

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended (the "Act");

AND IN THE MATTER OF a proposal by the Superintendent of Financial Services (the "Superintendent"), pursuant to the Act, to refuse to consent to the payment of surplus out of The Independent Order of Foresters Fieldworkers' Pension Plan, Registration No. 0354399 (the "Plan");

AND IN THE MATTER OF a proposal by the Superintendent, pursuant to the Act, to refuse to approve a wind up report in respect of the Pension Plan;

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

BETWEEN:

THE INDEPENDENT ORDER OF FORESTERS

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES and IRVIN GRAINGER

Respondents

BEFORE:

Mr. Colin H.H. McNairn
Vice Chair of the Tribunal and Chair of the Panel

Mr. Louis Erlichman
Member of the Tribunal and of the Panel

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

APPEARANCES:

For The Independent Order of Foresters:

Ms. Lisa J. Mills

Ms. Elizabeth Brown

For the Superintendent of Financial Services:

Mr. Mark Bailey

Ms. Deborah McPhail

HEARING DATE:

June 18, 2002

REASONS FOR DECISION OF MR. MCNAIRN

Background

This proceeding was commenced as a result of a request for hearing filed on April 12, 2001 by The Independent Order of Foresters (the "IOF") challenging a notice of proposal of the Superintendent of Financial Services (the "Superintendent ") dated March 19, 2001 (the "Notice of Proposal"). In that Notice, the Superintendent proposes to refuse consent to an application by the IOF for the payment of surplus from the Independent Order of Foresters Fieldworkers' Pension Plan (the "Plan"), on its wind up effective December 31, 1997, and to refuse approval of the wind up report in respect of the Plan filed by the IOF. The stated basis for the proposed refusals is two-fold;

- the IOF had not demonstrated that the assets in the pension fund, representing the excess over and above the basic benefit entitlements of members and former members of the Plan and the anticipated expenses of wind up, constituted surplus for the purposes of the *Pension Benefits Act*, as amended (the "Act"), and
- the assets held in the pension fund, including those excess assets, were subject to a trust for the benefit of the members, in which case the Plan could not be said to provide for the payment of surplus to the IOF.

The excess assets were estimated to have a value of \$1,433,760 as at December 31, 1999.

The IOF's application for the payment of surplus was made to the Superintendent on the basis that at least two-thirds of the Plan members had consented to a surplus distribution proposal under which the IOF would share in the surplus on a 50-50 basis with the

members and former members of the Plan. Subsection 79(3) of the Act requires, among other things, that before an application for the payment of surplus on the wind up of a pension plan can be approved, the Superintendent must be satisfied that the pension plan has a surplus and the pension plan must provide for the payment of surplus to the employer on wind up.

The issue that was the subject of the hearing before the Tribunal is whether the Plan provides for the payment of surplus to the IOF. The Tribunal was invited by the parties to determine this issue on the assumption that the excess assets in the pension fund for the Plan represent surplus. The determination of whether the latter assumption is correct was left for a subsequent hearing as necessary.

Analysis

1. The Nature of the Pension Fund at the Inception of the Plan in 1953

In his written representations, Mr. Grainger, a former member of the Plan who was granted party status in this proceeding, submitted that the amounts contributed by the IOF and the Plan members from time to time, pursuant to the Plan, and the income generated from those contributions (together comprising the “Pension Fund”) constituted trust funds for the benefit of the members, who were, therefore, entitled to any surplus. This submission was based on a provision of the Plan to the effect that the Pension Fund was to be used only for the purpose of the payment of the benefits provided under the Plan. This exclusive benefit provision is found in subsection 7(2) of the original Plan and was carried forward in subsequent versions of the Plan. However, the Plan does not say specifically that the Pension Fund is to be held in trust nor does it make reference to a trustee in respect of that Fund. Indeed, the evidence in this case was that until 1995 the assets comprising the Pension Fund, although accounted for separately, were held as part of the assets of the IOF, in accordance with the Constitution and Laws of the IOF. One of the elements essential to the creation of a valid trust is an intention to create a trust. There was no evident intention, on the part of the IOF, to create a trust in respect of the Pension Fund upon the establishment of the Plan. An exclusive benefit provision similar to that contained in the Plan has been held to be insufficient, of itself, to establish such an intention; see *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, at p. 666, and *Howitt v. Howden Group Canada Ltd.* (1999), 179 D.L.R. (4th) 423, at pp. 429-430 (Ont. C.A.).

