

CANADA / JUDGMENT

Buschau v. Rogers Communications Inc.

2004 BCCA 282

COURT

British Columbia Court of Appeal

DECIDED

18 May 2004

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2004 BCCA 282 Buschau v. Rogers Communications Inc. COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Buschau v. Rogers Communications Inc., 2004 BCCA 282 Date: 20040518 Docket: CA030787 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 Tuvera, Sheera Waisman, Margaret Watson, Gertrude Westlake, Robert E. White, Patricia Jane Whitehead, Aileen Wilson, Elaine Wirtz, Joe Wuychuk, Zlatka Young Respondents (Petitioners) And Rogers Communications Incorporated Appellant (Respondent) And National Trust Company Respondent Before: The Honourable Madam Justice Newbury The Honourable Mr. Justice Low The Honourable Mr. Justice Thackray I.G. Nathanson, Q.C. and J.C. MacInnis Counsel for the Appellant J.N. Laxton, Q.C. and R.D. Gibbens Counsel for the Respondents Place and Dates of Hearing: Vancouver, British Columbia March 26, 2004 Place and Date of Judgment:

Vancouver, British Columbia May 18, 2004 Written Reasons of the Court Reasons for Judgment of the Court:

- [1] On February 20 of this year, we issued our Reasons for Judgment in this appeal. We will not describe the facts of the case here, but refer the reader to those Reasons, indexed as 2004 BCCA 80. Capitalized terms used herein shall have the same meanings as in those Reasons.
- [2] In the closing paragraphs of our February judgment, we stated that although we would normally have allowed the appeal and dismissed the petition, we wished to allow all counsel an opportunity to consider their options in light of the Reasons and to make such submissions as they might wish concerning those options. Accordingly, we directed that our order (which would otherwise have allowed the appeal) not be entered for three months. We stated that if during that period, counsel for the petitioners advised counsel for RCI that the petitioners proposed "to take any step bearing upon the applicability of the rule in *Saunders v. Vautier* to the Premier Trust", the petitioners should provide particulars to counsel for RCI and file particulars with the Court. RCI would then be expected to respond in writing within one month, and a hearing would be set down to enable counsel to make submissions to the Court. Failing the foregoing procedure being followed, we directed that an order allowing the appeal and dismissing the petition be entered at the end of the three months.
- [3] On March 12, counsel for RCI filed a notice of motion seeking an order "that the Appellant be at liberty to enter an order allowing the appeal and dismissing the petition without awaiting the expiry of three months from February 20, 2004."
- [4] On March 17, counsel for the petitioners filed a notice of motion seeking an order "that the appeal in this matter be dismissed". In support, the petitioners filed affidavits of Sandra Buschau, Brian Dodd, Sherra Waisman and Margaret Watson, all of whom deposed (and attached copies of supporting agreements) that their former spouses have no claim to or interest in any of their pensions, including the Premier Pension, and all of whom consented to the termination of the Trust. In addition, a lengthy affidavit of Mr. Poy, also a petitioner, was filed. He deposed that on January 2003, RCI had advised the Chambers judge below that the consents of a total of 28 designated beneficiaries to the termination of the Trust had not been obtained. Mr. Poy also recounted that at para. 102 of our Reasons in this appeal, Newbury J.A. had stated for the Court: If my analysis of the applicable law is correct, what actions are left to the Members? One possible solution (and counsel may well conceive of others) may lie in the fact that under the terms of the Plan, a Member may revoke the designation of a beneficiary at any time. If those Members who designated the [approximately] 25 "missing" persons were to revoke their designations, the consents of those designees would no longer be required for the termination of the Premier Trust pursuant to the rule in *Saunders v. Vautier*. Where a Member has been required to make a designation, as on a division of family assets or otherwise, alternate designations could perhaps be made in favour of persons who could consent and agree to hold in trust any benefits for the "missing" intended beneficiaries. Mr. Poy deposed, partly on information and belief, that as at the time of swearing his affidavit, the 28 Members who had designated

the "missing" beneficiaries had either located those beneficiaries and obtained their consents to the termination of the Trust or had revoked their designations and designated other beneficiaries who had consented. Attached to Mr. Poy's affidavit as exhibits A through BB were the 28 consents and/or revocations and consents of the newly-designated beneficiaries. In the result, the petitioners assert that the consents of all members and their designated beneficiaries to the termination of the Trust pursuant to the rule in *Saunders v. Vautier* have been obtained. No application was made by RCI to cross-examine any of the deponents on their affidavits.

