TAB 5

Most Negative Treatment: Distinguished
Most Recent Distinguished: Bennett v. British Columbia | 2009 BCSC 1358, 2009 CarswellBC 2635, [2009] B.C.J. No. 1955, 77 C.C.P.B. 56, 181 A.C.W.S. (3d) 596, [2009] B.C.W.L.D. 7782, [2009] B.C.W.L.D. 7783, 2009 C.E.B. & P.G.R. 8363 (headnote only) | (B.C. S.C., Oct 1, 2009)

1995 CarswellOnt 318
Ontario Court of Justice (General Division)

Canada (Attorney General) v. Confederation Life Insurance Co.

1995 CarswellOnt 318, 1995 C.E.B. & P.G.R. 8227 (headnote only), [1995] O.J. No. 1959, 24 O.R. (3d) 717, 31 C.C.L.I. (2d) 77, 33 C.B.R. (3d) 161, 56 A.C.W.S. (3d) 509, 8 C.C.P.B. 1, 8 E.T.R. (2d) 72

Re CONFEDERATION LIFE INSURANCE COMPANY; AND Re Insurance Companies Act, S.C. 1991, as amended; AND Re Winding-up Act, R.S.C. 1985, c. W-11, as amended

ATTORNEY GENERAL OF CANADA v. CONFEDERATION LIFE INSURANCE COMPANY

R.A. Blair J.

Heard: March 3, 7, 8, 20, 21, 27, 28 and 31 and April 5, 6 and 13, 1995
Judgment: July 4, 1995
Docket: Doc. RE 4315/94

Counsel: *Benjamin Zarnett, Andrea W. Rowe* and *Michele Altaras*, for Peat Marwick Thorne Inc., agent of Superintendent of Financial Institutions, provisional liquidator of Confederation Life Insurance Company.
Mark Zigler, Susan Rowland and *Cynthia Weekes*, appointed as representative counsel to represent interests of retirees of Confederation Life Insurance Company.
Donald C. Matheson, Q.C., Martha Milczynski and *Clifton Prophet*, appointed as representative counsel to represent interests of Supplementary Pensioners "In Pay"; and appointed as representative counsel to represent interests of Messrs. Rhind and Burns in respect of their claims for payment from Confederation Life Insurance Companies Deferred Compensation Plan.
Ronald Robertson, Q.C., Michael MacNaughton and *Edmond Lamek*, appointed as representative counsel to represent interests of Supplementary Pensioners "Not In Pay".
J.H. Grout and *Aida Van Wees*, appointed as representative counsel to represent interests of all policyholders and claimants of Confederation Life Insurance Company other than those persons described above.
Charles Scott and *David Roney*, for Canadian Life and Health Insurance Compensation Corporation.
Shaun Devlin and *Peggy McCallum*, for Superintendent of Pensions.
John Varley and *M. Jasmine Sweatman*, for Deloitte & Touche which was appointed administrator of Confederation Life Insurance Company Pension Plan for Canadian Salaried Employees by Superintendent of Pensions.
Hart Schwartz, for intervenor, Attorney General of Ontario.
R. Stephen Paddon, Q.C. and *Russell Laishley*, for Prost Investments Limited, Grant Forest Industries Corporation, Domco Food Services Ltd., Sullivan Entertainment, The Miller McAsphalt Corp. and CCL Industries Inc., policyholders.
Robb Heintzman, for Price Waterhouse Limited, liquidator for Confederation Trust Company.
Lawrence Ritchie, for Avenor Inc., Coopérative fédérée du Québec, Avenor Maritimes Inc., Bombardier Inc., ITT Industries of Canada Limited and AlliedSignal Canada Inc., policyholders.
Jeff Carhart, for Association of Confederation Life Contractholders, Inc.
Dana Fuller and *Derrick Tay*, for Fidelity Management Trust Company, policyholder.
Ian Morris, for Daniel Wiseblott, former employee of Confederation Life Insurance Company.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts; Insurance

