

**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 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

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

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

**HEARING DATE:**

May 7, 2003

## REASONS FOR DECISION

### **Background**

CBS Canada Co. ("CBS Canada"), the applicant in these proceedings, is the successor to Westinghouse Canada Inc. ("Westinghouse"). CBS requested hearings before this Tribunal in respect of several Notices of Proposal, issued by the Superintendent of Financial Services (the "Superintendent"), to refuse to approve various partial wind up reports filed by CBS Canada. One of those reports (the "London Wind Up Report") concerns the partial wind up of Westinghouse Pension Plan Registration No. 348409 (the "Hourly Plan") in respect of those members who were affected by the closure of a plant in London, Ontario (the "London plant") that was formerly owned by Westinghouse. Another of the reports (the "Hamilton Wind Up Report") concerns the partial wind up of the Hourly Plan in respect of those members who were affected by the closure of a plant on Beach Road in Hamilton, Ontario (the "Hamilton plant") that was formerly owned by a joint venture in which Westinghouse was a participant. While other wind up reports were initially involved in these proceedings, the London Wind Up Report and the Hamilton Wind Up Report are the only ones that remain in issue given the order of this Tribunal dated March 4, 2002, disposing of a jurisdictional motion, and settlement by the parties of certain matters remaining at issue, as evidenced by minutes of settlement dated March 28, 2003 (the "Minutes of Settlement"). A brief history of the events leading up to the filing of the London and Hamilton Wind Up Reports is set out below.

In 1989, the businesses carried on at the London and Hamilton plants by Westinghouse or its joint venture were sold to Asea Brown Boveri Inc., now called ABB Inc. ("ABB") and employees at those plants transferred their employment to ABB. A predecessor union to CAW-Canada and its Local 504 ("CAW-Canada") that was the bargaining agent for those employees continued to represent them as their bargaining agent, now in connection with the collective bargaining relationship to their new employer, ABB.

During the years 1991-1992, ABB closed the London and Hamilton plants. On May 13, 1999, the Superintendent made orders, pursuant to subsection 69(1) of the *Pension Benefits Act*, as amended (the "Act"), directed to CBS Canada, requiring partial wind ups of the Hourly Plan on account of these ABB plant closures (the "London Wind Up Order" and the "Hamilton Wind Up Order"). 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. The London Wind Up Report and the Hamilton Wind Up Report relate to the partial wind ups of the Hourly Plan that were directed by the London Wind Up Order and the Hamilton Wind Up Order, respectively.

The parties have agreed to resolve the matters remaining at issue in these proceedings on the basis set out in the Minutes of Settlement. Those Minutes of Settlement provide, among other things, that the members of the Hourly Plan affected by the ABB plant closures shall receive early retirement benefits calculated in a specified manner. For this purpose, the affected members are those members who are listed, as included in the relevant partial wind ups, in the London and Hamilton Wind Up Reports. Those lists of affected members are to be supplemented by the addition of any of twenty named members of the Hourly Plan whom the parties agree to add or who are added by order of this Tribunal. The Tribunal may add named members if CAW-Canada “establishes that their inclusion is required by law.”

The Minutes of Settlement were approved by order of the Tribunal dated April 3, 2003. By the terms of that order, the Tribunal remains seized of the matters in these proceedings for the purpose of dealing with the question of which of the twenty named members of the Hourly Plan, if any, should be included in the partial wind ups occasioned by the ABB plant closures.

The parties agreed on the inclusion of ten of the named members in the relevant partial wind ups. At the hearing before the Tribunal, CAW-Canada sought to establish that nine of the remaining named members should also be included. CBS Canada resisted their inclusion, arguing that it was not “required by law,” although there would be no additional cost to the Hourly Plan (or to CBS Canada) of including any of those nine. The adjustment required by the addition of any of them will be cost-neutral because the Minutes of Settlement specify that the early retirement benefits of the other affected members will be reduced in accordance with a formula that would achieve that result.

## **Analysis**

We deal first with the case for inclusion of Mr. Arnold Albert in the partial wind up resulting from the closure of the London plant.

Mr. Albert testified that he was a member of the Hourly Plan who worked in the London plant, transferring his employment to ABB when the plant was sold. He worked for ABB at that location until October 1, 1992, the effective date of the partial wind up of the Hourly Plan as it relates to members employed at the London plant. Mr. Albert, who was in ill health, retired from his employment at that time, having reached age 55 on September 30, 1992, entitling him to unreduced early retirement benefits. Mr. Albert testified that he made the decision to take early retirement when the pending closure of the London plant was announced in May of 1992. He also indicated that he would still have retired when he did if it had been announced that the plant would stay open for another year.