I have concluded, therefore, that the Pension Fund was not subject to a trust at the inception of the Plan. Moreover, there were no changes to the Plan or to the funding of the Plan before 1995 that were alleged, by any of the parties, to have the effect of imposing a trust on the Pension Fund.

2. Entitlement to Surplus under the Original Plan

Section 9 of the original Plan provided as follows;

In the event of the discontinuance of the [P]lan, the [Pension] Fund shall immediately vest in the members and shall be distributed or otherwise dealt with for their benefit in such equitable manner as the Supreme Court [of the IOF] may with the advice of the actuary by resolution decide.

This provision remained in place without change until 1990, when the Plan was amended with effect from January 1, 1988. The validity of that amendment, as it purports to affect the above noted provision, is considered below (see section 3).

The authority of the Supreme Court of the IOF to decide, on the advice of the actuary, upon an equitable manner by which the distribution or other disposition of the Pension Fund should occur cannot reasonably be construed as giving the Supreme Court the power to direct any surplus in the Pension Fund to be applied for the benefit of the IOF. Rather, the Supreme Court's authority should logically be interpreted as simply allowing it to adopt a plan for the distribution or other disposition of the Pension Fund that provides in an equitable way for the determination of the extent of participation of the various members.

I have concluded that the Plan did not provide for the payment of surplus to the IOF and that this remained the position at the time of the amendment to the Plan that was adopted in 1990.

3. The Validity of the Plan Amendment Providing for the Payment of Surplus to the IOF

The Plan was amended in 1990 with effect from January 1, 1988 (the "1988 Plan Amendment") to provide, among other things, for the payment of any surplus in the Pension Fund to the IOF. I refer to this particular provision of the 1988 Plan Amendment as the "1988 Surplus Amendment". The Superintendent challenged the 1988 Surplus Amendment as unauthorized, and therefore without effect, on two grounds.

First, the Superintendent maintained that the Plan was part of the Constitution and Laws of the IOF and, as such, could only be amended by the Supreme Court (now called the International Assembly) of the IOF. The 1988 Plan Amendment was apparently adopted by the Executive Council (now called the Board of Directors) of the IOF pursuant to a general delegation of authority by the Supreme Court to the Executive Council. Although there was some confusion in the evidence on this point, I have concluded that the Plan was not part of the Constitution and Laws of the IOF, although the Pension Fund was referred to therein as one of the IOF's funds. Accordingly, the Executive Council had

the authority to amend the Plan under the general delegation of authority from the Supreme Court.

Second, the Superintendent maintained that there was no authority under the terms of the Plan to make amendments and the IOF could not, therefore, effect the 1988 Surplus Amendment unilaterally given that the Plan constituted a contract between IOF, as an employer, and its employees. In *Crownx Inc. v. Edwards* (1994), 120 D.L.R. (4th) 270, the Ontario Court of Appeal described the right to amend a pension plan as follows:

Whether one applies the law of trusts or the law of contract to pension plans, the right to later unilaterally amend the pension plan to provide for payment of surplus monies on termination must be found in the provisions of the original plan. It is trite to say that if the plan constitutes a contract between the employer and employees, the right of one party to make significant amendments to the contract at a later stage must be found expressly or by implication in the original contract. (At pp 280-281.)

In the present case, it is appropriate to apply contract principles in determining the authority of the IOF to make the 1988 Surplus Amendment since, as the Supreme Court of Canada stated in the *Schmidt* decision;

[I]f the pension fund, or any part of it is not subject to a trust, then any issues relating to outstanding pension benefits or to surplus entitlement must be resolved by applying the principles which pertain to the interpretation of contracts to the pension plan. (At p. 655.)

In *Schmidt*, the Supreme Court examined the amending power in a pension plan the fund of which was not subject to a trust (the Stearns plan) to determine whether an amendment to the plan providing for a reversion of surplus to the employer was valid (see [1994] 2 S.C.R. 611, at pp. 671-674). In that case, the amendment was found to fit within the express amending power and, therefore, to be effective.

In the present case, there was no amending power set out expressly in the Plan prior to 1990, when the 1988 Plan Amendment was adopted, nor can I find any basis for implying any such power that would be broad enough to authorize an amendment in the terms of the 1988 Surplus Amendment. This is not to say that the power to make some other kinds of amendments to the Plan – say, to comply with income tax or pension legislation, to enhance benefits or to implement a collective agreement with a labour union - could not be implied or that the consent of the employees to some or all of those kinds of amendment could not be inferred. Given the effect on their entitlement to surplus on termination, the employees who were members of the Plan cannot, in my view, be presumed to have consented to the 1988 Surplus Amendment.

