

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Pensions 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 request for an order under section 87 of the *Act* submitted on behalf of Barbara Lewis, spouse and beneficiary of Harold Lewis, deceased, in connection with the calculation of pre-retirement death benefit in the Retirement Plan for Unionized Employees of Donohue Forest Products Inc. – Pulp and Paper Divisions – Thorold Sector, Registration Number 0294496 (the “*Plan*”);

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

BETWEEN:

BARBARA LEWIS

Applicant

– and –

**SUPERINTENDENT OF FINANCIAL SERVICES and
ABITIBI-CONSOLIDATED COMPANY
OF CANADA (formerly Donohue Forest Products Inc.)**

Respondents

BEFORE:

Martha Milczynski*
Chair of the Tribunal
and of the Panel

David A. Short
Member of the Tribunal
and of the Panel

Shiraz Y. M. Bharmal
Member of the Tribunal
and of the Panel

[*Note: Following the conclusion of the hearing by the panel but prior to the rendering of its decision, Martha Milczynski was appointed a Prothonotary in the Federal Court of Canada. As a result of this appointment, Ms. Milczynski was precluded from participating in the panel’s decision.]

APPEARANCES:

For Barbara Lewis
Gordon H. Lewis

For the Superintendent
Deborah McPhail

For Abitibi-Consolidated Company of Canada
Bruce Pollock
Gary Nachshen

HEARING DATES:

July 2, 2003
September 22, 2003
September 25, 2003

REASONS FOR DECISION

Background

1. Abitibi-Consolidated Company of Canada and its predecessor corporations ("Employer") are the sponsor and the administrator of the Plan registered under the *Act*; Aon Consulting Inc. ("Aon") are external consultants engaged by the Employer to provide administrative and Actuarial services for the Plan.
2. The Plan succeeded pension plans previously established by a predecessor corporation dating back to July 1, 1944.

In January 1982, the Plan was restated with effect from January 1, 1981 ("January 1982 Restatement").

In March 1988, the Plan text was consolidated effective September 1, 1987 and was restated to include various amendments between January 1982 and the date of consolidation, and to incorporate changes agreed in the collective agreement effective May 1, 1987 ("March 1988 Restatement").

On March 24, 1993, the Plan was revised and restated to January 1, 1992, incorporating revisions effective January 1, 1988 to reflect changes to the *Act* and other matters ("March 1993 Restatement"). The March 1993 Restatement made substantial changes to the calculation of benefits for retirement after 1990, and included minimum provisions to ensure that benefits already earned before then were not reduced. The March 1993 Restatement also reflected the revised requirements of the *Act* as of January 1, 1988, which affected minimum requirements for registered plans for periods on and after January 1, 1987 (the "reform" date). Among other things, the March 1993 Restatement provided for a minimum benefit upon the death of a vested member, prior to retirement, for the benefit related to post-reform service and to post-reform amendments respecting pre-reform service ("pre-retirement death benefit").

In June 1997, the Plan was again revised and restated as of March 1, 1996 to reflect the change in the sponsoring employer and to effect changes requested by the federal tax regulatory agency, Revenue Canada, as it then was.

Further changes were made to the early and postponed retirement provisions of the Plan in December 1997.

