consistent with *Knocker v. Youle*. The members of the ongoing pension plan in that case had a present interest to any surplus funds but the interest was contingent on the plan being terminated, a surplus existing on termination, and the members remaining members at termination. They were therefore members who had a present contingent interest to a surplus that might arise in the future. Moreover, what is significant in *Bentall Corp. v. Canada Trust Co.* is that the court provided its consent to the proposed variation on behalf of plan members - not the designated beneficiaries as in this case - who were opposed to the variation.

[25] I find that *Knocker v. Youle* is inconsistent with the law in this province and I decline to follow it.

[26] The petitioners have offered no explanation for the lack of consents from the 25 or so designated beneficiaries. I note, however, that on some of the consent forms, members have indicated "N/A", suggesting that who was once a spouse might now be a former spouse or deceased. On other forms, the person who has signed as spouse or beneficiary is not the same person shown on the member's beneficiary designation form completed more than 15 years ago, but is a person who resides at the same address as the member, suggesting that the member has a new spouse or partner. In still other cases, since designating a beneficiary a member has elected a life-only pension, so there will be no benefits payable on the death of the member, and no need to obtain the consent of any beneficiary. Notably, several members have designated a change of beneficiary, for example, from the name of a parent to the name of a spouse, from a spouse to a son or daughter, or from a former spouse to a present spouse. There are many reasons why a member might do so, including marriage, separation or divorce, and death. It is significant that some members have changed their designated beneficiaries as recently as last year, and that until death, one or more members

may in the future change the name of a beneficiary unless they have elected a life-only pension.

- [27] For these reasons, I adopt the reasoning of the Court of Appeal in *Sandwell and Co.*, *supra*. The interest of the designated beneficiaries is contingent not only on him or her surviving the member, but remaining the designated beneficiary to whom benefits may pass on the death of the member. It is not reasonable or necessary to obtain the consent of the 25 or so designated beneficiaries whose consent RCI contends is missing. The consent of the members who made the designation is sufficient.

Conclusion

- [28] For the foregoing reasons, I conclude that the interests of the designated beneficiaries fall within s. 1(b) of the Trust and Settlement Variation Act, and the court has jurisdiction to consent on behalf of those designated beneficiaries.
- [29] According to the Amended Report on the Actuarial Valuation as at March 31, 2002 prepared for RCI by Mercer Human Resource Consulting, the market value of the Plan's assets as at January 1, 2001 was \$19,342,200 and as at March 31, 2002 it stood at \$18,471,300. Regardless, there is little doubt that termination of the trust will benefit all of the designated beneficiaries, provided of course that they remain the beneficiary and are alive on the death of the member.
- [30] Mr. Laxton on behalf of the petitioners advances a myriad of reasons why they have "lost faith" in RCI, the trustee, and the actuary appointed by RCI. These include the fact that RCI improperly took contribution holidays now worth more than \$4 million, which had the petitioners known in time, their claim would not have been found statute barred by Mr. Justice Lowry; the fact that RCI admitted to a breach of trust when they removed funds from the trust and were forced to pay back more than \$4 million; and the fact that not only has RCI had difficulty in determining and identifying the Plan members, it cannot determine whether 26 deferred vested members have received their pension entitlements from the trust fund.
- [31] RCI now contends that the value of trust funds should be reduced by approximately \$750,000. Its actuary has recently found what is described as a "serious error" in the 1989 actuary report that overstated the investment return on the trust assets from 1987 to 1989 at 32.88 per cent, rather than 17.23 per cent as determined by the audited financial statements. The error resulted not only in an overstatement of the trust assets by more than \$750,000, but an error in the evidence before Lowry J. and the order that he made in September 1998. RCI maintains that the error should be cured under the "slip rule", Rule 41(24). While I do not think the error is the kind of clerical mistake, accidental slip or omission contemplated by Rule 41(24), the issue of any error is not properly before me and I am making no decision on that point.

[32] The petitioners seek the following orders:

1. the Premier Pension Plan be terminated;
2. RCI be enjoined from having any further dealings with the Premier Pension Plan;
3. the Pension Committee appointed by RCI be removed as the administrator of the Premier Pension Plan;
4. Albert Poy be appointed administrator to oversee the orderly termination of the Plan;
5. National Trust Company be removed as a trustee and a new trustee, approved by the new administrator, be appointed in its place within 14 days;
6. T.I. Benefits and any other actuary appointed by RCI be removed and a new actuary, approved by the new administrator, be appointed;
7. RCI obtain from T.I. Benefits and any other actuary appointed by RCI, all of their records pertaining to the Premier Pension Plan, such records to be transferred to the new administrator within 30 days;
8. the trust funds be transferred to the new trust company within 21 days in whatever form they presently exist (whether as stock, bonds or cash) in an amount as determined by the court, with liberty to the new administrator to apply for an order that additional funds be transferred if further valuations support such an order;
9. the new administrator be at liberty, at the appropriate time, to apply for an order approving the conversion of the pension benefits into annuities and the distribution of the surplus trust funds to the individual members; and
10. the new administrator be at liberty to apply to vary the termination order to allow for the Plan to be amended as may be necessary to improve the tax position of the members upon distribution.

[33] During the hearing of the application, Mr. Laxton proposed that rather than the court determining the amount of the trust funds that should be transferred, a more practical solution is an order that the entire trust fund portfolio, whether it is made up of cash, securities, bonds, or otherwise, be transferred from National Trust Company, or wherever it is situate, to the new trust company on behalf of the petitioners. I agree. I also agree with Mr. Laxton that the transfer of the portfolio should not be delayed pending any resolution or determination of the issue relating to what RCI claims is a \$750,000 over-contribution on its part.

[34] Except for continuing to maintain that the Plan should not be terminated, RCI advanced no argument towards the remaining orders sought by the petitioners.

[35] The orders sought by the petitioners are granted. Should there subsequently be a resolution or determination of the issue relating to the \$750,000 over-contribution, it may be dealt with at a later date after the transfer has taken place.

"L.A. Loo, J."

The Honourable Madam Justice L.A. Loo

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