While the original Plan contemplates the discontinuance of the Plan (subsection 10(5)), that does not carry an implication that the IOF may also amend the Plan so as to reserve any surplus to itself. Indeed, as noted above, any discontinuance of the Plan was to be on

the basis that the Pension Fund should immediately vest in the members and be distributed or otherwise dealt with for their benefit. If, as I have concluded, the 1988 Surplus Amendment was not within the scope of an amending power implicit in the Plan, that amendment is without effect and the treatment of surplus on the discontinuance of the Plan must be in accordance with the pre-Amendment provisions of the Plan. In particular, the surplus must be distributed or otherwise dealt with, as part of the Pension Fund, for the benefit of the members upon the wind up of the Plan that has now occurred.

I assume that the 1988 Plan Amendment was accepted for registration by the Superintendent, pursuant to the terms of the Act, although there was no evidence before us on this point. Such registration does not mean that the Amendment must, therefore, be treated as valid in its entirety. There is nothing in the Act, or the regulations under the Act to the effect that registration of an amendment cures any invalidity (see sections 12-17 of the Act and section 3 of Regulation 909, R.R.O. 1990, as to the registration of plan amendments).

My conclusion that the original provision of the Plan dealing with the treatment of the Pension Fund on discontinuance remained in effect at the wind up of the Plan disposes of the IOF's challenge to the Superintendent's Notice of Proposal. That provision requires that the Pension Fund, including any surplus, is to be applied for the benefit of the members of the Plan, with the result that the Plan cannot be said to provide for the payment of surplus to the employer, the IOF, on the wind up of the Plan. Therefore, the Superintendent is obliged, under subsection 79(3) of the Act, to refuse IOF's application for consent to the payment of surplus from the Plan. It follows, as well, that the Superintendent is entitled, under subsection 70(5) of the Act, to refuse to approve the report filed by the IOF in respect of the wind up of the Plan, for failure to protect the interests of the members of the Plan, in particular their interests in the surplus on wind up. Such refusals are, therefore, properly proposed by the Superintendent in the Notice of Proposal.

The other members of the Panel who heard this case would support the proposed refusals of the Superintendent on a different basis, as their separate reasons indicate, namely what they see as the overriding effect, upon the terms of the Plan, of the two successive trust agreements that the IOF entered into with respect to the Pension Fund. As I disagree with their reasons in that respect, I will go on to set out my views as to the impact of those agreements.

4. The Effect of the Trust Agreements Entered into by the IOF as of 1995 and 1999

The IOF entered into a Trust and Master Custodial Services Agreement with the Trust Company of Bank of Montreal effective as of June 21, 1995 (the "1995 Trust Agreement") engaging the trust company to serve as trustee and to provide certain custodial services, all in respect of the Pension Fund. Upon the resignation of the original trust company as trustee, the IOF entered into a similar agreement with CIBC Mellon Trust Company made as of October 1, 1999 (the "1999 Trust Agreement").

The Superintendent argued that, even if the 1988 Surplus Amendment was valid, its provision for the payment of surplus to the IOF was subservient to the trust in respect of the Pension Fund established, successively, by the 1995 and 1999 Trust Agreements. Since those Agreements did not expressly designate the IOF as a beneficiary of the trust, the IOF was no longer entitled, in the Superintendent's view, to the payment of surplus under the Plan. The IOF responded by saying that each of the Trust Agreements must be read in conjunction with the terms of the Plan, in which case it is clear that the IOF is identified as a person to which payments from the Pension Fund may be made and is, consequently, a beneficiary of the trust in respect of that Fund. The IOF argued, in the alternative, that each of the Trust Agreements expressly reserved to the IOF the power to revoke the trust, in which case it was within its power to bring the trust to an end, thereby effectively restoring the provision for the payment of surplus to the IOF under the 1988 Surplus Amendment.

The other members of the Panel, in their separate reasons rely on a passage from the majority decision of Mr. Justice Cory in *Schmidt* to the effect that the transfer of property by the settlor of a trust to the trustee is generally absolute and that any control of that property will be lost unless the transfer is expressly subject to it. However, the issue in the present case is not whether the IOF effectively reserved the power, under the terms of the Trust Agreements, to designate itself as a beneficiary of the trust when it transferred the Pension Fund to the trustee but whether those terms indicate that the IOF was a beneficiary of the trust from the time of its creation.

