

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 (the "Superintendent") to refuse to approve the Partial Wind Up Report for Westinghouse Canada Inc. Pension Plan, Registration No. 348409 in respect of business carried on by Westinghouse Canada Inc. at its Burlington, Ontario plant;

AND IN THE MATTER OF a proposal by the Superintendent to refuse to approve the Partial Wind Up Report for the Westinghouse Canada Inc. Pension Plan , Registration No. 348409 in respect of business carried on by Westinghouse Canada Inc. at its London, Ontario and St. Jean, Quebec plants;

AND IN THE MATTER OF a proposal by the Superintendent to refuse to approve the Partial Wind Up Report for the Westinghouse Canada Inc. Pension Plan , Registration No. 348409 in respect of business carried on by Westinghouse Canada Inc. at its Motors Division plant;

AND IN THE MATTER OF a proposal by the Superintendent to refuse to approve the Partial Wind Up Report for the Westinghouse Canada Inc. Pension Plan , Registration No. 348409 in respect of business carried on by Westinghouse Canada Inc. at its Beach Road plant in Hamilton, Ontario;

AND IN THE MATTER OF a proposal by the Superintendent to refuse to approve the Partial Wind Up Report for the Westinghouse Canada Inc. Pension Plan , Registration No. 526632 in respect of business carried on by Westinghouse Canada Inc. at its London, Ontario and St. Jean, Quebec plants;

AND IN THE MATTER OF a proposal by the Superintendent to refuse to approve the Partial Wind Up Report for the Westinghouse Canada Inc. Pension Plan , Registration No. 526632 in respect of business carried on by Westinghouse Canada Inc. at its Motors Division plant;

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

BETWEEN:

CBS CANADA CO.

Applicant

and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

and -

**NATIONAL , AUTOMOBILE, AEROSPACE, TRANSPORTATION
AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)
AND ITS LOCAL 504**

A Party in Relation to
Certain of the Proceedings

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

Mr. C.S. Moore
Member of the Tribunal and of the Panel

APPEARANCES:

For CBS Canada Co.
Mr. Andrew K. Lokan
Mr. Steve Fruitman

For the Superintendent of Financial Services
Ms. Deborah McPhail
Mr. Mark Bailey

For the CAW-Canada and its Local 504
Mr. Louis Gottheil

For ABB Inc.
Ms. Elizabeth M. Brown

HEARING DATES:

February 4-5, 2002

REASONS FOR DECISION ON JURISDICTIONAL MOTION

Facts

CBS Canada Co. ("CBS"), the applicant in these proceedings, is the successor to Westinghouse Canada Inc. ("Westinghouse"). CBS requested hearings before this Tribunal in respect of six separate Notices of Proposal, issued by the Superintendent of Financial Services (the "Superintendent"), to refuse to approve six Partial Wind Up Reports filed by CBS. Four of the reports concern partial wind ups of Westinghouse Pension Plan Registration No. 348409, being a plan for the hourly paid employees of Westinghouse (the "Westinghouse Hourly Plan"). Two of the reports concern partial wind ups of Westinghouse Plan Registration No. 526632, being a plan for the salaried employees of Westinghouse (the "Westinghouse Salaried Plan"). The grounds for the proposed refusals, relied on in each of the Notices of Proposal, are a failure of the partial wind up reports,

- (a) to treat company request early retirement benefits, and related bridge benefits, under the relevant Plan as consent benefits under section 74 of the Act, and
- (b) to provide for the distribution of the surplus assets related to the affected partial wind up group.

At a pre-hearing conference, the various requests for hearing were directed to be heard together. At the same conference, CAW-Canada and its Local 504 ("CAW-Canada"), which was the bargaining agent for the hourly paid employees of Westinghouse, was added as a party to the proceedings involving the Westinghouse Hourly Plan. CAW-Canada was also given the right to participate in the proceedings involving the Westinghouse Salaried Plan to the extent of cross-examining witnesses and making submissions.

The partial wind ups of the Plans, to which the reports relate, occurred against the following background. In the 1980's and early 1990's, Westinghouse went through a significant restructuring of its operations. In some cases, Westinghouse sold certain of its plants, or parts of its plants, as going concerns. In one case, the sale related to the plant of a joint venture in which Westinghouse

was a participant and to which it had sold one of its businesses. In other cases, it closed plants, or parts of plants, or simply reduced the workforces in its facilities. Specifically, it closed its Motors Division operations at a plant in Hamilton, Ontario and sold the balance of the business at that plant, which was operated by a joint venture, part of a plant in St. Jean, Quebec and plants in London and Burlington, Ontario to Asea Brown Boveri Inc., now called ABB Inc. ("ABB"), pursuant to an asset purchase agreement. Effective upon the sale, ABB created two wrap-around pension plans (the "ABB Hourly Plan" and the "ABB Salaried Plan"), providing virtually identical benefits to those under the Westinghouse Hourly Plan and the Westinghouse Salaried Plan, for employees who transferred to ABB in connection with the sale. CAW-Canada continued to represent the transferred employees as their bargaining agent, now in connection with the collective bargaining relationship to their new employer, ABB.

