

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended by the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 (the "Act")

AND IN THE MATTER OF a Partial Wind Up Report submitted by Monsanto Canada Inc. to the Superintendent of Financial Services respecting the Pension Plan for Employees of Monsanto Canada Inc., Registration Number 341230 (the "Plan"),

AND IN THE MATTER OF a Hearing in accordance with subsection 89(8) of the Act;

BETWEEN:

MONSANTO CANADA INC.
("Monsanto")

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES
(the "Superintendent")

Respondent

-and-

**A GROUP OF CERTAIN FORMER MONSANTO EMPLOYEES
and the ASSOCIATION OF CANADIAN PENSION MANAGEMENT**

Additional Parties

BEFORE: Colin H. H. McNair
Vice Chair of the Tribunal and Chair of the Panel

Louis Erlichman
Member of the Tribunal

C. S. (Kit) Moore
Member of the Tribunal

APPEARANCES: Freya J. Kristjanson and
Markus F. Kremer,
for Monsanto

Deborah McPhail,
for the Superintendent

Ronald B. Davis and
Mark Zigler,
for A Group of Certain Former Monsanto Employees

Jeff W. Galway and
Randy V. Bauslaugh,
for The Association of Canadian Pension Management

HEARING DATE: January 10, 2000

REASONS FOR DISMISSAL OF MOTION

The Background

Monsanto brought a motion, at the commencement of the hearing in this proceeding, for an order disqualifying Mr. M. David R. Brown as an expert witness, prohibiting the Superintendent from calling him as a witness and prohibiting any party to the proceeding from referring to or relying on Mr. Brown's report dated November 30, 1999. That report was served by the Superintendent on the other parties but was not filed with the Tribunal with the result that the Tribunal is not aware of the contents of the report.

The main proceeding relates to a request for a hearing by Monsanto in connection with a notice of proposal by the Superintendent to refuse to approve a partial wind up report, relating to the Pension Plan for Employees of Monsanto Canada Inc., filed by Monsanto.

The basis for the motion was that there would be a reasonable apprehension of bias on the part of the Tribunal if it were to entertain evidence from Mr. Brown and that such bias could and should be avoided by the Tribunal refusing to entertain such evidence.

The Tribunal was urged to find that there would be a reasonable apprehension of bias if Mr. Brown were to provide evidence because a reasonable person would be concerned that the Tribunal might not act impartially in weighing the evidence Mr. Brown might present or, to put it another way, that Mr. Brown would be perceived to hold a position of special influence with the Tribunal. The circumstances that, it was argued, would give rise to this concern or perception were as follows;

- during the periods 1977-1983 and 1988-1994, Mr. Brown served as a member of the Pension Commission of Ontario (the "PCO") to which this Tribunal, in its hearing responsibilities in pension matters, could be regarded as successor,
- toward the end of Mr. Brown's most recent term as a member of the PCO, Mr. Kit Moore, who is a member of this Tribunal and of the panel in this proceeding, was also a member of the PCO and sat with Mr. Brown on a number of hearing panels,
- Mr. Brown was a member of the PCO when various policies relating to the wind up of pension plans and enhancements to pension benefits, including some policies referred to and relied on by the Superintendent in her written submissions in this proceeding, were adopted and published by the PCO, and
- Mr. Brown sat as a panel member on hearings before the PCO relating to pension surpluses where he had to interpret and apply some of those policies.

Analysis and Conclusion

This is clearly not the usual case of a challenge for apprehension of bias. In the usual case, the purpose is to persuade a court or tribunal that a member should be required to stand aside and refrain from serving as an adjudicator in a particular proceeding. When the challenge succeeds, it is because there is some circumstance relating to the member that, when considered in light of any of the aspects of the proceeding, would give rise to a reasonable apprehension that the member would be biased if he or she were to continue as an adjudicator in the proceeding. The leading authority of *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, involved just such a situation.

In this case, the purpose of the challenge is to disqualify a potential expert witness

not, primarily at least, because of an apprehension that he might be biased, but because of an apprehension that the Tribunal might be biased were it to hear him. As the Alberta Court of Appeal observed in *Re Public Utilities Board* (1985), 21 Admin. L.R. 59, the suggestion that a witness' testimony should be disregarded or disqualified by virtue of such an apprehension of bias is, indeed, "novel" (at p. 65).

While we recognize that the potential for an apprehension of bias raises important concerns, we are also keenly aware that the consequence of a successful challenge of the kind mounted in this case would be to interfere with the planned presentation by one of the parties, through an expert witness of its choosing, of its case before the Tribunal. There was no suggestion that the prospective evidence of the witness would be irrelevant or otherwise inadmissible or that the witness could not qualify as an expert in pension matters - say, for the purposes of a similar proceeding before another tribunal in which he had no previous role.

In these circumstances, we are reluctant to interfere with the Superintendent's choice of an expert witness. Monsanto must, therefore, bear a heavy burden of proof on this motion. The evidence presented by Monsanto of Mr. Brown's involvement with the PCO and its connection with this proceeding falls short of satisfying that burden. The following factors lead us to that conclusion:

1. Time Lapse

It has been five and a half years since Mr. Brown was a member of the PCO.

2. Professional Standards

Mr. Brown is a qualified actuary and as such is subject to a code of professional conduct. Accordingly, a reasonable person would fairly assume that his evidence would be given in accordance with his best professional judgment.

3. Degree of Association with PCO Policies

Mr. Brown was not shown to have any close personal involvement in the development of the PCO policies relating to the wind up of pension plans and enhancement of pension benefits that were adopted and published by the PCO while he was a member.

4. Novelty of the Issues in this Proceeding

The issues in this proceeding are whether surplus must be distributed on the partial wind up of a pension plan, whether payment of benefit enhancements on

a partial wind up constitutes a distribution of surplus and, in particular, an indirect distribution of surplus to the employer, and whether pensions and deferred pensions may remain in a pension plan upon partial wind up. There was no evidence presented to indicate that when Mr. Brown was a member of the PCO he participated in any decisions relating to those issues.

5. Overlap with a Member of this Tribunal

Mr. Brown's term as a member of the PCO overlapped with that of Mr. Moore, who is now a member of this Tribunal and this panel. However, that overlap occurred five and a half years ago, lasted for only two to three months, and resulted in the two of them sitting together on a limited number of applications to the PCO.

Since Monsanto has failed to satisfy the burden of proof as to a reasonable apprehension of bias on the part of the Tribunal were Mr. Brown to testify, the motion is dismissed.

DATED the 20th day of January, 2000 at the City of Toronto in the Province of Ontario.

"Colin H.H. McNair"

Colin H. H. McNair
Chair of the Panel

"Louis Erlichman"

Louis Erlichman
Member of the Panel

"C.S. (Kit) Moore"

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