

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P-8, as am. (the “Act”):

AND IN THE MATTER OF an Application under s. 78(4) of the Act submitted by The Great Atlantic & Pacific Company of Canada, Limited in respect of the Jane Parker Bakery Limited Retirement Plan for Full-time Bargaining Employees, Registration Number 0400325 (the “Plan”);

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

BETWEEN:

THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA, LIMITED

Applicant

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Colin McNairn
Chair of the Tribunal and of the Panel

Louis Erlichman
Member of the Tribunal and of the Panel

David Short
Member of the Tribunal and of the Panel

APPEARANCES:

For the Applicant:
Alan B. Merskey

For the Respondent;
Mark Bailey

DATE OF HEARING: February 27, 2007

MAJORITY REASONS FOR DECISION

1. The Facts

The Applicant, The Great Atlantic & Pacific Company of Canada, Limited, now known as A & P Canada Co., carries on business as a supermarket grocer. As part of that business, it operated a bakery facility known as Jane Parker Bakery Limited (“Jane Parker”). One of the employment benefits provided to the employees of Jane Parker was the Jane Parker Limited Retirement Plan for Full-time Bargaining Employees (the “Plan”).

In early 2000, the Applicant started taking steps to cease all operations at Jane Parker. Operations at the facility ended on March 4, 2000 and the Applicant began winding up the Plan. A wind up report as of March 4, 2000 was submitted to the Superintendent of Financial Services, the Respondent in this case, in or about July, 2000. That report indicated that the wind up deficit as of March 4, 2000 was \$997,673, but stated that the final amount of the contribution required from the Applicant to fund the deficit would not be known until such time as all the Plan’s benefit obligations (pension payments and expenses) were settled. The report noted that factors which may have a significant effect on the amount of contribution required include changes in annuity purchase rates between March 4, 2000 and the date annuities were actually purchased.

The Superintendent approved the wind up report on September 29, 2000. In so doing, he referred to the fact that the wind up report identified a deficit which the Applicant intended to fund in accordance with s. 75 of the *Pension Benefits Act* (the “Act”). He also noted that, as required by s. 32 of Regulation 909, R.R.O. 1990 (the “Regulation”) adopted under the Act, annual reports had to be filed until a report was filed certifying that there were no further amounts to be funded pursuant to s. 75 of the Act.

The Applicant obtained an updated estimate of the deficit in the Plan as at September 30, 2000. This estimate indicated that, as a result of decreases in annuity purchase rates, the deficit was no greater than \$500,000. The Applicant made a lump sum contribution of \$500,000 to the Plan on November 30, 2000, a month before the fiscal year end of the Plan, to fund the deficit.

Vested members of the Plan were entitled to a lump sum or a pension as a result of the wind up of the Plan. The individual elections as between these options were not completed until in or about May 2001. Therefore, the annuity obligations for those who elected the pension option were not fixed until then. Once fixed, the final amount of the contribution required from the Applicant was determined to be \$354,639, which was \$145,361 less than the Applicant had contributed. (We note that the agreed statement of facts, filed by the parties with the Tribunal, refers to an amount of \$145,631. However the actual amount, as referred to in the Applicant's application and in the Superintendent's Notice of Proposal, both of which are referred to below, was \$145,361 as of July 31, 2001. There appears to have been a typographical error in the agreed statement of facts).

On October 2, 2001, the Applicant applied to the Superintendent for consent to the payment to it from the pension fund for the Plan of the amount of \$145,361, which it characterized as an employer overpayment of what was due as of July 31, 2001. It also asked for consent to the payment to it of investment earnings, on the amount of the claimed overpayment, to the date of payment. Finally, it asked the Superintendent to extend the time, pursuant to s. 105 of the Act, for making its application.

The Plan provides for the return of an overpayment subject to applicable pension laws. The Act provides for the return of an overpayment by an employer in s. 78(4).

