

FINANCIAL SERVICES TRIBUNAL

FST FILE NO. PO150-2001
Decision No. P0150-2001-1

IN THE MATTER OF the Pension Benefits Act, R.S.O. 1990, as amended by the Financial Services Commission of Ontario Act, 1997, R.S.O. 1997, c.28 (the “Act”);

AND IN THE MATTER OF a Partial Wind-up Report submitted by Marshall-Barwick (formerly Marshall Steel Limited) to the Superintendent of Financial Services relating to the Retirement Plan for Salaried Employees of Marshall Steel Limited and Associated Companies, Registration Number 0968081 (the “Plan”);

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

BETWEEN:

MARSHALL STEEL LIMITED AND ASSOCIATED COMPANIES

Applicant

– and –

SUPERINTENDENT OF FINANCIAL SERVICES OF ONTARIO

Respondent

– and –

JEFFREY G. MARSHALL

(A FORMER EMPLOYEE OF MARSHALL STEEL LIMITED)

Interested Party

BEFORE:

Ms. M. Elizabeth Greville
Member of the Tribunal and Chair of the Panel

Ms. Heather Gavin
Member of the Tribunal and of the Panel

Mr. C.S. (Kit) Moore
Member of the Tribunal and of the Panel

APPEARANCES:

For Marshall Steel and Associated Companies
Mr. Sean Dunphy

For the Superintendent of Financial Services
Ms. Deborah McPhail

For Jeffrey G. Marshall
Mr. Michael Mazzuca

HEARING DATE:
September 9, 2002

REASONS

INTRODUCTION

Marshall Steel Limited and Associated Companies, (hereafter the “Company”) has requested a hearing before the Financial Services Tribunal (the “Tribunal”) with respect to a Notice of Proposal dated December 12, 2000 (the “NOP”) issued by the Superintendent of Financial Services (the “Superintendent”).

The NOP relates to a report prepared on behalf of the Company dated as of August 28, 1992 in respect of a voluntary partial wind-up, (the “Report”). The Report related to the Retirement Plan for Salaried Employees of Marshall Steel Limited and Associated Companies (the “Plan”). The partial wind-up was initiated by the Company in relation to members of the Plan who were employed by the Company at its plant in Milton, Ontario.

On May 22, 1992, the controlling interest in the Company formerly owned beneficially by Jeffrey Marshall and members of his family was purchased by a member of the Canadian Erectors Limited Group in a corporate takeover.

Mr. Marshall was terminated without notice or pay in lieu of notice on May 22, 1992. The Company purported to terminate his employment “for cause”. At the time of his termination, he was a member of the Plan.

Jeffrey Marshall had been employed with the Company or its predecessors from 1966. Mr. Marshall’s final position with the Company was that of President and Chief Executive Officer as provided in his employment agreement with the Company dated January 1, 1991. At the time of his termination, his office was located in the Company’s head office at its plant in Milton, Ontario.

The Company had begun a restructuring of its workforce, including a downsizing at its plant in Milton, in early 1992.

On August 28, 1992, the Company closed its plant in Milton. Head office functions were transferred elsewhere in this timeframe.

The Report indicates that the plant shutdown was preceded and followed by a series of lay-offs and terminations of salaried employees that occurred between January 1, 1992 and September 22, 1993. A total of 34 employees were included in the partial wind-up and were therefore eligible for benefits referred to in subsection 70(6) of the Act. Mr. Marshall was not included. The wind-up group was defined in the Report as:

“active or transferred members who terminated either voluntarily or involuntarily (except for just cause) between January 1, 1992 and September 22, 1993 in Ontario or the U.S.”

The Superintendent’s NOP proposed to refuse to approve the Report on the grounds that Mr. Marshall’s employment was terminated during the partial wind-up period. The Company had failed to demonstrate that his termination was not as a result of the closure of the plant in Milton and therefore excluding him from the partial wind-up group was contrary to subsection 70(5) of the Act.

For the reasons set out below, the Tribunal affirms the Superintendent’s NOP.

Requirements of the Act On Partial Wind-Up

Section 70(5) of the Act gives the Superintendent the authority to refuse to approve a wind-up report that fails to “protect the interests of the members and former members of the pension plan”.

This section applies whether a partial wind-up is initiated voluntarily by the employer under section 68(1) of the Act, or is imposed by order of the Superintendent under section 69(1) of the Act.