The Superintendent was unable to provide us with any authority for the proposition that the settlor of a trust may not be a beneficiary of the trust unless expressly named as such or that a plan sponsor may not be a beneficiary of a trust in respect of a pension plan unless expressly named as such. I believe that the proper inquiry in the present case should be whether the IOF can be taken to be a beneficiary of the trust created by the Trust Agreements having regard to the express terms of those Agreements and any implications that can be reasonably drawn from those terms. Certainly, the absence of the word "beneficiary" in the Trust Agreements, to describe any interest the IOF may have in the Pension Fund, should not be determinative.

The Trust Agreements leave it to the IOF to provide instructions to the trust company as to the payments that are to be made from the Pension Fund. Any such instructions are deemed to constitute a "certification ... that such payments are in accordance with the ... Plan" (section 4(h) of the 1995 Trust Agreement and section 5.1 of the 1999 Trust Agreement). The Trust Agreements also provide that upon termination of the trust fund that comprises the Pension Fund, payments shall be made therefrom in accordance with the directions of the IOF (section 8 of the 1955 Trust Agreement and section 16.3 of the 1999 Trust Agreement), although in the case of the 1999 Trust Agreement those directions are to be in accordance with the terms of the Plan. To me, all of this means quite simply that the IOF is a beneficiary of the trust to the extent that the Plan provides for the payment of some part of the Pension Fund to the IOF. The 1988 Plan Amendment, which if valid is part of the Plan, makes such provision in respect of any surplus in that Fund.

The Trust Agreements make it clear that the role of the trust company as trustee does not extend to determining entitlements under the Plan. When it comes to the payment of amounts from the Pension Fund, the role of the trust company may be characterized as that of a “bare trustee” who must simply respond to the directions of the IOF. Therefore, with respect to distributions from the Pension Fund, the trustee acts, essentially, as an agent for the IOF, the settlor of the trust. In that kind of situation, the agency relationship with the settlor predominates over the trust aspect of the arrangement (see *Trident Holdings Ltd. v. Danand Investments Ltd.* (1988), 64 O.R. (2d) 65, at pp. 73-79 (Ont. C.A.)). Therefore, in the present case, the trust should not be taken to inhibit the right of the IOF to call for the payment to it of any surplus, in accordance with the Plan and, in particular, the 1988 Surplus Amendment, if valid.

The Superintendent relied on a statement of Mr. Justice Cory, giving the majority judgment of the Supreme Court in *Schmidt*, to the following effect;

...when a trust is created [in respect of a pension fund], the funds which form the *corpus* are subjected to the requirements of trust law. The terms of the pension plan are relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust. The contract or pension plan may influence the payment of trust funds but its terms cannot compel a result which is at odds with the existence of the trust. (At pp. 639-640.)

For the reasons set out above, I do not regard the Plan as compelling a result that is at odds with the trust established by the 1995 or 1999 Trust Agreement, but rather as having the capacity to influence payments from the Pension Fund in a way that is not inconsistent with the trust. While neither Agreement may, technically, incorporate the terms of the Plan, I do not believe that this should preclude the operation of those terms in the circumstances of the present case, given the limited scope of the trust. Each of the Agreements certainly references the terms of the Plan, leaving them to govern the ultimate disposition of the assets in the Pension Fund. It seems to me that this comes to the same thing as incorporating the terms of the Plan by reference into the trust instrument.

Finally, I am of the opinion that each of the Trust Agreements provides expressly for the revocation of the trust that it creates and, therefore, that the IOF could exercise the power of revocation so as to leave the provisions of the Plan to operate unaffected by the existence of a trust in respect of the Pension Fund. Each of the Agreements provides specifically for the termination by the IOF of the trust fund comprising the assets of the Pension Fund (section 8 of the 1995 Trust Agreement and section 16.3 of the 1999 Trust Agreement). In either case, the relevant provision has a broad scope and is not limited to situations where the trust company has resigned or been removed and is to be replaced by a new trustee. It seems to me that a termination of a trust fund by the settlor amounts to the revocation of the trust and that there is no particular magic in the use of language of revocation as opposed to termination or cancellation. Indeed. The Supreme Court in *Schmidt* said that the word “revocation” connotes cancellation (at p. 646) and

“termination” is certainly very close, in its ordinary meaning, to “cancellation”. The revocation of something is simply the termination or cancellation of that thing where it was originally created by the person exercising a power of revocation. Unlike my fellow Panel members, I can find nothing in *Schmidt* that suggests that an express power on the part of the settlor of a trust to terminate the trust fund does not amount to an express power to revoke the trust.