3. Mr. Harold Lewis (“Mr. Lewis”), the deceased husband of the Applicant, was a member of the Plan until his death on November 23, 1997. Mr. Lewis joined the Plan on April 1, 1965. He was on disability leave of absence at the time of his death. The total service credited to Mr. Lewis for the purposes of determining his pension under the Plan was 30.09 years. The credited service included a period of 46 weeks of disability absence preceding his eligibility for the employer’s long term disability plan (“LTD”). Mr. Lewis commenced LTD benefits on January 26, 1990. Of the total credited service, 10.89 years related to the period after 1986.
4. On December 10, 1997, the Applicant was advised by the Employer (the sponsor at that time was Donohue, a predecessor company) that, according to the provisions of the Plan, she was entitled to a death benefit upon Mr. Lewis’ death. The death benefit, at her option, could be taken as either a lump sum or an equivalent monthly pension. The lump sum benefit was equal to a refund of contributions made by Mr. Lewis, with interest, for the period prior to 1987 plus the value of the benefits earned on and after the reform date. The total amount of the lump sum was \$129,542.30. The determination of this death benefit excluded any credit for the 46 weeks of Mr. Lewis’ disability absence preceding LTD.
5. On December 17, 1997, the Applicant opted for the cash lump sum, which was to be transferred to her RRSP with the Royal Bank. An amount of \$130,303.58 (\$129,542.30 plus interest from the date of death to the date of disbursement) was transferred to her RRSP at the end of December 1997 or soon thereafter.
6. In response to enquiries from Mr. Gordon Lewis on behalf of the Applicant, the Employer asked Aon to prepare a detailed explanation for Mr. Gordon Lewis about the calculation of the death benefit. Aon prepared an explanation on May 22, 1998, which is briefly summarized below:
 - a. The pre-retirement death benefit according to Plan provisions comprised of a return of pre-reform member contributions with interest (\$44, 237.52) plus the commuted value of the benefit attributable to post-reform service (\$85,900.57), for a total of \$130,138.09 – higher than the previous amount of \$129,542.30. This change was attributed to an erroneous exclusion of a “bridge” benefit in the previous calculation.
 - b. The commuted value that would satisfy the minimum pre-retirement death benefit provisions of the *Act* was determined to be \$121,790.05. The following methodology was used to compute the minimum: determine the benefit for all service using the plan provisions applicable at the date of death, deduct from it the benefit for pre-reform service using the plan provisions as they existed on December 31, 1986, and add the pre-1987 member contributions with interest to the result. Since the amount so determined, was less than the computation according to plan provisions, no (upward) adjustment was necessary.

7. Following concerns raised by the (then) Pension Commission of Ontario, the Employer agreed to include the 46 weeks of the pre-LTD disability absence in the determination of Mr. Lewis' benefits. As a result, the death benefit was again revised upwards, this time to \$137,730.56, by a letter from Aon dated June 2, 1998.
8. On February 12, 1999, Aon further revised the death benefit upwards by another \$2,169.06 to rectify an "incorrect" calculation. Ms. Andréé Bonneville, an actuary with Aon testified that this addition reflects a difference that arose from "post-reform improvement to [the benefit for] pre-reform service." This adjustment was confirmed through a "Statement at Death of Member" dated February 19, 2003, showing a total revised death benefit entitlement of \$139,899.62. With the various revisions in the amount of pre-retirement death benefit calculated by the Employer, there remains a difference of \$10,357.32 between the disbursement of \$129,542.30 (as of the date of Mr. Lewis' death) to the Applicant and the latest computation of \$139,899.62. Ms. Bonneville has testified that any residual payment will be increased with interest at the annual rate of 6.5% compounded annually from the date of Mr. Lewis' death to the date of disbursement.
9. The Applicant's concerns were not assuaged and she requested the Superintendent to make an Order under section 87(2)(a) requiring the Employer to comply with section 37(3)(b) and 48(1) of the *Act*. On November 8, 2002, the Superintendent issued a Notice of Proposal To Refuse To Make an Order. On November 22, 2002, the Applicant requested a hearing before the Financial Services Tribunal on this matter.

Relevant Provisions of the Act

Pre-retirement death benefit

48. (1) If a member or former member of a pension plan who is entitled under the pension plan to a deferred pension described in section 37 (entitlement to deferred pension) dies before commencement of payment of the deferred pension, the person who is the spouse or same-sex partner of the member or former member on the date of death is entitled,

- (a) to receive a lump sum payment equal to the commuted value of the deferred pension; or
- (b) to an immediate or deferred pension the commuted value of which is at least equal to the commuted value of the deferred pension.

Calculation of pre-retirement death benefit

48. (5) For the purposes of this section, the deferred pension or pension benefits to which a member is entitled if the member dies while employed shall be calculated as if the member's employment were terminated immediately before the member's death.

Deferred pension (post-reform)

37. (1) A member of a pension plan who meets the qualifications in subsection (2) is entitled to the benefit mentioned in subsection (3).

Qualifications

(2) The qualifications are,

- (a) that the member must be a member on or after the 1st day of January, 1988;
- (b) that the member must be a member for a continuous period of at least twenty-four months; and
- (c) that the member must terminate his or her employment with the employer before reaching the normal retirement date under the pension plan.