During the period from 1991 to 1994, ABB closed the various plants that it had acquired from Westinghouse, terminating the remaining employees who had transferred from Westinghouse in connection with that acquisition. ABB declared partial wind ups of the ABB Hourly Plan and the ABB Salaried Plan in respect of the closure of the London and St. Jean plants. In February of 1994, the Superintendent approved the reports in respect of those partial wind ups that were filed by ABB, although those reports did not treat company request early retirement benefits provided for by the Plans as consent benefits under section 74 of the Act. In July of 1996, the Superintendent issued a Notice of Proposal to refuse to approve a report filed by ABB on the wind up of the ABB Hourly Plan, upon the closure of the Burlington plant, in part because company request early retirement benefits had not been treated as consent benefits under section 74 of the Act. ABB requested a hearing before the Pension Commission of Ontario (the "PCO") in respect of that Notice of Proposal. CAW-Canada is a party in that proceeding. In January, 1999, a pre-hearing conference was held in the PCO proceeding at which ABB took the position that the issue relating to company request early retirement benefits was addressed by a revised wind-up report that it had filed and that the pre-hearing conference should be adjourned because ABB's liabilities under the ABB Hourly Plan could not be finally calculated until Westinghouse had filed reports in relation to the partial wind ups of the Westinghouse Hourly Plan. The PCO pre-hearing conference was, in fact, adjourned and continues to stand adjourned.

Upon the closure of its Motors Division in June of 1995, Westinghouse declared partial wind ups of

the Westinghouse Hourly Plan and the Westinghouse Salaried Plan. The reports that were filed in respect of those partial wind ups were conditionally approved by the Superintendent in February of 1999, subject to further adjustment upon determination of whether company request early retirement benefits were payable. In September of 1999, CAW-Canada made detailed submissions to the Superintendent on the reports, addressing at length its position that company request early retirement benefits ought to be paid.

In January of 1999, the Superintendent ordered partial wind ups of the Westinghouse Hourly Plan and the Westinghouse Salaried Plan, on the basis of the closure by ABB of its London, St. Jean, Hamilton and Burlington plants. By this time, it had been established in *Gencorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 39 O.R. (3d) 38 (C.A.), that a wind up of an employer's pension plan could be triggered by the closure of a plant by a successor employer.

CBS filed four reports in respect of these partial wind ups in March of 2000 and counsel for CAW-Canada was advised of these filings. On September 8, 2000, copies of three of the reports – those relating to the Westinghouse Hourly Plan - were provided to CAW-Canada. On September 28, 2000, the Superintendent, acting through her delegate the Director of the Pension Plans Branch of the Financial Services Commission of Ontario, approved all four of the reports. On October 4, 2000, counsel for CAW-Canada, apparently unaware of those approvals, wrote to counsel for the Superintendent indicating that CAW-Canada intended to make submissions with respect to the reports relating to the Westinghouse Hourly Plan.

On November 17, 2000, the Director of the Pension Plans Branch advised CBS, CAW Canada and ABB in writing that he was of the view that all four approvals were granted in breach of the duty of fairness and were, therefore, null and void. On December 8, 2000, after receiving written submissions from CBS, CAW-Canada and ABB, the Director, acting once again as delegate of the Superintendent, re-affirmed the view he had expressed earlier to the effect that the approvals were null and void for breach of fairness, thereby effectively rescinding the approvals.

On May 9, 2001, following further submissions from CBS and CAW-Canada, the Superintendent issued four Notices of Proposal to refuse to approve the reports filed by CBS, in respect of one or the other of the Westinghouse Hourly Plan and the Westinghouse Salaried Plan, relating to the four

partial wind ups triggered by the ABB plant closures. On May 16, 2001, the Superintendent issued two Notices of Proposal to refuse to approve the reports filed by CBS, in respect of one or the other of the Westinghouse Plans, relating to the partial wind ups triggered by the closure by Westinghouse of its Motors Division. These six Notices of Proposal are the Notices of Proposal that are the subject of these proceedings. The grounds for the proposed refusals in each of the Notices are as recited at the beginning of this statement of facts.