The Superintendent issued a notice of proposal dated March 24, 2003 (the "Notice of Proposal") proposing to refuse to consent to the request of the Applicant set out in its application. The stated basis for the proposed refusal was that the amount of \$145,361 represented surplus, rather than an overpayment, in which case the Applicant would have to comply with s. 79 of the Act and the related provisions of the Regulation, including obtaining the written agreement of employees to any payment to it out of the pension fund. The Superintendent also maintained that, in any event, even if the amount of \$145,361 represented an overpayment by the Applicant, its application for a return thereof was out of time under s. 78(4) of the Act and that an extension of time pursuant to s. 105 of the Act was not warranted in the circumstances.

The Applicant applied to this Tribunal for a hearing in respect of the Notice of Proposal, taking the position that the Superintendent was entitled to allow its application under s. 78(4) of the Act, which deals with overpayments by employers, without the need for compliance with s. 79 of the Act, and that an extension of the time limit for making an application under s. 78(4) was warranted in the circumstances of this case.

The full text of the provisions of the Act and the Regulation that are referred to in this statement of facts and elsewhere in the body of these Reasons are set out, for convenience, in the Appendix that follows these Reasons and the Minority Reasons.

2. The Issues

The issues to be addressed in this case are as follows:

- (a) Did the excess assets in the pension fund for the Plan after the Applicant made a payment to fund the deficit on the wind up of the Plan result from an “overpayment” for the purposes of s. 78(4) of the Act?
- (b) If so,
 - (i) is the Applicant entitled to apply to recover that overpayment pursuant to s. 78(4) of the Act, without complying with the requirements for a surplus withdrawal pursuant to s. 79 of the Act, and
 - (ii) should the time limit, under s. 78(4) of the Act, for approving the Applicant’s application to recover the overpayment be extended, pursuant to s. 105 of the Act, so as to allow for the approval of that application?

3. The Analysis

Payments out of a Pension Fund to an Employer

There are two regimes under the Act through which a payment may be made to an employer out of a pension fund on the wind up of a pension plan. Both involve the Superintendent, whose consent must be obtained on the application of the employer. The more restrictive regime is that under s. 79(3) of the Act. It applies when an employer seeks consent to the payment to it of the “surplus” in a pension plan. The conditions for consent to such a payment include the written agreement of two-thirds of the plan members or the consent of any collective bargaining agent that represents the members as well as the written agreement of such number of former members and other beneficiaries as the Superintendent considers appropriate (see s. 8(1)(b) of the Regulation). That agreement is commonly secured by the employer undertaking to share the surplus with the members and former members under the terms of a surplus sharing agreement entered into with the members or their representative.

The term “surplus” is defined, for the purposes of the Act, as the “excess of the value of the assets of the pension fund related to a pension plan over the value of the liabilities of the pension plan ...” (s. 1(1)).

The other, less restrictive regime is under s. 78(4) of the Act. It applies whether or not a pension plan is in a wind up mode. A payment to an employer under s. 78(4) must not exceed the amount of an “overpayment” by an employer into the pension fund (or an amount paid by the employer that should have been paid out of the fund). The only condition for consent to a payment reflecting the amount of an overpayment is that the employer’s application must be made before the end of the fiscal year of the fund in

which the overpayment was made. If there were any other applicable conditions, it may be expected that they would be set out in s. 78(4) either directly or indirectly by cross reference to other provisions of the Act or potential regulations.

The term “overpayment” is not defined in the Act but, in its ordinary sense, it simply means a payment of more than is due (see the *Shorter Oxford Dictionary*, 5th ed. (Oxford: Oxford University Press, 2002). The Superintendent has adopted a policy statement that sets out some kinds of employer payments into a pension fund that would constitute an “overpayment” but the listing of such payments in that policy is not exhaustive (see FSCO Policy R350-101 - Application for Refund of Employer Overpayment).