Amount

(3) The benefit is a deferred pension equal to the pension benefit provided in respect of employment in Ontario or in a designated province,

- (a) under the pension plan in respect of employment by the employer after the later of the 31st day of December, 1986 or the qualification date;
- (b) under any amendment made to the pension plan after the 31st day of December, 1986; and
- (c) under any new pension plan established after the 31st day of December, 1986 for members of the pension plan.

Application of subss. (1-3)

(4) Subsections (1) to (3) do not apply in respect of benefits that result from additional voluntary contributions.

Pre-reform deferred pension

36. (1) A member of a pension plan who meets the qualifications in subsection (2) is entitled to the benefit mentioned in subsection (3).

Qualifications

(2) The qualifications are,

- (a) that the member must have been employed by the employer, or have been a member of the pension plan, for a continuous period of at least ten years;
- (b) that the member must have reached the age of forty-five years; and

(c) that the member must terminate his or her employment with the employer before reaching the normal retirement date under the pension plan.

Amount

(3) The benefit is a deferred pension equal to the pension benefit provided under the pension plan as it existed on the 31st day of December, 1986 in respect of employment before the 1st day of January, 1987 in Ontario or in a designated province,

(a) under the terms of the pension plan, with respect to employment on or after the qualification date;

(b) by an amendment to the pension plan made on or after the qualification date; and

(c) by the creation of a new pension plan on or after the qualification date.

Application of subss. (1-3)

(4) Subsections (1) to (3) do not apply in respect of benefits that result from additional voluntary contributions.

Relevant Provisions of the Plan

EXTRACTS FROM CURRENT PLAN

Provision for Death Benefit

Section 6.1 Death Before Pension Commencement

Where a Member dies before the commencement of his pension, a death benefit becomes payable, equal to (a) plus (b) as follows:

a) Pre 1987 Service

(1) the Member's required contributions made to the Plan from January 1, 1981 to December 31, 1986 with Credited Interest thereon is payable in a lump sum to the Members Beneficiary; plus

(2) the benefits, if any, payable in accordance with the terms of the Former Plan and/or the Prior Plans

b) Post 1986 Service

(1) if the member has been a Member of the Plan less than 24 months at his date of death, the Member's required contribution made to the Plan after 1986 with Credited Interest thereon is payable in a lump sum to the Member's Beneficiary or,

- (2) if the Member has completed at least 24 months of Plan membership at his date of death, the Commuted Value of the benefits accrued to the Member, excluding any entitlement to bridge benefits pursuant to Section 5.3, for Credited Service after 1986 is payable to the Member's Spouse, unless the Member and his Spouse have completed and filed a waiver in prescribed form. The Spouse may elect to receive such benefits either as a lump sum, payable in cash or as a transfer to a Registered Retirement Savings Plan, or as an annuity payable for the Spouses lifetime, commencing any time prior to the end of the calendar year in which the Spouse attains age 71 or, if later, within one year after the death of the Member, or prior to 1992, age 65. If the Spouse fails to make an election within 90 days of being advised of the entitlement under [this] Section, the Spouse will be deemed to have elected an immediate annuity.

If the Member had no Spouse at the date of death or the Member and his Spouse had completed and filed a waiver in prescribed form, the benefit payable under this Section 6.1 (b) is payable in a lump sum to the Members Beneficiary.

If a Member had received, at termination, part of his benefits in cash with the balance to be provided as a deferred benefit, the Member's Spouse or Beneficiary, as applicable, will receive a settlement in respect of death benefits under Section 6.1 based on the commuted value of the yet undistributed portion of the termination benefits.

Section 6.2 Excess Contributions

Death benefits payable under this Article 6 upon the Members death prior to retirement will include, if applicable, a refund of any Excess Contributions determined in accordance with Section 5.6 (b)

Retirement benefit provisions relevant to computing the death benefit

Section 5.1 Normal Retirement Benefits

b) For Retirement After May 1, 1993

Subject to the provisions of Section 5.5 (Maximum Pension) and Section 5.1(c) (Minimum Benefit), a Member who retires after May 1, 1993 and on or after his normal retirement date will receive an annual pension in an amount equal to (1) minus (2), as follows:

- (1) 1.65% of the average of the Member's Earnings in each of his 5 consecutive years of highest Earnings during his last 15 years of Continuous Service before retirement multiplied by the number of his years of Credited Service.