The current motion before the Tribunal was brought by CBS with a view to obtaining the determination of the Tribunal on four preliminary or jurisdictional issues. At the pre-hearing conference, ABB was granted limited party status for the purpose of enabling it to participate in the hearing on the motion in so far as it concerns the issues that could have a direct impact on ABB, namely the first two issues considered below.

Issue No. 1 Does the Tribunal have jurisdiction to consider

- (i) whether CBS or ABB bears responsibility for payment of the benefits in issue under the terms of their respective pension plans, or**
- (ii) to the extent that CBS is responsible, is ABB required to indemnify CBS?**

It was accepted by all of the parties that the Tribunal is not entitled to make an order in these proceedings that would determine the responsibility of ABB, under its pension plans, to the former employees of Westinghouse who had become its employees. The Notices of Proposal that have been challenged in these proceedings relate only to partial wind up reports that have been filed in respect of the Westinghouse plans. The question that this Tribunal will ultimately have to answer is whether those reports should be approved by the Superintendent having regard, particularly, to the criteria set out in subsection 70(5) of the Act. After making that determination, the Tribunal will be constrained, in deciding what order it should make, by subsection 89(9) of the Act. That provision would allow the Tribunal to direct the Superintendent to carry out the proposal in one or other of the Notices of Proposal, or to refrain from carrying out any such proposal, “and to take such action as the Tribunal considers the Superintendent ought to take in accordance with” the Act and the regulations under it. We are of the opinion that any direction by the Tribunal to the Superintendent to take particular action, in accordance with the Act or regulations, must be closely

related to the subject matter of, or the circumstances underlying, the proposal that the Tribunal has directed the Superintendent to carry out or to refrain from carrying out. In these proceedings, an order directing the Superintendent to take action in respect of the wind up, in whole or in part, of ABB's pension plans would be too far removed from the Notices of Proposal that are before the Tribunal to be authorized by subsection 89(9) of the Act.

However, CBS maintained that the Tribunal had what it characterized as "plan text jurisdiction". By this, it meant that the Tribunal, in interpreting the Westinghouse pension plans, could properly look at the ABB pension plans and consider the inter-relationships between the pension plans of the successive employers of the plan members affected by certain of the partial wind ups of the Westinghouse plans. It would be logical, CBS said, to take this approach with a view to trying to avoid a situation where those employees could "double-dip" by getting a duplication of benefits under the pension plans of the two employers on the wind up of those plans. One might add that a similar logic would support this approach in order to try to avoid a situation, if at all possible, where those employees would be denied a particular type of benefit, which one would expect would be available on a wind up, under both of their employers plans.

We agree that the Tribunal might well find it appropriate, in the course of these proceedings, to assume "plan text jurisdiction" over the ABB plans in this limited sense, i.e. a jurisdiction that allows it to consider one or other of the ABB plans as an aid to interpreting the Westinghouse plans. This is not to say that the Pension Commission of Ontario, in its proceeding concerning the Superintendent's Notice of Proposal to refuse to approve the wind up report in respect of ABB's Hourly Plan, would be bound by an interpretation of that plan or a factual finding in relation to that plan arrived at by this Tribunal in the course of these proceedings. It would be a matter for that Commission to determine how persuasive this Tribunal's interpretation or finding should be, having regard, among other things, to the fact that ABB was given the opportunity to participate in these proceedings (a similar approach was taken, in *obiter* comments, by the arbitration board in *Re Scarborough General Hospital and C.U.P.E., Loc. 1487* (1999), 79 L.A.C. (4th) 246, see esp. at pp. 258-260 (Ont.; L.M. Davie, J. Solberg and R. Charney)). There can certainly be no advance assurance that determinations made by this Tribunal, in these proceedings, will not affect the interests of ABB in any way or that ABB will be given notice and the opportunity to make

representations if and when any determination that might affect its interests is about to be made by this Tribunal.

We were also asked, by the terms of the motion, if the Tribunal has jurisdiction to consider whether ABB is required to indemnify CBS for the amount of any of the benefits at issue in this case the payment of which we might find to be the responsibility of CBS. There are, in fact, a number of indemnity provisions in the asset purchase agreement under which ABB acquired the businesses of Westinghouse. Some of these indemnities run from ABB in favour of CBS, including an indemnity that is specific to the situation where Westinghouse incurs costs, beyond those for which it retains responsibility, as a result of a partial wind up of a Westinghouse pension plan that is triggered by the actions of ABB (paragraph 5.3(f)). ABB pointed out, in argument, that the enforceability of these indemnity provisions will involve consideration of the potential application of limitation periods within which indemnity claims must be made and that, in any event, the asset purchase agreement provides for the resolution of any disputes arising out of the agreement or its interpretation by arbitration (section 17.11).