- [5] Both motions were set down for hearing on March 26. At that time, Mr. Nathanson on behalf of RCI advanced two general arguments in support of the immediate entry of an order allowing the appeal. First, he submitted that "if" this court had the jurisdiction to delay the entry of one of its orders, the Court should not do so where the effect would be to permit a litigant to act on the Court's "advice" as to how to overcome or avoid the result (i.e., the allowing of the appeal) that would otherwise obtain. In Mr. Nathanson's argument, this "advice", and the fact that the rights of the previously-designated "missing" beneficiaries have now been affected by the revocations, risked compromising the Court's appearance (if not the substance) of impartiality between the petitioners and RCI.
- [6] We will deal with this argument immediately, since it challenges our ability to proceed, and to do so in a judicial manner. On the question (if one was raised) of jurisdiction, we agree with Mr. Laxton that the broad jurisdiction conferred on this court by s. 9 of the Court of Appeal Act, R.S.B.C. 1996, c. 77, provides a complete answer. Section 9 states in part that the Court may:
- (a) make or give any order that could have been made or given by the court or tribunal appealed from,
 - (b) impose reasonable terms and conditions in an order, and
 - (c) make or give any additional order that it considers just. Further, under s. 9(8) the Court has the "power, authority and jurisdiction vested in the Supreme Court" for all purposes of and incidental to the hearing and determination of any matter. This provides ample authority for our delaying the entry of the Order on the terms described above.
- [7] As far as the propriety of our direction is concerned, what occurred was no different in principle than if we had addressed a question to counsel during argument as to what would happen if the designations of the "missing" beneficiaries were revoked, or indeed asked any other questions of counsel that might have occurred to us concerning an issue arising in the appeal. As it was, once we had arrived at the conclusion that the Supreme Court's jurisdiction under the Trust and Settlement Variation Act was not exercisable (despite a previous decision of the Court to the contrary) on behalf of the missing beneficiaries who were *sui juris*, and that RCI did not have an "interest" in the Trust that would preclude the application of the rule in *Saunders v. Vautier*, we foresaw that the revocation of the designations of the missing beneficiaries was only a matter of time. Those revocations and

the termination of the Trust would, one could also foresee, trigger a new application by RCI or the petitioners to the Supreme Court, and another possible appeal -- the fourth in litigation that began in 1995. We were of the view that such litigation would be largely, if not completely, re-litigation -- i.e., the re-exploration of complicated facts and legal issues that have already been extensively canvassed and judicially considered.