In our view, these regimes are not mutually exclusive since an “overpayment”, in the dictionary sense, made by an employer to a pension fund for a pension plan, while the plan is in the course of wind up, may result in a “surplus”, as defined in the Act, in the plan that is being wound up. There is no need to adopt a forced construction of either or both of the terms “overpayment” and “surplus” so as to avoid any overlap between s. 78(4) and s. 79(3) in a wind up situation. While both provisions deal with an employer’s access to assets in a pension fund, they do so on different premises – that the employer has over-contributed to the fund (s. 78(4)) and that the fund is in an over-funded state for whatever reason (s. 79(3)). Of course, if there are excess assets in a pension fund as a result of an over-funding of a terminal deficit at wind up, that excess could only be recovered by the employer as reflecting an overpayment if the excess was directly related to that overpayment.

Therefore, where the facts support an application under s. 78(4) or under s. 79(3), an employer ought to be able to elect between the two regimes for obtaining consent to a payment to it out of a pension fund or plan. There is nothing in the Act that would preclude such an election. Nor is there anything in the Act to suggest that an employer must comply with both regimes for obtaining approval for a payment out of a pension fund or plan if it makes an application for the return of an overpayment that has resulted in a surplus in a pension plan. We find it difficult to believe that the legislative intent was to permit a simple refund of an overpayment in cases where the pension plan remains underfunded following the overpayment (on the basis that the plan does not have a surplus), but not to permit such a refund in cases where the overpayment results in a surplus.

In the present case, the Applicant has elected to apply, under s. 78(4), for the payment to it out of the pension fund for the Plan of the amount of an overpayment made by it into the fund to cover the terminal deficit in the fund, which led directly to there being excess assets in the fund.

The Effect of s. 32(4) of the Regulation

The Superintendent argued that the combined effect of s. 75 of the Act and s. 32(4) of the Regulation was to require the Applicant in the present case to proceed, by way of a surplus withdrawal application, under s. 79(3) of the Act. Section 75 of the Act requires

an employer to cover any deficit in a pension fund, at the wind up of the plan to which the fund relates, by making a payment into the fund “in the prescribed manner and at the prescribed time”. The term “prescribed” means prescribed by regulations (see s. 1(1) of the Act). Section 32 of the Regulation provides, in subsection (4), that where an annual report made under that section shows that there is no further amount to be funded by the employer under s. 75 of the Act, “any surplus may revert to the employer, subject to the requirements of section 79 of the Act”.

(i) Whether s. 32(4) of the Regulation is Consistent with the Act?

In our view, the condition in s. 32(4) of the Regulation for the reversion of surplus to an employer is inconsistent with s. 78(4) of the Act to the extent that it purports to require that the payment out of a pension fund of an amount that represents an overpayment by an employer into the fund, made in the course of a pension plan wind up, must be approved, pursuant to s. 79 of the Act, as a withdrawal of surplus. Section 78(4) of the Act purports to deal comprehensively with the return of an overpayment made by an employer to a pension fund. In so doing, it does not require compliance with s. 79 of the Act if an overpayment has resulted in the pension fund being in a surplus position and it is not limited to situations where there has been an overpayment prior to the initiation of wind up proceedings.

In the event of an inconsistency between a statute and a regulation that cannot be resolved, priority must be given to the statute (see R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto, Butterworths, 2002). Accordingly, the condition in s. 32(4) of the Regulation must be read, to accommodate s. 78(4) of the Act, as limited to situations where there is a surplus in a pension plan that is not the result of an overpayment by an employer made while the plan is in the course of wind up. On this interpretation, s. 32(4) of the Regulation does not assist the Superintendent in the position he has taken in this case.

(ii) Whether s. 32(4) Applies in this Case?

Even if we had not concluded that the condition in s. 32(4) of the Regulation should be “read down” in the way we have suggested to avoid an inconsistency, we would still be of the opinion that it does not assist the Superintendent since s. 32(4) has no application in the particular circumstances of this case.

Subsection (4) of s. 32 only comes into play “where a report made under [that] section shows that there is no further amount to be funded” under s. 75 of the Act. The kind of report that is to be made under s. 32 is an annual report showing experience gains or losses in a pension plan since the previous report and the resulting changes that will have to be made in the special payments to make up the deficit in the pension fund over the balance of the five-year term allowed for completion of the funding of the deficit (see subsection (2)). The obligation to prepare and file such an annual report is set out in

subsection (1) of s. 32 in the following terms:

Until the employer's liability under section 75 of the Act is funded, the administrator of the plan shall annually cause the plan to be reviewed and a report prepared ... and shall file the report within six months after the valuation date of the report.