The parties were in apparent agreement that the Tribunal could not make a binding determination as to whether the asset purchase agreement imposed an enforceable obligation on ABB to indemnify CBS if we were to find CBS responsible for payment of the benefits at issue in this case. However, CBS maintained that the Tribunal had, at least, “agreement jurisdiction” with the result that it could look to the asset purchase agreement – not just its indemnity provisions – as an aid to interpreting the Westinghouse plans. It was important, CBS argued, for this Tribunal to make it abundantly clear what latitude it has to interpret the terms of the asset purchase agreement since a court would be likely to defer to the Tribunal for an initial view of the meaning of those terms to the extent that they are relevant in these proceedings. In this respect, it relied particularly on the decision of the Ontario Court General Division in *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107. We do not think that the interpretation of any of the terms of the asset purchase agreement is sufficiently connected to the subject matter of these proceedings, or within the special expertise of this Tribunal, that a court would be likely to defer to the Tribunal in this way.

Although the foreword to each of the ABB pension plans refers to the sale of the Westinghouse businesses to ABB as the reason for the establishment of the ABB plan, it also makes it clear that

the plan provides for benefits accruing to eligible members after the effective date of the sale, reciting that benefits accrued to the credit of those same individuals before the effective date of the sale remain the sole responsibility of the comparable Westinghouse plan. The asset purchase agreement is not incorporated into either employer's plan so as to be subject, for that reason, to interpretation by this Tribunal in any determination of responsibility for payment of the benefits that are at issue in this case.

All of this said, we are of the opinion that some of the provisions of the asset purchase agreement might prove to be relevant in these proceedings and that the Tribunal might have occasion to use the agreement in some way to interpret the Westinghouse plans. The persuasive force of the Tribunal's conclusions about that agreement, in any subsequent proceeding before an adjudicator to resolve a dispute under the agreement, would be for the adjudicator to determine. The situation would not be materially different from that where the Tribunal has expressed its views about the terms of one or the other of the ABB pension plans and those terms subsequently come directly into issue in another proceeding.

Issue No. 2

Does the Tribunal have jurisdiction to add ABB as a party without ABB's consent when ABB has not sought party status?

In the course of the hearing on the motion, we indicated that we had decided to refuse to make an order adding ABB as a party to these proceedings and that our reasons for this decision would be included in the reasons for our dispositions on the motion generally.

CBS argued that the Tribunal has jurisdiction to add ABB as a party under the broad authority of subsection 89(11) of the Act, which says that:

The Superintendent, the person who requires a hearing and such other persons as the Tribunal specifies are parties to the proceeding before the Tribunal under this section.

Although the Interim Rules of Practice and Procedure for Proceedings before the Financial Services Tribunal only provide, in specific terms, for the addition of a party on application to the Tribunal, CBS

maintained that a party could be added in the absence of such an application pursuant to Rule 2.02. That Rule says that:

Where procedures are not provided for in these Rules, the Tribunal may do whatever is necessary and permitted by law to effectively determine the matter before it.

ABB argued that it would be illogical to treat Rule 2.02 as available for this purpose given the right of any party to bring a motion to discontinue its participation in a proceeding before the Tribunal under Rule 42.02. Relying on Rule 42.03, it suggested that any such motion could not be denied, although the granting of the motion could be subject to conditions, such as the payment of costs by the party seeking to discontinue participation. As to subsection 89(11) of the Act, ABB maintained that the power that it conferred on the Tribunal to specify parties to a proceeding should be read narrowly, so as to avoid its use as a coercive measure, as simply allowing the Tribunal to specify parties from among those who may have applied for such status.

We do not find it necessary to decide whether the Tribunal has the jurisdiction to order that ABB be added as a party since we do not think that it would be necessary or appropriate to join ABB against its will in these proceedings should we have the jurisdiction to do so. CBS supported the addition of ABB as a party on the basis that it has information relevant to these proceedings that is not also in the possession of CBS, such as that pertaining to the severance of ABB employees who were members of the Westinghouse Plans. That information might be difficult to obtain if ABB were not a party as ABB does not currently have a presence within this jurisdiction. However, ABB advised, through its counsel, that it would co-operate by causing the appropriate officers to respond to subpoenas from this Tribunal, subject to the usual rules about attendance in response to a subpoena. As the responsibility of ABB under its plans and under the asset purchase agreement are not directly at issue in these proceedings, we do not think it appropriate to take the unusual step of mandating ABB's participation as a party, especially given its offer of co-operation.