- [8] We also considered that since RCI had been found to have no "interest" in the Trust, which was established for the exclusive benefit of Plan Members and their beneficiaries, a resolution in accordance with the law, sooner rather than later, was in the interests of justice. Indeed, as Mr. Laxton suggested, delaying tactics by RCI could become abusive. No one would be served by further hearings and arguments to the extent they would be unnecessary or duplicative. In this regard, we note the duty of this Court to "secure the just, speedy and inexpensive determination of every proceeding on its merits." (Here we quote from R. 1(5) of the Rules of the Supreme Court, but the same principle applies to this court as well.) Keeping this objective in mind, we believe it was appropriate for us to suggest that alternatives be explored or questions be responded to by counsel, and that the Court could do so without prejudicing the appearance or reality of impartiality, provided counsel had a full opportunity to make such submissions as they wished.
- [9] RCI's second argument was that further hearings in the court below will be necessary - i.e., that there are factual and legal questions that must be resolved before the order of Loo J. could be upheld. (In fact, as will be seen, our order will allow the appeal.) In particular, Mr. Nathanson contends that examinations for discovery of the deponents will be necessary, that there is a question regarding the formal validity of the consents and revocations which the petitioners have now filed, and that an entirely new proposal and application will now be required pursuant to s. 1 of the Trust and Settlement Variation Act (a section discussed extensively in our earlier Reasons), in light of certain "interests" in the Trust given by statute to spouses of Plan Members. In this regard, Mr. Nathanson drew our attention to ss. 22(2) and 22(5) of the Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.), which provide:
- (2) A pension benefit that commences to be paid on or after January 1, 1987 to a member or former member of a pension plan who has a spouse or common-law partner at the time the pension benefit commences to be paid shall be in the form of a joint and survivor pension benefit, subject to subsection 25(7). . . .
 - (5) Notwithstanding subsections (2) to (4), a pension plan shall provide that, in respect of a pension benefit that commences to be paid on or after January 1, 1987, a member or former member may elect to receive
 - (a) the normal form of the pension benefit, or
 - (b) the pension benefit in any other form provided for under the terms of the plan, except that, where the member or former member has a spouse or common-law partner, an election as a result of which the pension benefit would reduce on the death of the member or former

member, where the member or former member predeceases the spouse or common-law partner, to less than sixty per cent of the amount payable when both were alive, may not be made without the spouse's or common-law partner's written agreement, in prescribed form and deposited with the administrator of the plan. [Emphasis added.]

- [10] We do not agree that a new application under the Trust and Settlement Variation Act is necessary by virtue of s. 22. Provided the consents of all Members and designated beneficiaries have been obtained, the Pension Trust can be terminated under the rule in *Saunders v. Vautier* itself, and without the Court's consent. As we stated at para. 4 of our previous Reasons, where the conditions for the application of the rule are met, the beneficiaries are entitled to call on the trustee to deliver over the trust property, and the trustee must comply. (At the same time, we recognized that most trustees will wish to ensure that they will not be subject to legal action by the settlor or beneficiaries should a question arise as to the propriety of abrogating the trust. Thus we said the direction of the court is generally sought, "if only to obtain its opinion as to the applicability of an undoubted rule.")
- [11] The question of who are the beneficiaries, actual and potential, is determined by reference to the terms of the Trust itself. We are not aware of any authority for the proposition that possible rights which might accrue under a statute at some point in the future to a spouse or other heir of a beneficiary makes the holder (or hypothetical future holder) of such rights a beneficiary under the trust. To take a simple example, suppose a trust in favour of X for life and then to Y. There is no suggestion in the case-law or any text to which we were referred that X and Y would be precluded from terminating the trust under the rule in *Saunders v. Vautier* because a possible future spouse's written agreement to an election of some kind might be required some day under the Pension Benefits Standards Act, or (to pose another example) because of the possibility that X or Y might marry in future, giving his or her spouse an interest in the trust property under the Family Relations Act. It is also possible that X might some day become bankrupt, in which event his or her estate would pass to a trustee in bankruptcy for the benefit of his or her creditors. Again, no authority suggests that prior to the bankruptcy, the possible future trustee in bankruptcy or the creditors of X would have an "interest" or possible future interest in the trust such that the Court's consent to the termination must be sought and obtained under the Trust and Settlement Variation Act on behalf of the possible trustee or creditors. The situation is different, of course, where by virtue of the trust instrument, a future spouse or issue of X (for example) may acquire a beneficial interest. Thus where a trust is established for X and on his death for his children then alive, the Court's consent must be sought under the Act on behalf of possible unborn children before X and his existing children may be permitted to terminate the trust. The question in each case turns on the terms of the trust instrument itself.