5. The Remaining Significance of the Issue of Whether the Excess Assets in the Pension Fund Constitute Surplus

I agree with the other members of the Panel that it is not necessary for the Tribunal to hear argument on the issue of whether the excess assets in the Pension Fund represent surplus. If they do not, the Superintendent would have two proper grounds for refusing approval of the application for the payment of surplus and of the wind up report in respect of the Plan. If the excess assets do constitute surplus, the Superintendent's proposals to refuse those approvals are, nonetheless, supportable on the basis that the Plan does not provide for the payment of such surplus to the IOF. We are, therefore, in a position to dispose of the matter that is before us without the need for a further hearing on the issue of whether there is any surplus in the Pension Fund.

Disposition

Although I disagree with the other Panel members in their conclusion as to the effect of the Trust Agreements, I concur in their ultimate disposition of this case. I reach that common result because of my conclusion that the 1988 Plan Amendment is invalid.

DATED at Toronto, Ontario this 16th day of September, 2002.

“Colin H.H. McNaim”
Colin H.H. McNaim, Vice Chair of
the Tribunal and Chair of the Panel

REASONS FOR DECISION OF MR. ERLICHMAN AND MS. GAVIN

Background

We adopt the Background as set out in the separate Reasons of Mr. McNairn.

Analysis

The Superintendent and IOF asked the Tribunal to rule on the issue of whether the Plan provides for the payment of surplus to IOF. Since this is a necessary, though not sufficient, condition under subsection 79(3) of the Act, for any payment of surplus to the employer, a negative ruling on this issue would be determinative with respect to the Superintendent's Notice of Proposal, and no further hearing on the other issues would be required. In effect, if the Plan did not provide for the payment of surplus to IOF, the existence of a surplus and other possible issues arising in this case would be moot. A positive ruling could require a hearing of other issues.

Accordingly, the representations at this hearing focused quite narrowly on the language of the Plan text, trust agreements and other documents related to the pension plan. Counsel for both IOF and the Superintendent relied heavily on the leading Supreme Court of Canada case on pension plan surpluses, *Schmidt v. Air Products Canada Ltd.* [1994] 2 S.C.R. 611 (*Schmidt*).

In *Schmidt*, the Supreme Court said: "the first question to be decided in a pension surplus case is whether or not a trust exists" (p. 639).

In 1995, the IOF entered into a Trust and Master Custodial Services Agreement with the Trust Company of the Bank of Montreal, effective as of June 21, 1995 (the "1995 Trust Agreement") engaging the trust company to serve as trustee and to provide certain custodial services with respect to the Pension Fund. Upon the resignation of the original trust company as trustee, the IOF entered into a similar agreement with CIBC Mellon Trust Company as of October 1, 1999 (the "1999 Trust Agreement").

It was not disputed by the parties that the pension plan was a pension trust from the time of 1995 Trust Agreement. In *Schmidt*, the Supreme Court said (at p. 643):

When a pension fund is impressed with a trust, that trust is subject to all applicable trust law principles. The significance of this for the present appeals is twofold. Firstly, the employer will not be able to claim entitlement to funds subject to a trust unless the terms of the trust make the employer a beneficiary, or unless the employer reserved a power of revocation of the trust at the time the trust was originally created. Secondly, if the objects of the trust have been satisfied but assets remain in the trust, those funds may be subject to a resulting trust.

The settlor of a trust can reserve any power to itself that it wishes provided the reservation is made at the time the trust is created. A settlor may choose to maintain the right to appoint trustees, to change the beneficiaries of the trust, or to withdraw the trust property. Generally, however, the transfer of the trust property to the trustee is absolute. Any power of control of that property will be lost unless transfer is expressly made subject to it.

IOF argued that, as the 1995 Trust Agreement names no specific beneficiaries and does not explicitly prohibit IOF from being a beneficiary, IOF was not precluded from being a beneficiary of the fund. Further, IOF cited the language of the trust agreement, which allowed it to instruct the trust company with respect to payments from the trust in accordance with the provisions of the pension plan, and to designate the direction of trust property if the trust agreement were terminated, to argue that 1995 Trust Agreement gave IOF the power to designate itself a beneficiary of the trust.