The Applicant in the present case chose to fund the deficit through a single payment into the pension fund rather than a series of annual special payments as contemplated by s. 31(1) of the Regulation. As that single payment proved to be more than adequate to satisfy the employer's liability under s. 75 of the Act, the Applicant never had occasion to file an annual report of the kind referred to in s. 32 of the Regulation. The Superintendent appears to have accepted that the employer's liability under s. 75 was fully satisfied on the basis of a certification by the actuary of the Plan, dated December 27, 2001, to the effect that there were no further amounts to be funded pursuant to s. 75 of the Act. The parties agreed that, in fact, no reports were filed with the Superintendent pursuant to s. 32 of the Regulation. Subsection (4) of s. 32 can have no application because there was never an annual report under that section which showed there was no further amount to be funded nor, apparently, a need for such a report, to satisfy the requirements of s. 32(1), given the certification by the actuary. The first such annual report would have been due to be prepared as of March 4, 2001 (i.e. the first anniversary of the wind-up date), but before that date the employer had contributed a sufficient amount (in fact more than a sufficient amount) to fully fund the deficit, thus eliminating the requirement for such a report.

Consistency with the Purpose and Intent of the Act

The result we have arrived at, to this point, on our interpretation of the Act and the Regulation is consistent with the purpose of the Act and the intention of the Legislature in enacting it, as recognized by the courts - that is to improve various employee rights and at the same time to maintain a fair and delicate balance between employer and employee interests while advancing the public interest in a thriving private pension system (see, for example, *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (2004), 242 D.L.R. (4th) 193, at pp. 203 & 207 (S.C.C.)). Our interpretation encourages the early and full funding by an employer of a deficit on the wind up of a pension plan by removing the risk to the employer of being unable to recover any overfunding, at least without having to share it with employees. Such early funding is of potential benefit to employees in that they may receive the pension benefits to which they are entitled sooner.

Our interpretation carries some prejudice to employees in that it denies them any potential for participating in the distribution of the excess assets generated by an overfunding of a wind up deficit. But, in our view, employees do not have any reasonable expectation that they would enjoy such participation when the excess assets are the direct result of a payment by their employer made after the effective date of the wind up of the pension plan when they are no longer active members of the plan accruing pension

benefits thereunder. While there has been a good deal of jurisprudence on the entitlement of pension plan members to participate in plan surpluses, we are not aware of any decisions that support the notion that plan members are entitled to participate in a plan surplus that results directly from an overpayment by an employer into a pension fund made after the effective date of a plan wind up to fund a terminal deficit in the plan.

The Time Limit for Making Application for the Return of an Overpayment

Section 105 of the Act allows the Superintendent, upon the application of an affected person, to extend any procedural time limit under the Act, before or after its expiration, if the Superintendent is satisfied that there are reasonable grounds for applying for the extension.

In the present case, the Applicant made such an application in respect of the time limit under s. 78(4) of the Act for obtaining the Superintendent's consent to the return of the amount of its overpayment into the pension fund for the Plan. This application was made on October 2, 2001 at the same time as the Applicant applied for the consent of the Superintendent to the return of the amount of the overpayment. The time limit under s. 78(4) for the application for that consent was the end of the fiscal year of the Plan in which the overpayment was made, being December 31, 2000. The overpayment was made on November 30, 2000. Thus the time for making the application for the Superintendent's consent pursuant to s. 78(4) was one month later than that, on December 31, 2000, while the application was, in fact, made approximately 10 months later, on October 2, 2001. It is significant that less than 12 months had elapsed since the date of the overpayment. The Superintendent may give his consent, under s. 78(4) of the Act, to the return of an overpayment made at the beginning of a fiscal year before the end of that year, 12 months later, without offending the time limit in s. 78(4). In other words, the time limit would not have to be extended in that situation. This supports the reasonableness of an application for an extension to approximately 10 months (i.e. to October 2, 2001), under s. 105 of the Act, of the time limit under s. 78(4).

