

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 under section 89(5) of the *Act*, to Refuse to Make an Order pursuant to section 69 of the *Act*, respecting the Pension Plan for AIG Assurance Canada Pension Plan for Salaried Employees, Registration Number 0284604 (the “*Plan*”);

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

BETWEEN:

MARY SUTTON

Applicant

-and-

**SUPERINTENDENT OF FINANCIAL SERVICES
And AIG ASSURANCE CANADA**

Respondents

BEFORE:

Mr. Ralph Scane
Member of the Tribunal and Chair of the Panel

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

Mr. Martin Brown
Member of the Tribunal and of the Panel

APPEARANCES:

For Mary Sutton

Ms Susan Philpott

For the Superintendent of Financial Services

Ms Deborah McPhail

For AIG Assurance Canada

Mr. Mahmud Jamal

Ms Anna Zalewski

DATE:

June 27 – 28, 2005

REASONS FOR DECISION

This is a decision upon a Request for Hearing filed by the Applicant Mary Sutton pursuant to s. 89 (8) of the *Pension Benefits Act*, R.S.O. 1990 c. P. 8, as amended (the *PBA*). The Request arises from a Notice of Proposal (NOP) issued by the Deputy Superintendent of Financial Services, Pensions (the Superintendent) proposing to refuse to make an order for a full winding up of a certain pension plan, pursuant to s. 69 (1) (a) of the *PBA*.

Background

The Plan involved is the AIG Assurance Canada Pension Plan for Salaried Employees (the AIG Plan). Originally, this was the Norwich Union Life Insurance Company Pension Plan for Salaried Employees. The Plan name was changed on May 1, 2001, when the company name was changed to AIG Assurance Canada (AIG) following a change of share control. The Plan is a defined benefit plan. AIG is the Plan sponsor and administrator. Mary Sutton, (the Applicant) is a member of the AIG Plan. As of May 1, 2001, there was an actuarial surplus in the AIG Plan.

On May 1, 2001, AIG became a participating employer under the Commerce and Industry Insurance Company of Canada Pension Plan (the Commerce Plan) sponsored by an affiliate of AIG. All members of the AIG Plan ceased to participate in that Plan with respect to future services after May 1, 2001. For those future services, they became members of the Commerce Plan, which is a defined contribution plan. AIG has applied to convert the AIG Plan to a defined contribution plan. Members of the AIG plan have been offered elections either to convert their accrued benefits to defined contribution benefits or have them provided for by purchases of annuities. AIG filed a conversion report with the Superintendent on September 19, 2002. We have been advised that the Financial Services Commission of Ontario (FSCO) has approved the conversion in principle, but that final approval of the related conversion

amendments is being held in abeyance pending resolution of the merger application referred to below.

On October 25, 2002, AIG applied to merge the AIG Plan with the Commerce Plan, and in that application seeks to transfer all assets from the AIG Plan to the Commerce Plan.

In documents prepared for the Pre-Hearing Conference in this matter by Counsel for AIG, it was disclosed that, since May 1, 2001, funds had been transferred periodically from the AIG Plan to the Commerce Plan to fund the defined contribution benefits of the former AIG Plan members participating in the Commerce Plan, without the permission of the Superintendent. Solicitors for AIG advised FSCO of this in June, 2004. FSCO requested the voluntary return of the assets so transferred.

Subsequently, shortly before this hearing commenced, AIG disclosed that it was proposing to deal with the problem of the improperly transferred assets by applying to amend the AIG and Commerce Plans to permit transferring the assets and liabilities of the individual accounts of the members of the Commerce Plan who were former members of the AIG Plan back to the AIG Plan. These accounts would then continue to accrue defined contribution benefits in the AIG Plan. The intention is to continue such arrangement until such time (if at all) as the merger of the AIG and Commerce Plans and the accompanying transfer of assets to the Commerce Plan is approved.

Discussion

The Applicant's claim for a wind-up of the AIG Plan is founded on S. 69 (1) (a) of the *PBA*, which reads:

69. (1) The Superintendent by order may require the wind up of a pension plan in whole or in part if,

(a) there is a cessation or suspension of employer contributions to the pension fund.

