

NOVA SCOTIA COURT OF APPEAL

Jones, Hallett and Roscoe, JJ.A.

**Martin & Stewart Inc. v. Nova Scotia, (Superintendent of Pensions),
1993 NSCA 109**

BETWEEN:

MARTIN & STEWART INC.	)	Peter McLellan, Q.C. and
	)	William Lahey
Appellant	)	for the Appellant
)	
- and -	)	Ronald A. Pink, Q.C. and
	)	Leanne MacMillan
	)	for the Respondent,
THE SUPERINTENDENT OF PENSIONS))
Robert Attenborough)	
(NOVA SCOTIA) and)	
ROBERT ATTENBOROUGH)	
	)	Jonathan Davies
Respondents	)	for the Respondent,
	)	The Superintendent of
	)	Pensions (Nova Scotia)
)	
	)	Appeal Heard:
	)	June 1, 1993
)	
	)	Judgment Delivered:
	)	June 1, 1993
)	

THE COURT: Appeal dismissed, appellant shall pay costs to the respondent, Attenborough, in the amount of \$1,500.00 plus disbursements, and the balance of Attenborough's costs shall be paid out of the surplus of the pension plan before distribution to the members, per oral reasons for judgment of Roscoe, J.A., Jones and Hallett, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally
by:

ROSCOE, J.A.:

This is an appeal from a decision of Glube, C.J.S.C., in Chambers on an application under the ***Pensions Benefits Act***, R.S.N.S. 1989, c. 340, for a determination of entitlement to the surplus funds remaining in the Martin & Stewart Inc. Pension Plan after the company ceased operations. The learned chief justice decided the issue in favour of the former employees, represented by the respondent Attenborough.

After setting out the background and details of the pension plan and considering ***Re Reeve et al. and Montreal Trust Co. of Canada et al.*** (1986), 25 D.L.R. (4th) 312 (Ont. C.A.), ***Re National Trust Co. and Sulpetro Ltd.*** (1990), 66 D.L.R. (4th) 271 (Alta. C.A.), and ***Hockin v. Bank of British Columbia*** (1990), 34 C.C.E.L. 304 (B.C.C.A.), the learned Chambers judge determined that the original pension plan was established as an irrevocable trust. She found that the company was not entitled to amend the plan to provide that the surplus on winding up revert to it. She applied the reasoning of the ***Reeve*** and ***Sulpetro*** cases.

The appellant submits that the Chambers judge erred in law in finding that an irrevocable trust had been established in respect to excess funds not required to cover defined benefits of the members.

After reviewing the record and considering the arguments, we are of the view that the Chambers judge came to the correct conclusion. The member's right to the distribution of a surplus, if any, on discontinuance of the plan was an accrued benefit under the 1969 plan and the company did not have the power to amend the plan by revoking s. 12.2 and amending s. 12.3 as it did by amendment number 9.

The appeal is accordingly dismissed. The appellant shall pay costs to the respondent Attenborough in the amount of \$1,500.00 plus disbursements

and the balance of Attenborough's costs shall be paid out of the surplus of the pension plan before distribution to the members.

J.A.

Concurred in:

Jones, J.A.

Hallett, J.A.