

FST File No. P0095-1999

Decision No. P0095-1999-1

**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 proposal by the Superintendent of Financial Services to Make an Order under section 87 of the Act respecting the **Retirement Plan for Employees of Dustbane Enterprises Limited**, Registration Number 229419 (the “Plan”)

**BETWEEN:**

**DUSTBANE ENTERPRISES LIMITED**

Applicant

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES**

Respondent

**BEFORE:** Ms. Kathryn M. Bush, Vice Chair of  
the Tribunal and Chair of the Panel  
Mr. Louis Erlichman, Member of the Tribunal  
Mr. David Wires, Member of the Tribunal

**APPEARANCES:** For the Applicant:  
  
Mr. Andrew K. Lokan  
Ms. Karen Shaver  
  
For the Superintendent:  
Ms. Deborah McPhail

**HEARING DATE:** June 21, 2000  
Toronto, Ontario

**ORDER**

**Background**

On June 21, 1999 the Tribunal held an oral hearing on a preliminary motion in this matter, made by the Applicant, Dustbane Enterprises Limited (“Dustbane”), for an Order

directing the Superintendent of Financial Services (the “Superintendent”) to respond to the following interrogatories:

Interrogatory 1:

How many employees and officers of the Pension Commission of Ontario (“PCO”) and subsequently, the Financial Services Commission of Ontario (“FSCO”) have been involved in processing Dustbane’s partial wind-up application? If any documentation exists in this regard, please provide it to the Applicant.

Interrogatory 2:

Who has been responsible for carriage of this matter and for what period of time since March, 1990 when Dustbane first advised the PCO that it intended to partially wind-up the pension plan? Please produce any documentation in this regard to the Applicant.

Interrogatory 3:

What arrangements were made and what instructions were given by the PCO, and subsequently FSCO to transfer this matter between staff and pension officers of the PCO and subsequently FSCO? Please produce any documentation in this regard to the Applicant.

Interrogatory 4:

How many other partial wind-up reports were approved by the Superintendent between the filing of Dustbane’s partial wind-up report in 1991 and the date of the notice of proposal in 1999? How long did the approval process take in these other cases?

Interrogatory 6:

What caused the delay between the PCO approval of the transfer of assets in August, 1993 and January, 1997 when the PCO advised Dustbane that it would forward the application for partial wind-up to the Superintendent within a week? What consideration, if any, was given to the possible effect of this delay upon the potential liabilities of Dustbane and/or the Distributors? Please produce any documentation in this regard to the Applicant.

Interrogatory 7:

When was the application actually forwarded to the Superintendent? What caused the delay between the PCO’s advice in January, 1997 that the application would be forwarded to the Superintendent, and the issuance of the Notice of Proposal in December, 1999? What consideration, if any, was given to the possible effect of

this delay upon the potential liabilities of Dustbane and/or the Distributors?  
Please produce any documentation in this regard to the Applicant.

The reasons for Superintendent's refusal to answer the interrogatories may be summarized as follows:

"The Superintendent of Financial Services (the "Superintendent") is not prepared to answer this question because it is irrelevant to the issues in this proceeding. The reasons for any delay, and the conduct of the Regulator during any delay, are irrelevant. The Pension Commission has previously decided that it is inappropriate to consume the hearing process with an examination into the internal workings of the Regulator."

Paragraph 1, Superintendent of Financial Services Reply to Interrogatories of Dustbane Enterprises Limited ("Superintendent's Reply to Interrogatories")

At the conclusion of the hearing, after receiving submissions from both parties, the Tribunal ordered the Superintendent to answer all the disputed interrogatories for the following reasons:

1. The Tribunal adopted the test for requiring the answers to interrogatories set out in *Monsanto Canada Inc. and Superintendent of Financial Services*, (June 2, 1999) (Financial Services Tribunal) which provided the following:

- a. The information is arguably relevant to an issue in the proceeding and that issue is not a frivolous one;
- b. The information sought is sufficiently particularized that the party from the information is requested should be able to respond sufficiently and with a reasonable degree of precision; and
- c. The information is not privileged.

2. The Pre-Hearing Conference Memorandum agreed to by both parties included the issue of delay and therefore discovery on these issues seems appropriate. The Pre-Hearing Conference Memorandum framed the matters in issue as follows:

- a.) As at the partial wind up date, was the Plan a multi-employer pension plan within the meaning of section 1 of the Act?
- b.) If the answer to issue #1 is "yes", who is required to fund the deficit in the Plan's fund?
- c.) If the answer to issue #1 is "no", who is required to fund the deficit in the Plan's fund?

- d.) Does the Tribunal have the jurisdiction to take into account any delay on the part of the regulator in its determination of the above issues?
- e.) If the answer to issue #4 is “yes”, are Dustbane or any of the Distributors liable for the deficit in light of the delay by the regulator in the circumstances of this case?

3. A question was raised in the hearing as to whether the Tribunal has the jurisdiction to order discovery before determining its jurisdiction to hear the merits of the case to which the discovery relates. The Tribunal felt that the issue of delay had been put at issue by the parties through the Pre-Hearing Conference Memorandum. Further, the Tribunal was not persuaded that it would be more expeditious to hear the jurisdictional matter as a preliminary matter. Finally, the Tribunal was concerned about permitting any further delay in this matter given the time which had already elapsed since partial plan wind-up.

4. The Superintendent indicated the ability to respond to the interrogatories within one week and was so ordered. Objections to the responses, if any, are to be put in writing.

5. Costs to be awarded, if any, will be determined at the end of the main hearing and will be in accordance with the Financial Services Tribunal Practice Direction on Costs.

DATED THIS 18<sup>th</sup> day of July, 2000.

“Kathryn M. Bush”

Kathryn M. Bush

Chair

“Louis Erlichman”

Louis Erlichman

Member

“David Wires”

David Wires

Member