In this case, the partial wind-up was initiated by the Company under section 68(1). The Report prepared on behalf of the Company set out the purpose and scope as follows:

“Purpose of Valuation

Marshall Steel Limited (the “Company”) closed down its plant and operations in Milton, Ontario effective August 28, 1992.

The Plant shutdown was preceded and was followed by a series of layoffs and terminations of the salaried employees that occurred between January 1, 1992 and September 22, 1993. In addition, Head Office functions were transferred to the Laval operation and to the Company's new parent, Canerector Inc. over the same period of time. By September 22, 1993, no Ontario employees remained in the Plan. In addition one Ontario member had transferred to a U.S. plant. That U.S. operation was sold in early 1993.

As a result of these events, a partial wind-up of the Retirement Plan for Salaried Employees of Marshall Steel Limited and Associated Companies (the "Plan") is required."

As noted above, the partial wind-up group was defined in the Report as all active or transferred members who terminated voluntarily or involuntarily between January 1, 1992 and September 22, 1993 except for those terminated "for just cause". The Report did not name Mr. Marshall, but in correspondence between the Company and the Pension Officer at the Pension Commission of Ontario ("PCO") as it then was, the PCO was advised of Mr. Marshall's exclusion because the Board of Directors had passed a motion that Mr. Marshall be terminated for "cause".

Without notice to Mr. Marshall, the then Superintendent, by letter to the Company dated December 1, 1995, authorized the distribution of assets in the Plan as provided in the Report. The letter, however, did not deal with the issue of surplus assets:

"... the proposals with respect to the distribution of surplus assets attributable to members, former members and other persons affected by the partial wind-up will be dealt with separately.

When the proposals for the distribution of the surplus assets are found to be acceptable, I shall proceed with my approval of the wind-up report."

Exclusion of Mr. Marshall from the Partial Wind-Up Group

The Company made submissions to the Tribunal that Mr. Marshall was properly excluded from the partial wind-up group because his termination was not a result of the closure of the plant.

In support of these submissions, the Company argued that the termination of Mr. Marshall was a direct result of a change of control of the Company, not of the plant closure or consequential transfer of the Company's head office, that in any event, both the closure and transfer occurred after his dismissal, and/or that Mr. Marshall was terminated for just cause.

The Company further argued that since the partial wind-up was initiated under Section 68(1) of the Act, the Company was free in the first instance to establish the criteria for members and former members to be included in the eligible group.

In the NOP it is stated that the Company failed to demonstrate that Mr. Marshall's termination was not "a result of" the plant closure.

The Company contended that because the partial wind-up application was governed by Section 68(1) of the Act, the Tribunal was not required to consider the operation of Section 69(1) of the Act, and in particular clause 69(1)(d) which states that the Superintendent may require a wind-up if:

"(d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;"

However, the Company submitted that because the Superintendent's stated reason in the NOP for proposing to reject the Report mirrored the "as a result of" language in clause 69(1)(d), case law applicable to that clause could be considered. In this regard, the Company cited *Imperial Oil Ltd. vs. Ontario (Superintendent of Financial Pensions)* (1996) 15 C.C.P.B. 31 (PCO), p. 44-45 affirmed (1997), 16 C.C.P.B. 93 (Ont. Div., CT.) in support of the contention that under clause 69(1)(d) of the Act, the partial wind-up group should include members who are affected by the partial wind-up or who have ceased to be employed "as a direct result of" discontinuance of or reorganization of the business.

In that case, the issue was whether a former officer should have been included in the partial wind-up group even though his employment was terminated outside the wind-up period.

However, the circumstances of this case are that Mr. Marshall was terminated within the partial wind-up period defined by the Company in the Report. The PCO, in the case of *Imperial Oil Retirement Plan* (1988) dealt with the issue of a business reorganization within the meaning of clause 69(1)(d) of the Act. With respect to the composition of the partial wind-up group, the PCO held:

“The reason that prompts the reorganization may be cost cutting, bench marking or cyclical employment patterns due to price fluctuations but whatever the underlying cause, it is the fact of the reorganization that is of legal significance.

Did the workforce reduction result from these activities? Again, we answer “yes”. Are we inclined to force the Superintendent to consider each termination over the 3 year period (of the reorganization) to ensure that the driving force was the reorganization? No. The amount of resources to do that would be enormous and it is not clear that accurate information could even be obtained. For example, if a lower performing employee is let go when the restructuring takes place, is the termination deemed to be a result of performance or the restructuring? If the employer and employee differed in their views as to what was the dominant reasons, how would the dispute be resolved? This simple example illustrates the futility of such an approach. ... The information given by Imperial Oil itself shows that the terminations took place contemporaneous with the reorganization and were related to the activities we have found amount to a reorganization. There is no need to go behind that information.”

