

## ONTARIO COURT OF APPEAL HOLDS PENSION PLAN MEMBERS CANNOT REQUIRE EMPLOYER TO WIND UP PLAN

In a decision released on March 10, 2010, *Lomas v. Rio Algom Limited*,<sup>1</sup> the Ontario Court of Appeal held that pension plan members cannot obtain a court order requiring the employer to wind up a pension plan. The court decided that such an order would conflict with the Supreme Court of Canada's decision in *Buschau v. Rogers Communications Inc. ("Buschau")*,<sup>2</sup> and would be contrary to the legislative scheme of the *Pension Benefits Act (Ontario)* (the "PBA").<sup>3</sup> The *Rio Algom* decision benefits employers as it underlines the exclusive rights of the employer and the Superintendent to initiate the wind up of pension plans.

The pension plan at issue (the "Plan") was originally created as a defined benefit ("DB") plan, but was later changed to a plan with both a DB portion and a defined contribution ("DC") portion. Plan members at the date of the change could elect to switch from the DB to the DC portion of the Plan, but members admitted thereafter were eligible only for the DC portion.

The applicant sought to represent the DB members of the Plan, and alleged that the employer had committed a number of serious breaches with respect to the DB portion. The applicant requested a variety of relief, including an order that the court wind up the Plan or, alternatively, that the court require the employer to initiate proceedings under section 68 of the PBA to partially wind up the Plan. As the DB portion was closed, and the Plan assets associated with that portion were alleged to be in excess of that required to fund the DB portion benefits, the plaintiff alleged that maintaining the DB portion served no good purpose.

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<sup>1</sup> 2010 ONCA 175.

<sup>2</sup> [2006] 1 S.C.R. 973.

<sup>3</sup> R.S.O. 1990, c. P.8.

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After the proceeding was commenced, the Supreme Court of Canada released its decision in *Buschau*, holding that pensioners cannot invoke the rule in *Saunders v. Vautier*<sup>4</sup> to compel the termination of a pension trust. The rule in *Saunders v. Vautier* provides that if all the beneficiaries in a trust are legally competent adults, they may by unanimous consent require the trustee to distribute to them the assets of the trust. Attempts to invoke this rule in the pension context have failed because the potential beneficiaries of a pension plan may include spouses, dependent children and designated beneficiaries, many of whom may not be ascertainable at the time the rule is invoked. Also, in many plans the employer itself will be a beneficiary by virtue of a right to surplus on wind up. The applicant in *Rio Algom* conceded that *Buschau* prevented the DB members from asking the court to wind up the pension plan, but argued that the employer could still be ordered to declare a partial wind up by means of the statutory procedure in section 68 of the PBA.

This argument was rejected by a unanimous panel of the Ontario Court of Appeal for two reasons. First, the court held that the reasoning in *Buschau* does not depend on the manner by which the members seek to force a plan termination. To allow members to force a wind up by any means would be contrary to the societal purposes for which pension plans exist, the scheme of the legislation governing pension plans, and the language of pension plans themselves which generally provides only the employer with the right to terminate the plan.

Second, the scheme of the PBA precludes the court from ordering an employer to commence wind up proceedings. Under the PBA only the employer and the Superintendent of Financial Services (the “Superintendent”) have the power to initiate a wind up, and the procedure that applies in each case is different. While the employer may initiate a wind up at will, the Superintendent’s power is limited to specified circumstances. Furthermore, in the case of an employer-initiated wind up the Superintendent provides regulatory oversight of the proceedings but cannot require that the pension plan continue in existence. By contrast, where the Superintendent initiates wind up proceedings the employer and others may request a hearing in respect of the proposed wind up before the Financial Services Tribunal, and may subsequently appeal the decision of the Tribunal to the courts. Plan members’ normal recourse if they feel the Plan should be wound up is to request that the Superintendent initiate wind up proceedings. If plan members were permitted to force the employer to initiate wind up proceedings, however, the checks and balances applicable to wind up proceedings initiated by the Superintendent would be circumvented.

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<sup>4</sup> (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch. D.).

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The *Rio Algom* decision will likely restrict creative attempts by members' counsel to obtain remedies not contemplated in the PBA or the relevant plan documents. Together with *Buschau*, it sends a clear message to members: where pension benefits legislation empowers a pension regulator to address a particular issue, plan members should exhaust that avenue before coming to court. This may lead to slightly more Financial Services Tribunal hearings in the future, and slightly fewer court cases

The Pension and Benefits Group at Borden Ladner Gervais LLP would be pleased to discuss with you the implications of this decision and any other pension issues you may have.

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