Issue No. 3

- (a) With respect to the September 28, 2000 approvals of four wind up reports filed by CBS with respect to the Westinghouse Hourly Plan (London/St. Jean, Burlington and**

Beach Road) and with respect to the Westinghouse Salaried Plan (London/St. Jean):

- (i) Did the Superintendent have jurisdiction to rescind the approvals;**
- (ii) If so, did the Superintendent err in rescinding such approvals;**
- (iii) If so, what procedural consequences should flow from such refusals?**

There is nothing in the Act or the *Financial Services Commission of Ontario Act, 1997* that gives the Superintendent the authority to re-consider, and revise or revoke, a decision that he or she has made. There is no general authority to do so and there is no authority to do so when the decision involves the approval of a partial wind up report.

In the absence of such authority, the doctrine of *functus officio* comes into play. That doctrine is to the effect that an adjudicator - whether a court or an administrative body - once having made its final decision cannot alter that decision except in very limited circumstances (see Brown & Evans, *Judicial Review of Administrative Action in Canada* (looseleaf), at pp. 12-80 to 12-90). The doctrine, at least as it applies to administrative bodies, is based on policy considerations that favour the finality of decisions (see *Chandler v. Alberta Association of Architects* (1989), 62 D.L.R. (4th) 577, at p. 596 (S.C.C.)).

The exceptions from the doctrine include one that enables an administrative body to re-visit and correct a decision that was made in error where the error is of a kind that makes the decision null and void (see *Chandler, supra*, at p. 597). When an administrative body is subject to a duty of procedural fairness, under common law principles, in coming to a particular decision, the failure to adhere to that duty renders the decision a nullity (see Jones & de Villars, *Principles of Administrative Law* (3rd ed., 1999), at pp. 231-234). Thus, a breach of the duty of fairness in arriving at a "final" decision provides a proper basis for the administrative body that made the decision rescinding it and substituting a new decision that is arrived at in accordance with that duty.

The Superintendent acts as an adjudicator in deciding whether to approve a partial wind up report under the Act and is subject to a duty of fairness in exercising that function. This follows from the

decision of the Ontario Divisional Court in *Re Collins & Pension Commission of Ontario* (1986), 56 O.R. (2d) 274, esp. at pp. 289-290 & 295-296. In that case, the court held that the Pension Commission of Ontario, a predecessor of the Superintendent, owed a duty of fairness to pension plan members in considering an application by their employer, under the Act, for consent to the withdrawal of surplus from their pension plan. That decision was recently followed in *Retirement Income Plan for Salaried Employees of Weavexx Corp. v. Ontario (Superintendent of Pensions)* (2000), 24 C.C.P.B. 154 (addendum to reasons for judgment at (2000), 26 C.C.P.B. 290) (Ont. Div. Ct.) (the decision of the Divisional Court was affirmed, with a variation in remedy, in an unreported decision of the Court of Appeal dated February 14, 2002).

The real dispute among the parties on this Issue No. 3 is as to what is required by the duty of fairness in the circumstances of this case and as to whether the applicable requirements were breached by the Superintendent in arriving at the initial decisions to approve four of the wind up reports filed by Westinghouse.

The Supreme Court of Canada has stated, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1991] 2 S.C.R. 817, that the "duty of fairness is flexible and variable and depends on an appreciation of the particular statute and the rights affected ..." The court set out five factors that should be taken into account in determining what procedural rights the duty of fairness requires. Underlying all of these factors, the court noted,

is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker. (At p. 837.)

The factors listed by the court are as follows:

(a) the nature of the decision being made and the process followed in making it (the closer to the judicial model, the more likely that procedural protections akin to those in a trial setting will be required),

- (b) the statutory scheme and the terms of the statute pursuant to which the decision-making body operates (for example, greater procedural protections will be required when no appeal process is provided within the statute),
- (c) the importance of the decision to the individual or individuals affected (the more important the decision is to the lives of those affected, the greater the procedural protections that will be required),
- (d) the legitimate expectations of the person challenging the decision (this factor takes account of promises and regular practices of administrative decision-makers, recognizing that it would be generally unfair to act in contravention of representations as to procedure), and
- (e) the choice of procedure made by the decision-making body itself, in light of relevant institutional constraints (this factor recognizes that some deference should be paid to the choice of procedure made by the decision-maker, particularly if the chosen procedure is within the range of those procedures contemplated by the governing statute or if the decision-maker has expertise in deciding on the appropriate procedure).