The 1995 Trust Agreement defines the “Trust Fund” as “the securities or other properties delivered to or held by Trustco [Trust Company of the Bank of Montreal] from time to time and constituting the pension fund of the Pension Plan to be held as trust properties pursuant to the terms of this Agreement including the proceeds and income therefrom” (Paragraph 1(m)). The 1995 Trust Agreement also authorizes the Trust Company “to make payments . . . in accordance with the provisions of the Pension Plan” (Paragraph 4(h)). Members of the pension plan are obviously beneficiaries of a pension trust set up to provide pension benefits to plan members.

On the other hand, it cannot be assumed that the employer, IOF, is a beneficiary of the trust. This would require a clear statement in the 1995 Trust Agreement, and not the general powers given to IOF as plan administrator. As there was no such clear statement, IOF is not a beneficiary of the trust.

IOF argued that Section 22 of the 1995 Trust Agreement, which allowed IOF to direct the distribution of trust property on the termination of the trust agreement, had the effect of reserving for IOF the power to revoke the trust. This proposition does not accord with the *Schmidt* decision, in which the Supreme Court said (at p. 646) that the power to revoke cannot be read into a trust agreement without “extremely clear and explicit language.” The Supreme Court continued:

A general amending power should not endow a settlor with the ability to revoke the trust. This is especially so when it is remembered that consideration was given by the employee beneficiaries in exchange for the creation of the trust. In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer’s agreeing to set up the pension trust in their favour. The wording of the pension plan and trust instrument are usually drawn up by the employer. The employees as a rule must rely upon the good faith of the employer to ensure that the terms of the specific trust arrangement will be fair. It would, I think, be inequitable to accept the proposition that a broad

amending power inserted unilaterally by the employer carries with it the right to revoke the trust. The employer who wishes to undertake a restricted transfer of assets must make those restrictions explicit. Moreover, amendment means change not cancellation which the word revocation connotes.

In fact, the Supreme Court specifically ruled, in *Schmidt*, that the power in the original trust document of the Catalytic pension plan to direct the distribution of trust funds on plan termination did not constitute a right of revocation.

IOF also argued that the pension plan text, which was amended in 1990 to provide for surplus to revert to IOF on plan wind-up, was implicitly incorporated into the 1995 Trust Agreement. As a result, it was argued, IOF was a beneficiary of the Plan, particularly with respect to surplus on wind up, at the time of the first trust agreement.

Here again, the Supreme Court set a high standard for the incorporation of pension plan language into the terms of a trust. To quote the *Schmidt* decision once more (at pp. 639-640):

The terms of a pension plan are relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust. The contract or pension plan may influence the payment of trust funds but its terms cannot compel a result which is at odds with the existence of the trust.

In this case, the references within the 1995 Trust Agreement to the provisions of the Pension Plan can influence payments from the Pension Fund, but, in the absence of an explicit incorporation by reference, the terms of the Plan Text cannot be used to read either IOF's rights as a beneficiary or the right of revocation into the 1995 Trust Agreement.

The one other avenue by which IOF might claim entitlement to pension plan surplus is through the creation of a resulting trust, if the objects of the trust have been fully satisfied and money still remains in the trust fund. The clear object of this trust was to provide pension benefits to plan members. In a defined contribution plan, such as the IOF Plan, the object is to provide whatever benefits can be generated from contributions and investment earnings, and there is no reasonable basis for arguing that the object of the trust has been met, while assets remain in the trust. There is therefore no resulting trust created in this case.

We therefore conclude that, as IOF is not a beneficiary of the trust, nor does it have the power to revoke the trust, nor has a resulting trust been created, consequently the Plan does not provide for the payment of surplus to IOF.

In light of these conclusions, we see no need to deal with the other arguments raised by the parties concerning IOF's entitlement to surplus.

DISPOSITION

We direct the Superintendent to carry out the Notice of Proposal dated March 19, 2001, refusing to consent to an application by the IOF for the payment of surplus from the Plan on its windup and to approve the wind up report in respect of the Plan.

DATED at Toronto, Ontario this 16th day of September, 2002

“Louis Erlichman”
Louis Erlichman
Member of the Tribunal and the
Panel

“Heather Gavin”
Heather Gavin
Member of the Tribunal and the
Panel