The precise amount of the overpayment in this case could not be determined until all the members of the Plan had made their elections as to whether to take a lump sum or a pension in satisfaction of their benefit entitlements under the Plan. This did not happen until in or about May 2001, eight months after the Superintendent had approved the wind up report for the Plan, which, in our view, was not unreasonable and, in any event, was not entirely within the control of the Applicant. The time between the determination of the amount of the overpayment and the application for the Superintendent's consent was no more than five months, all within a single fiscal year of the Plan. This also supports the reasonableness of the application for the extension of the time limit under s. 78(4) of the Act that the Applicant applied for, under s. 105, in the present case.

The time limit under s. 78(4) of the Act is, in our view, a procedural time limit capable of extension under s. 105. It has to do with an application procedure prescribed by the Act,

namely that by which an employer may seek the consent of the Superintendent to a payment to it out of the pension fund for a pension plan.

We conclude, therefore, that the Applicant was entitled to invoke s. 105 of the Act in making the application for an extension of time that it put forward to the Superintendent on October 2, 2001 and that there were reasonable grounds for the Applicant applying for that extension.

4. The Disposition

For the forgoing reasons, we order the Superintendent to:

- refrain from carrying out the proposal contained in the Notice of Proposal;
- extend the time limit for the Applicant making an application under s. 78(4) of the Act, in respect of its overpayment of \$145,361 into the pension fund for the Plan, to October 2, 2001, the date of such application by the Applicant; and
- consent to the request contained in the application of the Applicant for the payment to it of \$145,361, the amount of its overpayment determined as of July 31, 2001, out of the pension fund for the Plan plus investment earnings thereon from July 31, 2001 to the date of payment.

DATED at Toronto, Ontario this 27th day of March, 2007.

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

“David A. Short”
David Short, Member of the Tribunal
and of the Panel

MINORITY REASONS

I cannot agree with the majority view in this case. The majority says that the choice of proceeding under Section 78(4) (refund of an overpayment) or Section 79(3) (surplus distribution) of the Act is a matter of employer option. I see nothing in the legislation that suggests that this is the case.

If the method of proceeding were the employer's option, one would expect an employer to always, before or after plan wind-up, elect to treat excess funding as an overpayment. An employer would then be able to claim the full amount of any funding excess, without restrictions, or even the requirement of notification to plan members. An employer would never have to deal with the provisions relating to plan member rights to surplus. This interpretation would fly in the face of virtually all of the jurisprudence of the last twenty years with respect to pension fund surplus rights.

The majority reasons also point to the apparent fact that the employer did not file a report as required under Section 32 of the Regulation, as a further reason for exempting the employer from the requirement of Section 32(4) to treat the excess funding as surplus covered by Section 79(3) of the Act. I do not find this persuasive.

I believe that that Section 32 requires the filing of at least one report if there is a shortfall on plan wind-up, even if the shortfall has disappeared in the first year following wind-up, if only to indicate that no deficit remains. It is not logical that the Applicant's failure to comply with the reporting requirement of the Regulation should exempt it from another (more substantive) requirement of the Regulation.

On the main question at issue in this case, I recognize that an argument can be made that surplus arising after a wind-up, in a plan which indicates a funding shortfall at wind-up, should be treated as an overpayment rather than surplus. Unfortunately for the Applicant, there is nothing in the legislation which clearly supports this view, and Section 32(4) of the Regulation explicitly states that surplus arising after wind-up must be treated as surplus subject to the requirements of Section 79 of the Act. I do not see how it is possible to rule in opposition to such a clear statement in the legislation.

I also do not see a basis for recourse to the general purposes of the Act, when the requirements are laid out explicitly and they are not clearly contrary to the basic intent of the legislation.

For these reasons, I would support the Superintendent's view and direct him to carry out his notice of proposal. Consequently, the question of extending time limits would be moot.