In the earlier case of *Wiswell v. Metropolitan Corporation of Greater Winnipeg* (1965), 51 D.L.R. (2d) 754, the Supreme Court of Canada concluded that a "known opponent" to particular action that was taken after a hearing by a quasi-judicial body should have been given specific notice of the hearing. The action in question in this case was that of a city council in "downzoning" a particular property, which the "known opponent" - a homeowners association - could be expected to oppose given previous representations it had made to the city and its zoning board against potential high density development of the subject property. Although notice of the hearing was published in two local daily newspapers, the failure of the city to give specific notice to the association, along with a failure to post the notice on the property in accordance with the city's own procedures, amounted to a breach of the city's duty to act in good faith and fairly listen to both sides in a dispute. The failure to give notice directly to the association in this case was particularly telling given that the city had communicated with the association a few months before the hearing in a manner that would suggest that there was nothing further that could be done by the association at that stage to further its opposition to the high density development of the property.

We now have to consider the application of the principles in *Wiswell* and *Baker* to the

circumstances of this case.

It seems to us that CAW-Canada, prior to the initial approval by the Director of the Pension Plans Branch of the three wind up reports relating to the Westinghouse Hourly Plan, was in a similar position to the "known opponent" in *Wiswell* given the fact that it was on record with the office of the Superintendent as having an interest in making submissions to the effect that company request early retirement benefits were payable under the Westinghouse Hourly Plan upon a partial wind up. In August of 1999, in response to certain inquiries that had been made by CAW-Canada about four of the partial wind ups of the Westinghouse Plans, counsel for the Superintendent asked CAW-Canada if it intended to make submissions on the issue of whether company request early retirement benefits were payable in relation to the partial wind up of the Westinghouse Hourly Plan that was occasioned by the closure of the Motors Division. Counsel for CAW-Canada responded by saying that his client did, indeed, want to make such submissions. In September of 1999, CAW-Canada made extensive written submissions to counsel for the Superintendent to the effect that such benefits were payable.

On April 3, 2000, counsel for the Superintendent advised CAW-Canada of receipt of the four reports relating to the partial wind up of the Westinghouse Plans arising out of the ABB plant closures, promising to keep CAW-Canada "advised of the progress". However, in the case of these reports, CAW-Canada received no inquiry from the office of the Superintendent about its intention to make submissions and the reports were approved on September 28, 2000 without the apparent knowledge of CAW-Canada.

CBS argued that CAW-Canada had had the opportunity to make its submissions on the company request early retirement benefits issue in the context of the Superintendent's consideration of the partial wind up of the Westinghouse Hourly Plan that was occasioned by the closure of the Motors Division. But there may have been differences in the underlying facts, or in the position taken by CBS, in relation to the partial wind ups triggered by the ABB plant closures that might have dictated different submissions from CAW-Canada in that context or, indeed, CAW-Canada may have simply chosen to remind the Superintendent of its earlier submissions if it had been given the chance to do so. In either event, the opportunity to make submissions could have proven to be meaningful and could conceivably have influenced the decision of whether the wind up reports should be approved.

CAW-Canada cannot, however, be properly treated as a "known opponent" in relation to the approval of the report on the partial wind up of the Westinghouse Salaried Plan that was later rescinded by the Superintendent. CAW-Canada did not represent any of the members of that Plan. The common language of the two Westinghouse Plans on the subject of company request early retirement benefits and the common circumstances that gave rise to the partial wind ups of the two Plans do not give CAW-Canada the status of a party in opposition or dispute in any of the proceedings before the Superintendent in respect of a partial wind up of the Westinghouse Salaried Plan.

We now turn to the factors outlined in *Baker* in their application to the circumstance of this case.

(a) The Nature of the Decision

The decision of the Superintendent to approve a partial wind up report is clearly one in which employees who have lost their jobs as a result of the event giving rise to the partial wind up have a direct interest. Thus, given the nature of the decision, there may well be a *lis* or dispute between parties, in this case between a union that represents employees affected by the partial wind up and the employer, that is similar to the *lis* or dispute that characterizes judicial proceedings.

(b) The Statutory Scheme

It is significant that the Act is, in the words of the Ontario Court of Appeal in *Firestone Canada Inc. v. Ontario (Pension Commission)* (1990), 1 O.R. (3d) 122, "clearly intended to benefit employees" and "[i]n particular ... evinces a special solicitude for employees affected by plant closures" (at p. 127). Indeed, when in receipt of a request for approval of a wind up report, the Superintendent is directed, by subsection 70(5) of the Act, to refuse approval if the report "does not protect the interests of the members and former members of the pension plan". All of this suggests that the procedural protections that the Superintendent affords employees, particularly those affected by plant closures and resulting pension plan wind ups, as in this case, should be more than minimal.

