

COURT OF APPEAL

BETWEEN:

FREDERICK BENNETT

**APPELLANT
(PLAINTIFF)**

AND:

**HER MAJESTY THE QUEEN IN RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA**

**RESPONDENT
(DEFENDANT)**

APPELLANT'S REPLY

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A. General Themes

1. Politics, Bargaining, Etc.

1. Throughout the Statement of Facts, the Respondent relies on the political history of the development of pensions and other benefits for retirees. He goes into retiree lobbying and union negotiations: proposals, reaction by the government, etc.

(Respondents' Factum, paras. 20-35). He goes on at para. 46, "The Government told the public sector unions..." then continues at para. 53, "new consultations", para. 54, "The Government wanted..." and para. 55, "One result of this deal is that retirees are better protected against future inflation...".

2. In argument the Respondent argues the law from paras. 67 to 118 but there are lapses: at para. 101, "...Government and public sector unions struck a deal..."; at para. 108, "In 1977 the Government risked a public service strike..." and at para. 110 "The Government wanted to keep its free hand". And, under "Context" it is said, at para. 119, "The Government insisted....".

3. The issue is whether the government has legal obligations under contract and statute. Politics, lobbying and government bargaining positions have little or no bearing on that legal question. In interpreting a statute, the Court may consider the language of the Minister in introducing the bill. His or her speech would indicate why the legislature was asked to pass the statute, its purpose and so on. See e.g. – *Rizzo Shoes* at paras. 34-35. But none of the Respondent's material thus qualifies.

2. Vesting

4. The Respondent urges under several heads of argument that vesting must be agreed to or expressly appear in the enactments. This emerges in: the Respondent's definition of the basic principle of contract (para. 76); discussion of the communications (para. 116) and the enactments (para. 123); attribution of positions to the Appellant (paras. 109 and 144) and ultimately, in the argument that the Court should adopt a presumption that statutory "social welfare" benefits do not vest (paras. 141-157).

5. Vesting occurs by *operation of law*. It does not depend on a declaration by the legislature or by the parties to a contract that a right is indefeasible or guaranteed.

B. Contract

1. The Standard of Review

6. The Respondent urges that the standard of review is “palpable and overriding error”, relying on the *Housen* case. That standard, of course, applies to findings of fact. Mischaracterization of the proper legal test or similar error in principle is subject to the standard of correctness: see *Housen* paras. 33-36. An appellate court must intervene: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 49-50.

2. Prior Vesting

7. The Appellant argued that prior vesting is irrelevant to the existence of a contract. At the outset, the Respondent argues from cases dealing with prior vesting or prior rights (referring to *Dayco* and *Sneddon*) back to the existence of a contract (relying on *British Columbia v. E.N.R.* (1950)). In *Dayco* the issue was whether a contractual promise to pay survived the expiry of an agreement; in *Sneddon* the Court considered whether a statutory provision barred a member's election to take a refund of contributions. In *E.N.R.* the railway company urged that there was a *pre-existing* agreement for a tax exemption that was carried into effect by a statute. Prior vesting or prior agreement was important in each case. The Appellant's argument, on the other hand, is that there were promises made which were complete upon a member serving to retirement and electing coverage as requested, i.e. – there was then a contract, and the rights accrued or were vested by operation of law.

3. Offer, Acceptance, Consideration

8. Under these heads, the Respondent addresses arguments not made by the Appellant. The Appellant did not say that the legislation constituted an offer, did not urge that such offer was accepted by performance of conditions laid down in the statute, and did not argue that statutory eligibility was consideration.

4. The Collective Agreement was Exhaustive

9. As to the argument that the collective agreement was exhaustive, the Appellant refers to the judgment of Newbury J.A. in *Bennett v. British Columbia* at paras. 42-47.

5. Intention to Create Contractual Relations

10. Under this head, the Respondent's argument substantially tracks the approach of the trial judge that the Appellant requires "not only a contractual right, but an indefeasible one" (para. 109). (The trial judge sought a guarantee.) The objective intention can be seen in the promises, e.g. - "The government will pay the monthly premium for you and your dependents after retirement."

6. Breach/Content of Communications/Context

11. In discussing breach, the Respondent urges at para. 112 that the trial judge "would have had to find that a future right to enjoyment of premium-free MSP had been vested by the Communications". Again, that approach and the argument that follows look for vesting in the promise rather than the law. The Respondent urges at para. 113 that the trial judge would have had to go farther still on EHB because the sub-class pays no EHB premiums. But contributions to premiums were introduced by amendments to B.C. Reg 145/95 on January 14, 2000, as set out in the Appellant's factum at para. 33.

12. As to the content of the communications:

a. The Respondent says that benefits are never referred to as "vested" "life-time" or "for life". What the government did say is that coverage would continue as long as a retiree, spouse or dependent was receiving a pension. And indeed the point of the advice which was offered on electing a "joint life and last survivor" pension option was that the promised benefits *would continue after the life of a retiree until the death of the beneficiary*. See for example the booklet referred to in para. 21 of the Appellant's factum and AB Vol. 1, pp. 198-199.

b. The Respondent says that communications aimed at those already retired were in the present tense, e.g. - "The premium is paid by the Provincial

Government" (para. 116). No citations are given and the significance of this (the use of the future tense is evident in the booklet and application materials emphasized for example by Newbury J.A. in *Bennett v. British Columbia* at paras. 19-20)¹ does not emerge from the Respondent's argument.

c. It is true that the statements do not suggest that EHB deductibles etc. will remain frozen (para 118). The declarations sought by the Appellant in this Court relate to premiums only.