Related Abridgment Classifications

Business associations

VI Changes to corporate status

VI.4 Winding-up

VI.4.b Under Dominion Act

VI.4.b.vii Claims of creditors

VI.4.b.vii.F Miscellaneous

Pensions

I Private pension plans

I.2 Payment of pension

I.2.l Bankruptcy or insolvency of employer

I.2.l.iii Supplementary plans

Headnote

Corporations --- Winding-up — Under Dominion Act — Claims of creditors

Corporations — Winding-up — Priorities — Employees of life insurance company ranking behind policyholders as ordinary unsecured creditors — Employees not qualifying as "policyholders" under s. 161(1)(c) of Winding-up Act and failing to establish facts that would support claim of trust — Winding-up Act, R.S.C. 1985, c. W-11, s. 161(1)(c).

A life insurance company was ordered to be wound up. The company had a contractual arrangement with its employees as part of their remuneration package. Under the arrangement, they would be entitled to long-term medical, dental and life insurance coverage after their retirement. The company had also set up a supplementary retirement income arrangement with its senior officers, the purpose of which was to "top up" the benefits provided under the company's registered pension plan for officers and employees.

One of the issues in the winding up process was the priority to the company's remaining assets between the employees and insurance policyholders. Since only "policyholders" are entitled to priority under the distribution provisions of the *Winding-up Act*, the employee claimants could only receive effective protection in the winding-up proceedings if they could show that their claims were in the nature of trust claims or if they could show themselves to be in the category of policyholders who had priority.

Held:

The policyholders had priority.

Under s. 161(1)(*c*) of the *Winding-up Act*, the claims of "policyholders" of the company rank in priority after the costs of the liquidation and preferred claim given to employees for three months' wages, but ahead of the priority provided in s. 161(2) for ordinary or general creditors. The only reason the claimants could argue that they were "policyholders" under the Act was because the liquidation of the company was a liquidation of an insurance company. Parliament could not have intended to treat employees differently with respect to priority on liquidation simply because of the nature of their employer's business. Therefore, the claimants were not "policyholders" as that term is used in s. 161(1)(*c*).

None of the claimants was successful in showing the existence of an express trust with respect to their benefits. The trust claims failed because certainty of intention to create a trust and certainty of subject-matter were not shown. No funds or assets were set aside or designated to fund any of the claimants retirement benefits arrangements.

Insufficient evidence was adduced to support the claimants' suggestion that constructive trusts should be declared. There was no indication that there was fiduciary relationship between the company and the claimants with respect to the retirement benefits arrangements. The evidence did not show a mutual understanding that the benefits would be pre-funded or secured, and there was nothing upon which to base a finding that the claimants had any reasonable expectation that the company had undertaken to subordinate its own interests, and those of its policyholders, to those of the claimants with respect to the benefits. Therefore, since there was no fiduciary relationship in this regard, no constructive trust could be imposed as a remedy for breach of the obligations arising out of such a relationship.

No constructive trust could be imposed on the basis of a finding of unjust enrichment. While the company benefitted from the services of its former employees, and they were going to suffer from the collapse of the company, the deprivation of the claimants was not related to the company's enrichment. The deprivation of the claimants related to the company's collapse.

> Insolvency and the winding-up of an insurance company are two events which threaten the protection and the financial security sought by the people who execute annuity contracts with an insurer, if they cannot benefit from the privileged status provided by the legislature in the Winding-Up Act.

122 The purpose of the regulatory scheme governing the insurance industry, and of the priority scheme enacted through s.161(1) of the *Winding-up Act*, supra, in my view, is to protect policyholders who invest funds with an insurance company. In such circumstances the regulatory scheme established under the *Insurance Companies Act*, supra, requires that an adequate reserve be established to cover the actuarial liability associated with the investment. What the "policyholder" priority of para.161(1)(*c*) does is to preserve access to that reserve by arm's-length purchasers of financial services products from life insurance companies, when such companies become insolvent.