LESS

- (2) 1/35th of the maximum annual pension payable to a person retiring at age 65 under the Canada/Québec Pension Plan (or other similar statutory plan), the amount of such maximum annual pension to be determined at

his retirement date (or his date of Total Disability if the Member retires immediately after being in receipt of income continuance benefits under an insured program contributed to by the Participating Company), multiplied by his years of Credited Service for Canada/Québec Pension Plan Offset to a maximum of 14 years.

c) Minimum Benefit for Retirement after 1990

Subject to the provisions of Section 5.5 (Maximum Pension), the pension under Section 5.1(b) shall not be less than (1) plus (2) plus (3) minus (4) as follows:

- (1) The benefit to which a Member is entitled under the Former Plan and/or the Prior Plans in respect to Credited Service prior to January 1, 1966,

PLUS

- (2) 2% of the average of the Member's Earnings in each of his 5 consecutive years of highest Earnings during his last 15 years of Continuous Service immediately preceding January 1, 1991 multiplied by the number of his years of Credited Service on and after January 1, 1966 but before January 1, 1991.

PLUS

- (3) 1.65% of the average of the Member's Earnings in each of his 5 consecutive years of highest Earnings during his last 15 years of Continuous Service before retirement multiplied by the number of his years of Credited Service on and after January 1, 1991.

MINUS

- (4) The lesser of

- (A) 7/10ths of 1% of the average of such Member's Earnings in each year of his 5 consecutive years of highest Earnings during his last 15 years of Continuous Service with a Participating Company; or
- (B) 7/10ths of 1% of the average of the YMPE during the last 5 years of his Continuous Service with a Participating Company, or, for a Member in receipt of benefits under the Participating Company's long term disability plan, 7/10ths of 1% of the average of the YMPE during the 5 years immediately preceding, his date of Total Disability,

multiplied, in either case, by the number of years of his Credited Service for Canada/Québec Pension Plan Offset.

EXTRACT OF COMPARABLE RETIREMENT PROVISIONS IN JANUARY 1982
RESTATEMENT

Section 6.01 Normal Retirement Benefits

A Member who retires at normal retirement date on or after January 1, 1981 will receive an annual retirement income equal to the total of the following:

(a) Regular Retirement Income

An annual retirement income equal to 40% of the total of the required contributions deposited or deemed, by reason of periods of absence in excess of 52 weeks' duration, to have been deposited to his credit in the Trust Fund for service on or after January 1, 1981.

(b) Minimum Retirement Income Supplement

In addition, the Member will receive such amount of supplementary benefit, if any, as may be required, when added to the retirement income benefits provided under paragraph (a) above and the regular retirement income under section 7.1 of the Former Plan with respect to service on and after January 1, 1966, to provide a total annual retirement income equal to two per cent (2%) of the average of the Member's Earnings in each of his five (5) consecutive years of highest Earnings during his last fifteen (15) years of employment prior to retirement multiplied by the number of his years of Credited Service, reduced by the lesser of –

- (A) 7/10ths of 1% of the average of such Member's Earnings in each year of his five (5) consecutive years of highest Earnings during his last fifteen (15) years of employment with a Participating Company;
- or
- (B) 7/10ths of 1% of the average of the annual year's maximum pensionable earnings as defined by section 17 of the Canada Pension Plan during the last five years of his employment with a Participating company

multiplied, in either case, by the number of years of his Credited Service for Canada Pension Offset.

Such supplementary benefit shall be inclusive of the minimum retirement income supplement provided under the Former Plan for service between January 1, 1966 and December 31, 1980.

(c) Former Plan and Prior Plan Benefits

In addition, each Member who was a member of the Former Plan and/or Prior Plans will receive the benefits to which he is entitled thereunder except for the minimum retirement income supplement based on Credited Service between January 1, 1966 and December 31, 1980 included in paragraph (b) above.