13. As to the Respondent's argument that the government could not contract because it would fetter Cabinet's power, the Appellant says Cabinet could alter premiums. But the exercise of that power and the effect of the alteration are informed and confined by the provisions of the *Interpretation Act* relied on by the Appellant.

C. Statutory Rights - Jurisdiction of this Court

14. The Respondent urges that the Court has no jurisdiction to consider a "bare" statutory argument, in the absence of an appeal on the issue of breach of fiduciary duty. In *Athey* at para. 51, the Court said that the "general rule is that an Appellant may not raise a point that was not pleaded, or argued in the trial court, unless all of the relevant evidence is in the record...". In the case at bar, the relevant evidence was part of the record and the trial judge dealt with the argument of whether the statutes gave rise to vested rights. She did not suggest that she needed additional evidence to decide the point, nor does the Respondent now suggest additional evidence is required.

15. The Respondent suggests that there is no challenge to the order of the court below and that the procedural history of the case would have been different because there would be no claim against the government for damages and the Board would have been a necessary respondent on a petition for judicial review.

¹ The sentence emphasized was: "The government will pay the monthly premium for you and your dependants after retirement".

16. The Appellant challenges the dismissal of the action by the trial judge and seeks declarations that the Crown remains under an obligation to provide premium-free retirement benefits and that the class is entitled to repayment of premiums (Appellant's Factum, p. 40). Such a claim is not appropriate for judicial review proceedings. Further, the statutory argument is a question of law (as the Respondent concedes at para. 130 - "an ordinary exercise in statutory interpretation") which the Court must consider: *Athey*.

D. Statutory Interpretation

17. Here the Respondent makes three points: a) the statutory framework is exhaustive about vested benefits; b) the primary legislation says that premium levels were determined "from time to time"; and c) there must be a presumption applied to 'social welfare' legislation "that future enjoyment of benefits conferred by legislation is not vested unless expressly or by necessary implication" (para. 133)

1. Exhaustive Definition

18. The Respondent refers to pension plan enactments at the time of joint trusteeship. Presumably, the enactments relied on are those set out at paras. 57-61 of the Respondent's Factum, commencing with the definition of the word "vested" in the 1999 Rules, continued under the 2000 Rules, and urged by the Respondent as continuing under the *Public Sector Pension Plans Act* and the Joint Trust Agreement.

19. The effect of these enactments at the time of their enactment and the power of the enacting body must be considered. The Appellants urged that there was a vested and accrued right to premium-free MSP and EHB *determined, established and prescribed* under the *Public Service Benefit Plan Act* after 1981 and later *prescribed* as a group benefit *entitlement* under the *Pension (Public Service) Act* in 1995. The adoption of a definition of the word "vested" by Cabinet in 1999 or 2000 could not have had the effect of divesting any accrued rights: see the *Interpretation Act* provisions relied on by the Appellant. Moreover, what was established as a prescribed entitlement in the statute cannot later be treated as no entitlement under a regulation. The argument that the definition in the 1999 or 2000 regulations was carried over into the *Public Sector*

Pension Plans Act (Respondent's Factum, paras. 60, 61) does not emerge on a review of the statute. In any event, the test is whether accrued rights were clearly and plainly extinguished by the Legislature.

2. From Time to Time

20. The Respondent emphasizes that Cabinet could alter premiums, as is suggested by the phrase "from time to time". Cabinet can certainly change premiums but in doing so, its powers are informed and confined by the provisions of the *Interpretation Act* referred to at para. 120 of the Appellant's Factum.

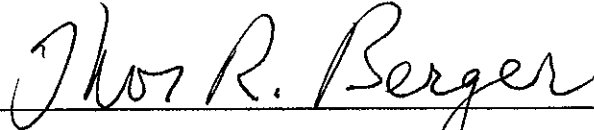
3. Presumption against Vesting of Legislated "Social Welfare" Benefits

21. This argument is without merit. The Supreme Court of Canada has set out in *Rizzo Shoes* how the courts are to construe "benefits-conferring" legislation: See Appellant's Factum, para. 104.

E. Sending the Case Back to the Trial Judge

22. The Respondent argues in the alternative that the case should go back to the trial judge to decide whether contractual rights were compromised for consideration during the 2000 joint trusteeship negotiations. The Appellant says there is nothing to go back to the trial judge because the retirees were not parties, and there is nothing in the governing statute which clearly and plainly says that other parties could extinguish or affect the accrued or vested rights of retirees even if an agreement were to have purported to do so.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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Gary A. Nelson, Counsel for the Appellant

Vancouver, December 3, 2010

List of Authorities**Authority****Para. in Reply**

Athey v. Leonati, [1996] 3 S.C.R. 458 6, 14, 16