

## LABOUR AND EMPLOYMENT

# Pension law is not simply trust law

## By Mitch Frazer

In its recent decision in *Buschau v. Rogers Communications Inc.* [2006] S.C.J. No. 28, the Supreme Court of Canada held that members of a closed pension plan could not rely on traditional trust law principles to require the termination of the plan and distribution of its surplus. In reaching its decision, the SCC recognized that pension plans have a unique set of legal principles that should not be blindly equated with traditional trust law principles.

### Background

Members of a closed pension plan registered under the federal *Pension Benefits Standards Act*,

1985 (PBSA) sought to unilaterally terminate the underlying trust of the plan and distribute surplus assets in the plan on the basis of the “rule in *Saunders v. Vautier*”, a principle from an old English trust law case. The rule in *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 allows beneficiaries of a trust to terminate the trust if all the beneficiaries are adults with full mental capacity who consent to the termination.

### Court of Appeal decision

The British Columbia Court of Appeal (Court of Appeal) held that members of the closed plan could terminate the trust and force a distribution of surplus according to

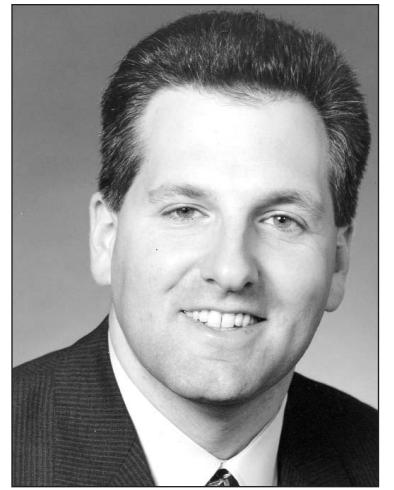
the rule in *Saunders v. Vautier*. The Court of Appeal further held that the plan sponsor could not avoid this result by re-opening the trust to new members.

### SCC decision

The SCC held that the members of the closed plan could not invoke the rule in *Saunders v. Vautier* to terminate the trust because this trust law principle could not be readily applied in the complex context of registered pension plans. Instead, the PBSA, which sets out a comprehensive legislative scheme dealing with plan termination and distribution of surplus assets, provides recourse for plan members and should displace the trust law rule. More specifi-

cally, the SCC recognized that pension trusts cannot be terminated without considering the legislation governing a particular pension plan and the plan itself. The SCC also recognized that the important social purpose of pension plans to preserve “the financial security of employees in their retirement by allowing them to receive periodic payments until they die” would be defeated if members could require early distribution of pension trust assets.

The SCC was divided on whether the closed plan could be re-opened by plan amendment. In a four to three decision, the majority of the SCC held that the superintendent of Financial Institutions was in the best position to deal with a number of issues, including plan termination and whether the plan could be amended to add new members.



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The majority specifically discussed the possibility of the superintendent’s terminating the plan on the basis of the contribution holi-

see *BUSCHAU* p. 9

## *Saunders v. Vautier* not applied

BUSCHAU

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days taken by the employer, and held that although contribution holidays were legitimate from a funding perspective, they could still be considered illegitimate if they disguised an improper refusal to terminate the plan.

The minority of the SCC found that none of the statutory grounds for plan termination were present. The minority went on to state that “suspension or cessation of employer contributions” in the context of the superintendent’s discretionary power to terminate a plan under the PBSA refers to an employer’s failure to make necessary contributions, not to legitimate contribution holidays as a result of surplus in the plan.

### Implications of *Buschau*

The SCC decision that the rule in *Saunders v. Vautier* is not applicable in the above circum-

stances represents an easing of the strict application of trust law principles in the pension context and confirms that pension trusts are different from traditional trusts.

Equally important is the deference that the SCC showed to the pension legislation, especially recognizing that the mechanisms established in the PBSA for dealing with issues such as plan termination and distribution of surplus assets take precedence over trust law rules, and that these mechanisms should be used to manage these issues.

Finally, the SCC’s formal acknowledgment of the important social purpose that pension plans play in society is a significant step forward under Canadian law.

One troubling aspect of the decision for plan administrators is the suggestion by the majority of the SCC that the superintendent can use his discretionary power to terminate pension plans where

contribution holidays, although proper from a funding perspective, could potentially be interpreted as disguising improper refusals to terminate pension plans. This adds a new, unnecessary and subjective dimension to the debate over contribution holidays. Administrators currently taking contribution holidays now face the risk of litigious plan members bringing applications to the pension regulator to use their discretionary powers under the PBSA or similar provincial statutes to terminate plans on the basis of “improper” contribution holidays.

Nonetheless, this decision clearly halts the recent trend of pension decisions in favour of employees and represents a victory for pension plan administrators.

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