“Louis Erlichman”

Louis Erlichman, Member of the Tribunal
and of the Panel

APPENDIX

Excerpts from the *Pension Benefits Act* and Regulation 909 under that Act

Pension Benefits Act, R.S.O. 1990, c. P.8, as am.

Interpretation Definitions

1. (1) In this Act,

...

“prescribed” means prescribed by the regulations;

...

“surplus” means the excess of the value of the assets of a pension fund related to a pension plan over the value of the liabilities under the pension plan, both calculated in the prescribed manner;

Liability of employer on wind up

75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

- (a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and
- (b) an amount equal to the amount by which,
 - (i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,
 - (ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and
 - (iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.

Exception, jointly sponsored pension plans

(3) This section does not apply with respect to jointly sponsored pension plans.

Payment out of pension fund to employer

78. (1) No money may be paid out of a pension fund to the employer without the prior consent of the Superintendent.

Application for payment

(2) An employer who applies to the Superintendent for consent to payment of money that is surplus to the employer out of a pension fund shall transmit notice of the application, containing the prescribed information, to,

- (a) each member and each former member of the pension plan to which the pension fund relates;
- (b) each trade union that represents members of the pension plan;
- (c) any other individual who is receiving payments out of the pension fund; and
- (d) the advisory committee established in respect of the pension fund.

Representations

(3) A person to whom notice has been transmitted under subsection (2) may make written representations to the Superintendent with respect to the application within thirty days after receiving the notice.

Return of excess amount

(4) Subject to section 89 (hearing and appeal), the Superintendent may consent to payment out of a pension fund to an employer of an amount not in excess of the amount of an overpayment by the employer into the pension fund or of an amount paid by the employer that should have been paid out of the pension fund, but shall not consent unless the application is made in the same fiscal year of the pension fund as the fiscal year in which the overpayment or the payment occurred.

Continuing pension plan

79. (1) Subject to section 89 (hearing and appeal), the Superintendent shall not consent to payment of money that is surplus to the employer out of a continuing pension plan unless,

- (a) the Superintendent is satisfied, based on reports provided with the application, that the pension plan has a surplus;
- (b) the pension plan provides for the withdrawal of surplus by the employer while the pension plan continues in existence, or the applicant satisfies the Superintendent that the applicant is otherwise entitled to withdraw the surplus;

- (c) where all pension benefits under the pension plan are guaranteed by an insurance company, an amount equal to at least two years of the employer's current service costs is retained in the pension fund as surplus;
- (d) where the members are not required to make contributions under the pension plan, the greater of,
 - (i) an amount equal to two years of the employer's current service costs, or
 - (ii) an amount equal to 25 per cent of the liabilities of the pension plan calculated as prescribed,
 is retained in the pension fund as surplus;
- (e) where members are required to make contributions under the pension plan, all surplus attributable to contributions paid by members and the greater of,
 - (i) an amount equal to two years of the employer's current service costs, or
 - (ii) an amount equal to 25 per cent of the liabilities of the pension plan calculated as prescribed,
 are retained in the pension fund as surplus; and
- (f) the applicant and the pension plan comply with all other requirements prescribed under other sections of this Act in respect of the payment of surplus money out of a pension fund.

Where no provision in pension plan

[\(2\)](#) A pension plan that does not provide for the withdrawal of surplus money while the pension plan continues in existence shall be construed to prohibit the withdrawal of surplus money accrued after the 31st day of December, 1986.

Wind up

- [\(3\)](#) Subject to section 89 (hearing and appeal), the Superintendent shall not consent to an application by an employer in respect of surplus in a pension plan that is being wound up in whole or in part unless,
- (a) the Superintendent is satisfied, based on reports provided with the application, that the pension plan has a surplus;
 - (b) the pension plan provides for payment of surplus to the employer on the wind up of the pension plan;
 - (c) provision has been made for the payment of all liabilities of the pension plan as calculated for purposes of termination of the pension plan; and
 - (d) the applicant and the pension plan comply with all other requirements prescribed under other sections of this Act in respect of the payment of surplus money out of a pension fund.

