

**FINANCIAL SERVICES TRIBUNAL**

**FST FILE NO. P0150-2001**

**Decision No. P0150-2001-2**

**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 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

**REPRESENTATIONS BY:**

For Marshall-Barwick Inc.

Mr. Sean F. Dunphy

Mr. Gary Nachshen

For Jeffrey G. Marshall

Mr. Michael Mazzuca

### REASONS FOR DECISION

In a decision dated November 29, 2002, the Tribunal affirmed the Superintendent's Notice of Proposal dated December 12, 2000 regarding a partial wind-up report prepared on behalf of Marshall Steel Limited and Associated Companies (the "Company"), with respect to the Plan. In that decision, the Tribunal also directed the Company as administrator to file a revised partial wind-up report including Mr. Jeffrey G. Marshall in the partial wind-up group. The Tribunal made no order as to costs, but remained seized to consider the parties' written submissions regarding requests that the Tribunal award costs in this proceeding.

Mr. Marshall has asked for an award of a portion of his costs in this proceeding to be paid by the Company, in the amount of \$12,000.00, or alternatively, in an amount to be assessed by the Tribunal on a full indemnity basis. The Tribunal received written submissions from Mr. Marshall and from the Company regarding this request. The Superintendent made no request or submission regarding costs in this proceeding.

In accordance with section 24 of the *Financial Services Commission of Ontario Act, 1997*, the Tribunal's *Interim Rules of Practice and Procedure* provide that the Tribunal may order that the costs of a party to a proceeding be paid by another party or parties. The Tribunal's *Practice Direction on Cost Awards* notes that costs will not be awarded as a matter of course, and lays out some criteria for a Tribunal's decision on the award of costs.

Mr. Marshall has presented two arguments in favour of an award of costs:

1. The Company was wholly unsuccessful in these proceedings; and
2. The Company caused unreasonable delays by advancing frivolous, vexatious and manifestly unfounded positions, including the Company's
  - (a) attempt to exclude Mr. Marshall from the partial wind-up group,
  - (b) attempt to rely on Mr. Marshall's earlier signed release, and
  - (c) hostility to Mr. Marshall.

Regarding Mr. Marshall's first argument, the fact that the Company was unsuccessful does not by itself justify the awarding of costs against the Company. The Company presented reasonable arguments that Mr. Marshall's termination was a direct result of the change of control of the Company, and that he was properly excluded from the partial wind-up group. The fact that the Tribunal did not finally agree with the Company's positions does not mean the arguments were totally without value or irrelevant to the issues being heard by the Tribunal. They were an important and necessary part of the hearing, and assisted the Tribunal in reaching its decision.

Regarding Mr. Marshall's second argument, the Tribunal was not aware of any unreasonable delays caused by the Company's positions taken during the proceeding. While the Company did attempt to exclude Mr. Marshall from the partial wind-up group, and did attempt to rely on Mr. Marshall's earlier signed release, the Tribunal did not view these efforts as frivolous, vexatious or manifestly

unfounded. In fact, the arguments put forward by the Company for taking these positions, as well as Mr. Marshall's arguments to the contrary, assisted the Tribunal in reaching its decision.

Mr. Marshall has also suggested that the Company's conduct in this matter stemmed largely from its hostilities towards the Marshall family, and was contrary to its obligations as Plan administrator. In response, the Company has argued that, where it considers a claim on the pension plan assets to be an improper one, its fiduciary duty as Plan administrator could require it to contest such a claim in the interests of other Plan participants. The Tribunal agrees with the Company, that such a position could be a reasonable one for the Company to have taken in this proceeding, despite the fact that the Company's arguments were ultimately unsuccessful.

Consequently, for the reasons expressed in this decision, the Tribunal denies Mr. Marshall's request for an order for costs against the Company.

Dated at Toronto, Ontario, this 7<sup>th</sup> day of July, 2003.

"M. Elizabeth Greville"

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

"Heather Gavin"

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

"C.S. Moore"

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