Imperial Oil Limited Retirement Plan (1988), May 27, 1996, DEC-34 (PCO), at pp 7-8.

This decision, which was affirmed on appeal to the Divisional Court and the Court of Appeal, supports the proposition that if the termination of employment occurred during the partial wind-up period, it is deemed to be as a result of the events giving rise to the partial wind-up.

The Company’s second basis for excluding Mr. Marshall is that he was terminated for just cause. In 1992, Mr. Marshall commenced a wrongful dismissal action against the Company. In 1998, a Full and Final Mutual Release (“Release”) was concluded between Mr. Marshall and the Company in relation to that proceeding. In the action, Mr. Marshall did not in his statement of claim raise any issues in relation to the Plan or to his entitlements or potential entitlements under the Act. Consequently, the Release is not related to the subject matter of these proceedings. Moreover, Mr. Marshall clearly meets the definition of “member” and “former member” of the Plan during the periods relevant to this case. Whether or not he was terminated for cause, he is entitled to the protection and rights extended by the Act to all pension plan members and former members, including the right to have his interests protected by the Superintendent pursuant to subsection 70(5).

Further, as the PCO noted, even if a member’s performance is an issue, the pension adjudicator cannot embark upon an inquiry as to the “dominant reason” for the termination.

On the face of the Report, the Company clearly made a decision to define the partial wind-up group in a manner that included individuals who were terminated prior to the actual plant closure by

establishing the relevant period as between January 1, 1992 and September 22, 1993. Mr. Marshall's employment was clearly terminated within this period, contemporaneously with the restructuring of the workforce and transfer of head office functions.

Onus of Proof

The Company also made submissions that because the partial wind-up was Company-initiated under Section 68(1), the onus of proof with respect to whether Mr. Marshall should be included in the partial wind-up group rests with the Superintendent and/or Mr. Marshall.

However, Section 70 of the Act places the responsibility on the administrator of a pension plan to file a wind-up report and to satisfy the Superintendent that the requirements specified in that section, including subsection 70(5), have been met before the Superintendent's approval will be granted. In the partial wind-up application that is the subject of the case, then, the onus rests with the Company to establish that the Report meets the requirements of the Act, including whether Mr. Marshall is properly excluded from the wind-up group. Section 70 applies to partial wind-ups governed by both Section 68(1) and Section 69(1).

Application of the Doctrine of *Functus Officio*

The Company has made submissions that the Superintendent lacked jurisdiction to issue the NOP on the basis that the Superintendent was *functus officio*.

In support of their position, they submitted that the letter of December 1, 1995 from the then Superintendent which authorized the distribution of non-surplus assets of the Plan pursuant to the terms of the Report, is tantamount to approval of the Report, except in relation to surplus.

It is well established practice in partial wind-up applications that the Superintendent:

- conditionally approves the distribution of basic benefit entitlements, and
- delays final approval of the report until the issue of any surplus assets associated with the particular partial wind-up has been resolved.

Final approval is not granted until all relevant assets (including surplus) and liabilities have been properly dealt with.

The Superintendent's letter of December 1, 1995 is consistent with this process. As already noted above, the then Superintendent wrote that when the proposals for the distribution of the surplus assets were found to be acceptable, he would proceed with approval of the wind-up report.

This statement clearly illustrates that a final decision had not been made by the Superintendent concerning the approval of the Report. Consequently, the doctrine of *functus officio* does not apply in the circumstances of this case.

ORDER

Accordingly, the Tribunal affirms the Superintendent's NOP and directs the Company as administrator to file a revised partial wind-up report that includes Mr. Marshall in the partial wind-up group.

The Tribunal will remain seized for the purposes of considering the parties' request for costs, such request and submissions to be made in writing within 30 days of this order.

Dated at Toronto, Ontario, this 29th day of November, 2002.

"M. Elizabeth Greville"

Ms. M. Elizabeth Greville
Member of the Tribunal and Chair of the Panel

"C.S. Moore"

Mr. C.S. (Kit) Moore
Member of the Tribunal and of the Panel

"Heather Gavin"

Ms. Heather Gavin
Member of the Tribunal and of the Panel