Idem

(4) A pension plan that does not provide for payment of surplus money on the wind up of the pension plan shall be construed to require that surplus money accrued after the 31st day of December, 1986 shall be distributed proportionately on the wind up of the pension plan among members, former members and any other persons entitled to payments under the pension plan on the date of the wind up.

Notice re return of excess amount

89. (3.2) Where an application is filed in accordance with subsection 78 (4) and the Superintendent proposes to consent or refuse to consent under subsection 78 (4), the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant and the Superintendent may require the applicant to transmit a copy of the notice and the written reasons on such other persons or classes of persons or both as the Superintendent specifies in the notice to the applicant.

...

Notice of proposal to attach terms and conditions to approval or consent

(4) Where the Superintendent proposes to refuse to give an approval or consent or proposes to attach terms and conditions to an approval or consent under this Act or the regulations, other than a consent referred to in subsection (3.1) or (3.2), the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant for the approval or consent.

...

Notice requiring hearing

(6) A notice under subsection (1), (2), (3), (3.1), (3.2), (4) or (5) shall state that the person on whom the notice is served is entitled to a hearing by the Tribunal if the person delivers to the Tribunal, within thirty days after service of the notice under that subsection, notice in writing requiring a hearing, and the person may so require such a hearing.

Power of Superintendent

(7) Where the person on whom the notice is served does not require a hearing in accordance with subsection (6), the Superintendent may carry out the proposal stated in the notice.

Hearing

(8) Where the person requires a hearing by the Tribunal in accordance with subsection (6), the Tribunal shall appoint a time for and hold the hearing.

Power of Tribunal

(9) At or after the hearing, the Tribunal by order may direct the Superintendent to carry out or to refrain from carrying out the proposal and to take such action as the

Tribunal considers the Superintendent ought to take in accordance with this Act and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent.

Extension of time

105. (1) Upon application by an affected person, the Superintendent may, before or after its expiration, extend any procedural time limit related to the powers conferred on or duties assigned to the Superintendent under this Act or the regulations if the Superintendent is satisfied that there are reasonable grounds for applying for the extension.

Terms

(2) In granting the extension, the Superintendent may impose such terms or conditions as the Superintendent considers proper.

Regulation 990, R.R.O. 1990

8. (1) No payment may be made from surplus out of a pension plan that is being wound up in whole or in part unless,

- (a) the payment is to be made to or for the benefit of members, former members and other persons, other than an employer, who are entitled to payments under the pension plan on the date of wind up; or
- (b) the payment is to be made to an employer with the written agreement of,
 - (i) the employer,
 - (ii) the collective bargaining agent of the members of the plan or, if there is no collective bargaining agent, at least two-thirds of the members of the plan, and
 - (iii) such number of former members and other persons who are entitled to payments under the pension plan on the date of the wind up as the Superintendent considers appropriate in the circumstances.

31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund.

(2) The special payments under subsection (1) for each year shall be at least equal to the greater of,

- (a) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, over not more than five years; and
- (b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30 (2) (b) and (c).

(3) The special payments referred to in subsections (1) and (2) shall continue until the liability is funded.

32. (1) Until the employer's liability under section 75 of the Act is funded, the administrator of the plan shall annually cause the plan to be reviewed and a report to be prepared by a person authorized by section 15 and shall file the report within six months after the valuation date of the report.

(2) A report required under subsection (1) shall show,

- (a) the gain or the loss in the pension plan since the valuation date of the immediately preceding report as a result of differences between the actual experience and the experience anticipated by the assumptions made in the previous report; and
- (b) the increase or decrease in the remaining special payments that will liquidate the gain or loss referred to in clause (a) over the remainder of the five-year period commencing from the effective date of the wind up.

(3) Any special payments required as a result of a loss referred to in clause (2) (a) shall be included as payments required to be made by the employer under section 75 of the Act.

(4) Where a report made under this section shows that there is no further amount to be funded, any surplus may revert to the employer, subject to the requirements of section 79 of the Act.