In the course of the hearing on this motion, we heard differing views on whether the Act allows for a review by this Tribunal, at the instigation of plan members or their bargaining agent, of a decision

of the Superintendent to approve a partial wind up report. If it does, this would suggest that the procedural rights of CAW-Canada before the Superintendent, in this case, should be tempered by the fact that they would not give CAW-Canada its only opportunity (at least short of going to court by way of judicial review) to make submissions against the approval of the partial wind up reports for the Westinghouse Hourly Plan. However, as CAW-Canada pointed out in argument, it is dangerous to attribute too much to the existence of any right to request a hearing before the Tribunal as the pursuit of such a request involves a commitment of resources that a would-be requester may not have. Of course, a considerable delay is also involved in having to await a Tribunal hearing before being accorded the right to make submissions.

We do not find it necessary, in this case, to decide whether anyone would have the right, under the Act, to request a hearing before the Tribunal in respect of an approval by the Superintendent of a partial wind up report since there are other considerations that provide adequate support for our conclusions on Issue No. 3.

(c) The Importance of the Decision to the Individuals Affected

It goes without saying that any decision of the Superintendent to approve a partial wind up report could be extremely important to affected employees, such as those represented by CAW-Canada. The older members of that group and their families may be particularly dependent on early retirement benefits which CAW-Canada would, most likely, have put in issue in this case, upon the Superintendent's initial consideration of the reports relating to the partial wind ups of the Westinghouse Hourly Plan, had it been given the opportunity to do so.

(d) The Legitimate Expectations of the Person Challenging the Decision

We have concluded that CAW-Canada had a legitimate expectation that it would be given the opportunity to make submissions to the Superintendent in connection with CBS's request for approval of the reports on the partial wind ups of the Westinghouse Hourly Plan occasioned by the ABB plant closures. A letter of October 4, 2000, written by counsel for CAW-Canada to counsel for the Superintendent, indicates that CAW-Canada was reviewing those reports, which it had recently received, and intended to file written submissions shortly. CAW Canada was apparently unaware,

at the time, that the reports had already been approved - on September 28, 2000.

The expectation that CAW-Canada had that it would be given the opportunity to make submissions was legitimate given the conduct of the office of the Superintendent. First, that office had given CAW-Canada that very opportunity in connection with its consideration of the report relating to the partial wind up of the Westinghouse Hourly Plan occasioned by the closure of the Motors Division. CAW-Canada had availed itself of that opportunity, making submissions about entitlement to company request early retirement benefits, which could reasonably be expected to be an issue for CAW-Canada in connection with the partial wind ups of the same Plan occasioned by the ABB plant closures. Second, counsel for the Superintendent told CAW-Canada, by letter of April 3, 2000, that the reports on those partial wind ups had been received and that CAW-Canada would be kept advised.

(e) The Choice of Procedure by the Superintendent in Light of Institutional Constraints

While the Superintendent chose not to invite CAW-Canada to make submissions with respect to the reports on the partial wind ups of the Westinghouse Hourly Plan occasioned by the ABB plant closures, it doesn't appear to us that providing such an opportunity in this and similar situations would unduly constrain the approval process before the Superintendent. If the Superintendent had to give notice and an opportunity to make representations individually to all plan members affected by a wind up, that might unduly constrain the approval process. But that is not this case.

We have therefore concluded that the Superintendent did have jurisdiction to rescind the approvals of the three wind up reports relating to the Westinghouse Hourly Plan in that there was a breach of the duty of fairness in the granting of those approvals for failure to give CAW-Canada the opportunity to make written submissions. We do not believe that the Superintendent erred in exercising that jurisdiction. We have concluded, however, that there was no breach of the duty of fairness in the granting of approval of the wind up report relating to the Westinghouse Salaried Plan. Accordingly, there was no basis for the Superintendent rescinding that approval. The consequence is that this approval must be reinstated.

Issue No. 4 Does the Tribunal have jurisdiction to direct the Superintendent to refuse to

approve the partial wind up reports for the Westinghouse Hourly Plan on the basis that they do not provide for special early retirement benefits under Article 6.06 of the Plan when this is not a ground raised in the relevant Notices of Proposal?

The four Notices of Proposal to refuse to approve partial wind up reports in respect of the Westinghouse Hourly Plan do not refer to a failure to provide for special early retirement benefits as a reason for the proposed refusals. However, after reciting the specific reasons for the proposals, the Notices purport to rely, as well, on such further and other reasons as come to the attention of the Superintendent. The Act requires that a notice of proposal be accompanied by written reasons (see subsection 89(4)), but does not expressly limit any requested hearing before the Tribunal, with respect to such notice, to a consideration of those reasons.