Paragraph 6 of the Agreed Statement of Facts states that AIG "has made no contribution to the Plan between May 1, 2001 and the present". Accordingly, we find that the factual basis for invoking s. 69 (1) (a) is established.

The Respondents argue that s. 69 (1) (a) does not apply to permit or require a wind-up here because of s. 81(1) of the *PBA*. That section reads:

81. (1) Where a pension plan is established by an employer to be a successor to an existing pension plan and the employer ceases to make contributions to the original pension plan, the original pension plan shall be deemed not to be wound up and the new pension plan shall be deemed to be a continuation of the original pension plan.

The Respondents argued that s. 81 (1) carves out an exception to the operation of s. 69 of the *PBA*, or, putting the matter another way, AIG argued that the Superintendent has no jurisdiction to make an order under s.69 (1) (a) because of the deeming provisions in s.81 (1), where, as here, the factual situation referred to in s. 81 (1) (a) exists. It was argued that the decision in *Re Otis Canada, Inc. and Superintendent of Pensions of Ontario et al*, (1992), 89 D.L.R. (4th) 746 (Div. Ct.) could be distinguished because the winding up application in *Otis* was made under s.68 of the *PBA*, not s.69. Section 68 deals with a winding up by an employer. An employer is entitled to initiate a winding-up at will. Section 69, which deals with a winding up initiated by the Superintendent, generally deals with cases where employees are losing rights or employment, or their jobs will no longer be covered by a plan. The Superintendent may act only when conditions set out in one of the subsections are met.

The original appeal in *Otis* was from a refusal to approve a winding up report pursuant to s.70 (5) of the *PBA*. The Superintendent had refused to approve the report on the ground that the employer had established a successor plan to its existing plan, and that therefore what is now s. 81(1) of the *PBA* deemed the plan not to be wound up. The Pension Commission of Ontario (PCO) upheld the Superintendent's decision (Pension Bulletin Vol. 1, Issue 1, February 1990, p.16). The Divisional Court reversed the PCO decision. In considering s.81 (1), the Court said (at p. 751 D.L.R.),

[T]he effect of the applicability of s. 81(1) is not to preclude the approval of the wind-up report. This provision is not relevant per se to the issue of winding –up. Section 81(1) contemplates that a “predecessor” plan can be wound up in fact, but as a legal fiction be deemed to continue to exist, thus providing further protection to the members of the former plan. Even though wound up, it is for all purposes to be treated as a continuing plan. In other words, where the circumstances are such that a winding-up of the Plan is appropriate under the relevant provisions of the Act then the approval to the winding up should be granted. Section 81(1) is not relevant to that issue.

The language of the Court in *Otis* is broad. The Court did not address the differences between s.68 and s.69. It did not need to. The basis for the initiation of the winding-up process was not in issue. Section 70 of the *PBA* applies to all windings-up, full or partial, and would apply to a winding-up under either s.68 or s.69. The Court was deciding that s.81 (1) in itself would not justify a refusal to approve a wind-up report under s.70 (5). Accordingly, as no other ground for refusing to accept the report was claimed in that case, the winding up should proceed. We cannot see any basis for believing that the Court would have come to a different conclusion had the wind-up been initiated under s.69, and s.81 (1) had been invoked as the only ground for refusing approval of the wind-up report. We are bound by this decision, and therefore conclude that s.81 (1) does not deprive the Superintendent of jurisdiction to order a wind-up under any of the subsections of s.69, in cases where the factual situation described in s.81 (1) exists.