Positions of the Parties

The parties are in agreement as to the various dates and other information that were used for the calculation of the pre-retirement death benefit by the Employer. They also agree that the final amount of the death benefit – \$139,899.62 after taking account of the several corrections – appropriately reflects Plan provisions. Ms. Bonneville fully described the computation of this final amount in her testimony and confirmed that it is now correct and, in her opinion, reflects a “generous” interpretation of Plan provisions in some respects.

The Applicant takes the position, however, that the administrator’s calculation of the minimum statutory pre-retirement benefit does not comply with subsection 48(1) of the *Act*.

Subsection 48(1) provides for an entitlement of a death benefit for the spouse of a member who dies prior to retirement and was entitled to a deferred pension described in section 37 of the *Act*. Subsection 48(5) provides that the deferred pension is to be calculated as if the member had terminated employment on the date of death. Section 37 of the *Act* provides for an entitlement to a deferred pension for a member who has completed 24 months of continuous service equal to the benefit provided under the pension plan for service after the reform date and under any amendment made to the pension plan after the reform date.

The Applicant argues that all benefits respecting both post-reform and pre-reform employment provided under post-reform amendments vest in accordance with section 37 of the *Act*, if all the sections of the pension plan in force at the termination date were created after the reform date. The member is not entitled to any benefits under sections of the Plan as it existed on the reform date because they have been repealed prior to the date of termination, and therefore there are no benefits to be considered under section 36 of the *Act*. The minimum pre-retirement death benefit under subsection 48(1) of the *Act* must therefore be based on the value of the deferred pension using the then current provisions of the Plan applied to all credited service.

The Superintendent and the Employer submit that the purpose of the split of deferred pensions between sections 36 and 37 of the *Act* is to segregate benefits earned prior to the major reforms to the *Act* effective on the reform date and benefits earned on or after the reform date. They argue that the purpose of clause 37(3)(b) of the *Act* is to capture additional benefits that do not fall within section 36 of the *Act* since they did not exist in the pension plan as at the reform date. The purpose is not to duplicate benefits already provided by the deferred pension described in section 36 of the *Act*. They both maintain that any increase in pre-reform benefits that was provided by a post-reform amendment to the Plan was taken into account in the final calculation.

The Superintendent and the Employer also argue that the effect of clause 37(3)(b) of the *Act* is not that any post-1986 amendment to a pension plan which changes the benefit formula for pre-1987 benefits incorporates all of the pre-1987 benefits into the deferred pension under section 37 of the *Act*. The benefit provided by the amendment is simply the change provided by the amendment, not the change as well as the original benefit.

The Employer also argues that the Applicant's interpretation of the *Act* would have the effect of retroactively increasing the costs of the Employer, contrary to the legislative intention. The Applicant's position is that his interpretation of section 37 of the *Act* is not retroactive, because it applies to actions taken by employers subsequent to the reform date with respect to service prior to that date.

The Applicant also questions the statutory basis for the methodology used by Aon for capturing the effect of post-reform amendments on pre-reform benefits.

Analysis

There is no issue as to whether the Employer's final calculation of the pre-retirement death benefits at least meets the provisions of the Plan. In her testimony, Ms. Bonneville stated that the Employer had been generous in its interpretation of the provisions of the Plan. We have difficulty in accepting all her assertions of this "generosity," especially as it relates to how the benefits for post-reform service were calculated. Nonetheless, we concur with the parties that the final calculation complies with or exceeds the Plan provisions.

The issue concerns whether the final calculation meets the statutory requirements for pre-retirement death benefits. The statutory pre-retirement death benefit is the commuted value of the benefit described in section 37 of the *Act*. There appears to be no dispute that the Employer's final calculation properly reflects the requirements of clause 37(3)(a) of the *Act*. The issue lies with whether the requirements of clause 37(3)(b) of the *Act* have been properly reflected. The crux of the issue revolves around what benefits are swept in to the phrase "under any amendment made to the pension plan after December 31, 1986." Does the word "amendment" connote the incremental change in the benefit, or does it incorporate the whole of the amended benefit?

We are persuaded by the Respondents' argument that the word "amendment" should be given its grammatical and ordinary sense in the context of the scheme and the object of the *Act*.