Before the issue of the Notices of Proposal, on May 9, 2001, CAW-Canada made submissions to the Superintendent to the effect that the wind up reports to which three of those Notices (those concerning the Westinghouse Hourly Plan) relate were deficient, among other reasons, for failure to provide for the payment of special early retirement benefits. These submissions were copied to counsel for CBS and counsel for ABB. In its application for party status in these proceedings, CAW-Canada also indicated that it would submit that the relevant wind up reports should not be approved because they failed to provide the special early retirement benefits contemplated by the Westinghouse Hourly Plan. CBS cannot, therefore, claim to be taken by surprise if this Tribunal were to entertain arguments in these proceedings that the four partial wind up reports relating to the Westinghouse Hourly Plan should not be approved because they don't make provision for special early retirement benefits.

We have concluded that we have the jurisdiction to consider that possible ground for refusal by virtue of subsection 89(9) of the Act, as read with subsection 70(5) of the Act. Subsection 89(9) authorizes the Tribunal to order the Superintendent "to take such action as the Tribunal considers the Tribunal ought to take in accordance with the Act and the regulations," in association with an order to the Superintendent to carry out or refrain from carrying out a particular proposal.

In the case of a request for approval of a wind up report, we believe that, generally speaking, the

action the Superintendent ought to take is to refuse such approval, in accordance with subsection 70(5), if the report “does not meet the requirements of [the] Act and the regulations or ... protect the interests of the members and former members of the pension plan.” Should a partial wind up report fail to provide for the payment of special early retirement benefits to qualifying members of the partial wind up group that are called for by the plan, we think that the report would, indeed, fail to “protect the interests of the members and former members of the pension plan.” Even if the Superintendent can be said to have implicitly rejected the argument that special early retirement benefits are payable under the Westinghouse Hourly Plan, that does not preclude this Tribunal from re-considering that argument since the Tribunal is entitled, under subsection 89(9) of the Act, to “substitute its opinion for that of the Superintendent” in ordering the Superintendent “to take such action as the Tribunal considers the Superintendent ought to take in accordance with [the] Act and regulations.” As the Tribunal said in its Reasons for Orders, dated January 8, 2002, in *Independent Order of Foresters v. Superintendent of Financial Services et al.*, FST File No. P0155-2001, “ the Tribunal ... does not simply review decisions or proposed decisions of the Superintendent but hears each case ‘de novo’” (at p. 4).

When an issue is raised before the Tribunal without the benefit of any findings on the underlying facts, if they are disputed, or without any considered opinion of the Superintendent, the Tribunal would be entitled, under subsection 89(9), to refer the matter back to the Superintendent to make the appropriate findings and take a position on the issue. However, we think that the referral approach is in the discretion of the Tribunal and that subsection 89(9) also permits the Tribunal to address such an issue as one of first impression. If any fact finding is required, the Tribunal is not without its own processes for engaging in that exercise.

We therefore conclude that the Tribunal does have jurisdiction to direct the Superintendent to refuse to approve the partial wind up reports for the Westinghouse Hourly Plan on the basis that they do not provide for special early retirement benefits under Article 6.06 of that Plan, even though this was not a ground for refusal that was raised in the relevant Notices of Proposal. Of course, the question of whether such benefits are required to be paid under that Plan, in the circumstances of this case, remains to be addressed at the hearing on the merits in these proceedings.

Order

Having regard to our conclusions on Issue No. 3, we order the Superintendent to refrain from carrying out the proposal to refuse to approve the partial wind up report for Westinghouse Pension Plan Registration No. 526632 (the Salaried Plan) in respect of business carried on by Westinghouse at its London, Ontario and St. Jean, Quebec plants. We further order the Superintendent to issue forthwith a new approval of that partial wind up report under current date. Consequently, the style of cause, describing the matters to which these proceedings relate and identifying the parties, shall be amended by deleting the sixth paragraph, which refers to that particular partial wind up report.

As noted in our discussion of Issue No. 2, we refused, at the hearing of this motion, to make an order adding ABB as a party to these proceedings. That refusal shall be deemed to speak from the date of these reasons.

DATED at Toronto, this 4th day of March, 2002.

“Colin H.H. McNairn”

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

“Louis Erlichman”

Louis Erlichman, Member of the Tribunal and of the Panel

“C.S. Moore”

C.S. Moore, Member of the Tribunal and of the Panel