In our view, the circumstances of Mr. Albert do not fit the description, in the London Wind Up Order, of the members of the Hourly Plan in respect of whom the Plan is to be wound up. He cannot be said to have ceased to be employed by ABB as a result of the discontinuance of the business carried on at the London plant on or about October 1, 1992 since he stated categorically that he would have retired at or very soon after that date in any event given his ill health and his entitlement, from that date, to unreduced early retirement benefits. We must assume that the London Wind Up Order is in accordance with the law, including the law evidenced by the terms of the Act, in the absence of any challenge to that Order. We conclude, therefore, that CAW-Canada has not established that the inclusion of Mr. Albert in the partial wind up of the Hourly Plan, as it relates to members employed at the London plant, is required by law.

Some of the members of the Hourly Plan named in the Minutes of Settlement worked at the Hamilton plant, transferred to the employment of ABB on the sale of that plant in 1989 and were subsequently offered and accepted employment by ABB at its Guelph facility, to commence on or shortly after May 27, 1991. Five such members - Gord Gittens, Harold Wilcox, Ron Buchanan, John Liberty and Dymtrow Slusarchuk – testified as to the nature of, and the transition to, that employment. Two of those members

indicated, in their evidence, that three of the other named members who worked at the Hamilton plant – Donald Cameron, Bruce Carver and Fred Noto – also took up employment with ABB at its Guelph facility at the same time and on similar terms. A letter from ABB to the solicitor for Mr. Cameron, dated December 1, 1992, which was admitted in evidence, discloses the terms on which Mr. Cameron was offered and accepted employment with ABB at its Guelph facility, upon cessation of his employment by ABB in Hamilton, and indicates that seven others from the Hamilton plant, who were not mentioned by name, were offered and commenced employment at that facility under similar arrangements.

On the basis of the evidence presented, we accept that all eight of the members of the Hourly Plan mentioned above (the “Hamilton Eight”) had their employment at the Hamilton plant terminated on May 23, 1991 and were re-hired by ABB, to work at its Guelph facility, commencing on or shortly after May 27, 1991, the next working day after May 23, their last day of service at the Hamilton plant, on the following basis:

- their employment was to meet transitional requirements for training and guidance in the start-up of certain operations at the Guelph facility that had previously been carried out at the Hamilton plant,
- the need for these employment services was not, generally, expected to last beyond eighteen to twenty-four months,
- employment was to be as new employees with no transferred seniority except that previous service would be recognized for vacation entitlement purposes, and
- severance payments would be made in respect of termination of prior employment at the Hamilton plant.

The Hamilton Wind Up Order describes the members of the Hourly Plan in respect of whom the Plan is to be wound up as those who ceased to be employed by ABB as a result of the discontinuance of its Hamilton plant on or about June 30, 1991. CBS

Canada maintained that the Hamilton Eight did not cease to be employed as a result of that event because they continued to be employed by ABB, through June 30, albeit at a different location. CBS Canada pointed out that neither the Hamilton Wind Up Order nor clause (d) of subsection 69(1) of the Act (which was the basis, in part, for the wind up order) describes those affected by the discontinuance of business as those whose *employment was terminated* as a result of that discontinuance, language that might fit the circumstances of this case.

In our view, the Hamilton Eight did cease to be employed by ABB as a result of the discontinuance of its Hamilton plant because their jobs at the plant (along with all the other jobs at the plant) were scheduled to be eliminated very shortly as a natural consequence of that discontinuance. They ceased employment with ABB on May 23, 1991, receiving severance, a clear indication of cessation of employment at the instance of the employer, although all this happened in the context of a promise of other immediate employment with ABB, commencing on or about May 27, 1991. Had that promised employment carried with it a general recognition of accumulated seniority with ABB, it could be argued that, in substance, there was no break in their employment with ABB. But that was not the situation. In the circumstances of this case and, in particular, in the absence of a carryover of seniority, we believe that the new employment of the Hamilton Eight with ABB, at its Guelph facility, should remain dissociated from their previous employment with ABB at the Hamilton plant for the purposes of applying the terms of the Hamilton Wind Up Order to their situation. We conclude, therefore, that CAW-Canada has established that the inclusion of the Hamilton Eight in the partial wind up of the Hourly Plan, as it relates to members employed at the Hamilton plant, is required by law.

Our decision in this matter should not be taken to indicate that this Tribunal will necessarily review the situation of any member of a pension plan who has ceased employment at the effective date of the partial wind-up of the plan or during the period of the event giving rise to the partial wind-up whenever the plan sponsor seeks to exclude that member from participation in the partial wind up. The present case is an unusual one in that, in the end, the Tribunal has simply had to decide, within the terms of a negotiated settlement, the specific question of whether the bargaining agent for certain

named plan members has successfully met the onus of establishing that they are entitled to be included in certain partial wind ups of the plan.

### **Disposition**

We hereby order that the following members of the Hourly Plan be added to the list of members to be included in the partial wind up of the Plan resulting from ABB's closure of the Hamilton plant, which list is set out in the Hamilton Wind Up Report; Messrs. Gord Gittens, Harold Wilcox, Ron Buchanan, Don Cameron, John Liberty, Dymtrow Slusarchuk, Bruce Carver and Fred Noto.

DATED at Toronto, this 16<sup>th</sup> day of May, 2003

"C. 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