123 It is not the senior officers of the Company — many of whom, including the Chairman and President, would have been at the helm in the period leading up to the collapse — whom the priority scheme is designed to protect. Vaulting the claims of such senior officers — and even the retired employees as well — into the same position as policyholders of the Company's products would mean ignoring the carefully constructed regulatory scheme which Parliament and the Legislatures have erected.

124 The only reason the Claimants are able to argue that their claims are claims of "policyholders" under the *Winding-up Act*, supra, is because the liquidation of their employer, Confederation Life, is the liquidation of an insurance company. Parliament, in my opinion, could not have intended to treat employees differently, in terms of priority on the liquidation of their employer, simply because of the nature of their employer's business. That, however, would be the result if the Claimants' position on the "policyholder" argument were to prevail. In my view, it cannot prevail.

125 I therefore hold that neither the Retirees nor the Supplementary Pensioners nor the Deferred Compensation Claimants are "policyholders" of Confederation Life, as that term is contemplated in para.161(1)(*c*) of the *Winding-up Act*, supra.

126 Finally, even if it could be said that the Claimants are "policyholders", as contemplated by s.161 of the *Winding-up Act*, supra, they would only rank, in the circumstances of this case, with "other creditors and *policyholders*" under subs.161(2), in my opinion. Ensuring the integrity of the legislative scheme of priority, intended as it is to protect arm's-length purchasers of insurance policies and annuities from insurers, commands nothing less.

127 I turn now to the issues of whether Confederation Life is bound by trust or fiduciary obligations in relation to its arrangements with the three groups of Claimants.

II. True or Express Trusts

128 All categories of Claimants are asserting the existence of an express trust in relation to their benefits.

129 For a Court to hold that a true or express trust exists, the party asserting the existence of such a trust must establish what are commonly referred to as "the three certainties". They are:

> (i) certainty of intention on the part of the settlor to create a trust;
>
> (ii) certainty of the subject matter of the trust i.e. the property to be settled upon the trustee in favour of the beneficiaries of the trust; and,
>
> (iii) certainty of the object or persons intended to be the beneficiaries of the trust.

130 See: *Knight v. Boughton* (1840), *(*sub nom. *Knight v. Knight)* 49 E.R. 58 (Ch.) at p.68; D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at p.105.

131 In terms of pensions, it has been held that whether the pension arrangement is governed by contract or by trust principles depends upon the terms of the plan itself: see *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631, at p.639 S.C.R., particularly per Cory J.

132 While, in determining whether or not there was an intention to create a trust, the use of the words "in trust", or "as trustee", or words to that effect is not essential, the evidence must be clear that the settlor did, indeed intend to create a trust; a general intention to benefit someone will not suffice to create a trust: *Re Allan Realty of Guelph Ltd.* (1979), 29 C.B.R. (N.S.) 229 (Ont. S.C.) at pp.241-242; *Jones v. Lock* (1865), 1 Ch. App.25 at pp.28-29; J.E. Martin, *Hanbury & Maudsely: Modern Equity*, 13th ed. (London: Stevens & Sons, 1989) at p.80. A Court will give weight to the absence of any reference to a trust in a pension plan, in determining whether there was an intention to create a trust: *Crownx Inc. v. Edwards* (1994), 20 O.R. (3d) 710 (C.A.), affirming (1991), 7 O.R. (3d) 27 (Gen. Div.).

133 In cases such as the present one, where what is argued is that the alleged settlor (Confederation Life) and the proposed trustee (the Confederation Life Trustees, or the Human Resources Committee acting under the direction of the Board of Directors) are in effect one and the same, particular difficulties arise. Waters, supra, at pp.150-151 deals with such difficulties in the following passage [emphasis added; footnotes omitted]:

> The principles applicable to this mode of making a gift are perfectly clear. The owner of the legal or equitable interest in the property in question must make it evident that he intends to constitute himself a trustee, *he must leave no doubt* as to what property interest of his is to be the subject of the trust, and he must similarly leave no doubt as to who is to be the trust beneficiary. In other words, the three certainties must be established as in the case of the creation of all trusts. As Jessel M.R. pointed out in *Richards v. Delbridge* [(1874), L.R. Eq. 11], however, an authority quoted in many Canadian judgments, it is not necessary that the donor use the words, "I declare myself a trustee": *words of any kind, and even conduct, are sufficient, provided it is satisfactorily shown that the donor did in fact intend to constitute himself a trustee. ...*
>
> The burden of proof that the donor intended to make himself a trustee is on those who allege such a trust, however, and many factors may reveal the true intent. ...