- [12] Mr. Nathanson also raises an evidentiary point -- that there may be common-law partners of Members who have not consented by signing the appropriate form -- and that in any event, those spouses (which term includes common-law partners) who have consented to the termination of the Trust by signing the form of consent prepared by Mr. Laxton's firm have not signed a waiver pursuant to s. 22(5) of the Pension Benefits Standards Act in the "prescribed form".
- [13] With respect, we are not persuaded that s. 22(5) is applicable to the termination of a trust under the rule in *Saunders v. Vautier*. Section 22(5) requires that a pension plan provide for the election therein described with respect to the payment of "pension benefits". (The Act defines "pension benefit" to mean a "periodic amount" to which a member or person claiming through a member is or may become entitled.) Once the rule in *Saunders v. Vautier* is invoked, however, pension benefits cease to be payable: the trust is wound up and its (net) assets are distributed to the beneficiaries once and for all.
- [14] Finally, counsel for RCI noted that the terms of the Premier Pension Trust allow Members to designate beneficiaries and to revoke those designations "subject always to any prevailing legislation governing designation of beneficiaries which may apply." Notice of a designation or alteration thereof "may be in such form and executed in such manner as the Committee [defined to mean the Retirement Committee Constituted by the Company from time to time] may, in its discretion, from time to time determine." The terms of the amalgamated RCI Plan are somewhat similar: they state that a Member may designate a beneficiary and alter or revoke the designation "by filing with the Company such alteration or revocation in writing on a form prescribed by the Company for that purpose, subject to any statutory conditions or limitations." Mr. Laxton advised the Court in the March hearing that the form of the revocations and the form of the consents which were obtained from designated beneficiaries were the same forms as have been used previously for revoking and consenting, without objection from RCI or the committee. RCI did not challenge that statement, but now contends that it is entitled to object to the forms used by the petitioners.
- [15] In the absence of evidence that the Committee or RCI itself prescribed a different form before this appeal was taken, or that the form used by the petitioners is somehow deficient, we are not minded to accede to any such formal objection at this stage of the proceedings.

Disposition

- [16] For the Reasons we issued on February 20, we remain of the view that the appeal should be allowed, and the order of Loo J. set aside. That order had contemplated the transfer of the Trust assets to a new trustee, subject to certain conditions, and the "conversion of pension benefits into annuities and the distribution of the surplus trust funds" to Members of the Plan. Neither that result, nor most of the items described at para. 32 of Loo J.'s Reasons, are sustainable in light of our Reasons of February 20. The Order of this court will dismiss the petition brought pursuant to the Trust and Settlement Variation Act since the Supreme Court was without jurisdiction to consent to the termination on behalf of the "missing"

beneficiaries who were sui juris. The Order will also state that RCI does not have an "interest" in the Trust that would make its consent to the termination under Saunders v. Vautier necessary; and that provided the consents of all Members and those persons who are now designated beneficiaries have been obtained for the termination of the Trust, the petitioners shall be at liberty to proceed to invoke the rule in Saunders v. Vautier. The Trustee shall thereupon be bound to co-operate in turning over the Trust assets, after the payment of all necessary debts and expenses, to the petitioners.

- [17] We recognize of course that questions may arise as to the mechanics of the termination and that the Trustee will have to satisfy itself that the conditions have been met and that all statutory requirements -- including the payment of applicable taxes -- have been complied with before the Trust assets may be distributed. For this purpose, the Trustee may wish to avail itself of the opportunity to seek the directions of the (Supreme) Court under s. 86 of the Trustee Act, R.S.B.C. 1996, c. 464, should it become necessary. We would regard the involvement of the Trustee, rather than the Settlor, in this way as a salutary development, it being the Trustee's role to protect the interests of the beneficiaries until the Trust has been extinguished.
- [18] We are indebted to counsel for their helpful submissions. "The Honourable Madam Justice Newbury" "The Honourable Mr. Justice Low" "The Honourable Mr. Justice Thackray"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/04/02/2004bccca0282.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/buschau-v-rogers-communications-inc-2004-bcca-282>

Prepared on 26 October 2026 · Esheria