In terms of the grammatical and ordinary meaning, we accept the following meaning ascribed to the word "amendment" by Webster's Ninth New Collegiate Dictionary: "an *alteration* proposed or effected by this process." That is, an amendment reflects the change in the provision, and not the provision as a whole.

The Applicant argues that the effect of the March 1993 Restatement was to repeal the provisions that were effective on the reform date, and therefore all the benefits at the date of termination were to be calculated under the new provisions. We do not agree since the Plan continues. The March 1993 Restatement reflects only a change in the provisions as they affected pre-reform service; not their repeal. This is further reinforced by the fact that the prior provisions are repeated in clause 5.1(c) of the Plan as a minimum; presumably to ensure that there was no reduction in benefits previously earned. Thus, the prior provisions continue to exist in a changed form.

In terms of the context of the *Act*, we note that the interaction of sections 36 and 37 of the *Act* is to delineate the portion of the deferred pension that relates to the amount that was attributable to pre-reform service based on pre-reform plan provisions, and which remains subject to the prior vesting rules, from the balance.

We conclude that the effect of clause 37(3) (b) is to provide for any change or increase resulting from a post-reform amendment. Having thus concluded, we do not need to deal with the issue of retroactivity.

Does the methodology used by Aon have a basis in the statute? We believe in essence it does, in that it is designed to capture any increase that is not apparent because of the construction of the amended formula. To quote the testimony of Ms. Bonneville:

“Given the redesign of the Plan back in 1991, we cannot compute, again, pension amounts for certain periods of service. We have to compute it on the aggregate and compare it. The only way we can obtain the post '86 pension entitlements, or pension, or whatever, is to compute the aggregate and then subtract what was accrued as of December 31, '86, with provisions applicable at that date. That's the only way we can do it on that particular plan.”

Like the Applicant, however, we are puzzled that the Employer chose to provide an enhancement to the death benefit by reflecting one component of the change (see paragraph 8 of the Background), which presumably was already accounted for in accordance with the above approach. Since this is to the benefit of the Applicant, and the final calculation (at least in so far as it reflects the Plan provisions) is acceptable to the parties, we do not need to pursue this matter.

We are also not convinced that Aon's calculation of the statutory death benefit is correct in all respects. Sections 48(1) and 37(3)(a) of the *Act* require the post-reform death benefit to include the commuted value of the pension benefit provided "under the pension plan in respect of employment by the employer after the later of the 31st day of December, 1986 or the qualification date". Ms. Bonneville testified (and the written summary of her calculations subsequently added to the submissions of the Employer confirms) that Mr. Lewis' pension amount under the terms of the pension plan based on post-reform service amounted to \$9,416.89. The commuted value of that pension, based on the factor of 9.85936 reported by Ms. Bonneville, was \$92,844.51 as of the date of death. This exceeds the minimum post-retirement death benefit of \$87,313.90 reported by Ms. Bonneville. It appears that the reason for this discrepancy is that Ms. Bonneville's calculations effectively recognize a negative pension benefit amount under section 37(3)(b) of the *Act* representing the effect of post-1986 pension plan amendments on Mr. Lewis' pension entitlement in respect of pre-reform service, and we question whether the intent of the legislation is that the effect of including the pension benefit amount under section 37(3)(b) can be to reduce the deferred pension and its commuted value. Nevertheless, we are satisfied that even if the higher commuted value had been used in the calculations, the death benefit of \$139,899.62 pursuant to the terms of the Plan would still have exceeded the resulting minimum death benefit.

Disposition

The Superintendent is hereby directed, by order, to carry out the proposal contained in the Notice of Proposal to Refuse to Make an Order requiring the Employer to comply with section 37 (3)(b) and 48 (1) of the *Act*.

We note that there remains payable a portion of the death benefit in the amount of \$10,357.32 as of November 23, 1997, the date of Mr. Lewis' death, plus interest at the

annual rate of 6.5 per cent compounded annually from that date to the date of disbursement.

We remain seized in this matter in respect of any applications made for costs within 60 days of the date of this decision.

DATED at Toronto this 9th day of January, 2004

“David A. Short”

David A. Short
Member of the Tribunal
and of the Panel

“Shiraz Y.M. Bharmal”

Shiraz Y. M. Bharmal
Member of the Tribunal
and of the Panel