134 See also on this point *Re Garden Estate*, [1931] 4 D.L.R. 791 (Alta. C.A.).

135 On behalf of the Supplementary Pensioners in Pay and the Deferred Compensation Claimants, Mr. Matheson submits that the Supreme Court of Canada has recognized the special nature of promises made with respect to retirement benefits and that such promises should be viewed as trust promises, in recognition of the special vested rights acquired by retirees in connection with their benefits. Mr. Zigler and Mr. Robertson make a similar submission on behalf of the Retirees and Supplementary Pensioners Not in Pay, respectively. In support of this proposition they all rely upon the decision in *Dayco (Canada) Ltd. v. C.A.W.* (1993), 102 D.L.R. (4th) 609 (S.C.C.).

136 In *Dayco*, supra, the Supreme Court of Canada held that retirement benefits, depending upon the wording of the promise, could survive the expiration of a collective agreement. This is so because when a worker withdraws from the employer-employee relationship upon retirement, his or her accrued employment benefits crystallize into some form of "vested" retirement right and cannot subsequently be terminated or "divested": see *Dayco*, supra, at pp. 619, 637, 654 and 659, per La Forest J.

137 The key to the *Dayco* decision for the purposes of this case, however, is to be found in the statement of La Forest J. at p.637, that [emphasis added]:

> the old collective agreement is not rendered a nullity. *Rights that have accrued* under that agreement *remain enforceable*.

138 In short, the rights that have accrued to the retired employees cannot be terminated and may continue to be enforced. This is the essence of the "vesting" concept in this context. The right remains *enforceable*. Being *enforceable* is not necessarily the equivalent to being *secured* in the sense of pre-funded or the equivalent of being subject to a trust. There is nothing in

166 In recent years the Supreme Court of Canada has had occasion to deal with the concept of fiduciaries on a number of occasions, and the following statement by Wilson J. (then in dissent) in *Frame v. Smith*, [1987] 2 S.C.R. 99 at p.135-136, is frequently cited — to use her words — as "a rough and ready guide" in determining whether a fiduciary relationship exists. She began the Supreme Court's search for "an underlying fiduciary principle" in this fashion:

> A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts emerging from the case law, it is understandable that they have differed in their analyses ... [references omitted] ... Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have [sic] been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

167 This conceptual approach was followed in *Guerin v. R.*, [1984] 2 S.C.R. 335 and in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574. In *Hodgkinson v. Simms*, supra, it has been developed further. There, La Forest J., speaking for the majority (in the result), said at pp. 409-410 (S.C.R.) [underlining added]:

> In *Lac Minerals* I elaborated further on the approach proposed by Wilson J. in *Frame v. Smith*. I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are *per se* fiduciary, Wilson J.'s three-step analysis is a useful guide.
>
> As I noted in *Lac Minerals*, however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relation ships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship; see at p.648. *In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue.* Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

168 At p.412 (S.C.R.) La Forest J. continued [emphasis added]:

> As is evident from the different approaches taken in [*Norberg v. Wynrib*, [1992] 2 S.C.R. 226], the law's response to the plight of vulnerable people in power-dependency relationships gives rise to a variety of often overlapping duties. Concepts such as the fiduciary duty, undue influence, unconscionability, unjust enrichment, and even the duty of care are all responsive to abuses of vulnerable people in transactions with others. *The existence of a fiduciary duty in a given case will depend upon the reasonable expectations of the parties, and these in turn depend on factors such as trust, confidence, complexity of subject matter, and community or industry standards.*