The issue here is whether the jurisdiction to order a wind-up under s. 69 (1) (a) of the *PBA* should be exercised. It is clear from the opening words of s. 69 (1), “[t]he Superintendent by order *may* require the wind-up of a pension plan....”, that the mere fact that a factual situation described in one of the subsections of s. 69 has occurred does not oblige the Superintendent to act. The question arises

whether the occurrence of one of the enumerated factual situations in s. 69 creates a presumption in favour of ordering a wind-up, imposing an onus upon the Superintendent to justify a refusal to do so. We conclude that the section does no more than confer jurisdiction to act upon the Superintendent when one of the listed factual situations occurs, and possibly to impose a duty to consider whether to exercise that jurisdiction. We do not need to decide here whether such a duty exists, as, if it does, it has been exercised. If it were intended that the Superintendent *should* wind up a plan in such circumstances unless he or she could show cause for not doing so, stronger language than the merely permissive *may* would be required. There may be cases where the circumstances so strongly point to the desirability of a wind-up that the evidentiary burden shifts to the Superintendent or others opposing a wind-up to show a factual basis for justifying refusal, but that is a different matter from a statutory presumption in favour of a winding-up. We believe that statements in the decision of the Pension Commission of Ontario in *Imperial Oil Limited and Superintendent of Pensions*, (May 27, 1996), Commission Bulletin Vol.6, Issue 4 (Ont. Pension Commission) which appear to differ from our conclusion that s.69 (1) of the *PBA* merely confers jurisdiction are simply an example of such a shift in the evidentiary burden.

The Applicant alleges that the purpose of the intended merger is to enable AIG to employ the surplus in the original plan to take contribution holidays from its obligations to contribute to the individual accounts of the members of the merged plan, including members who were not members of the AIG Plan. She points to the fact that, since the change of control of what was formerly Norwich Union, AIG has taken contribution holidays with respect to the Plan, and has discontinued applying any of the current surplus in enhancing the benefits payable under the Plan to account for inflation, as the former management had done regularly.

Accepting the above recital as true, either as proved or, in the case of AIG's alleged future intentions, for the sake of the argument, does the above make a case for the wind-up of this Plan at this time?

The "cessation or suspension of employer contributions to the pension fund" which is the basis for this application for a wind-up occurred as a portion of an intended process which would convert the Plan to a defined contribution plan and then merge it by a transfer of its assets to another defined contribution plan which also serves other entities in the AIG corporate family. The employment of the Plan members in the company continues, and their pension benefits continue to accrue, but on a different basis for establishing their entitlements at retirement. Generally, s.69 of the *PBA* gives jurisdiction to wind up to the Superintendent when the continuation of employment of the members and/or their ability to continue to accrue a pension with the employer appears to be in jeopardy. There is no evidence that the employment of the members or their continuance in their pension plan here is at risk. The cessation of contributions which provides the basis for the Superintendent's jurisdiction to order a wind-up in this case occurred only as a step in the intended process of conversion and merger. It did not signal danger to the expectations of the Plan members for continuing employment with the company or for a retirement pension. In these circumstances, we hold that the "cessation ...of employer contributions" did not call for a wind-up of the AIG Plan.

We believe that this approach to s.69 of the *PBA* is supported by the approach taken by the Ontario Court of Justice (General Division) in *Charles v. Canada (Attorney General)*, (1996), 14 C.C.P.B. 98. In that case, provincially appointed judges were transferred by the Province of Ontario from the Public Service Superannuation Plan to a new plan for provincially appointed judges. It was argued that this transfer constituted a partial wind-up of the Public Service Superannuation Plan pursuant to s.

26 (1) of the *PBA*, R.S.O. 1980, c. 373. The Court held that the Section was framed in the context of a termination of employment. Ground J. commented (at p.103)

The protection provided by Section 26 is unnecessary in the circumstances of this case where the provincial judges did not lose their jobs or change employers; only their pension plan was changed while their employment and employer did not change. It is difficult to envisage why, in these circumstances, provincial judges would be entitled to the same election rights as employees who lose their jobs as a result of the closing, sale or amalgamation of their employer. Those are the employees who require statutory protection and the consequent rights to election.

The Court therefore held that the transfer from plan to plan did not constitute a partial winding up of the former Plan, and did not trigger elections under s. 26 of the R.S.O.1980 version of the *PBA*.

The Applicant also argues that a wind-up in this case would have conferred benefits upon Plan members which would be denied to them if the wind-up does not proceed. These are the grow-in benefits under s. 74 of the *PBA*, and what the Applicant describes in her submission as “surplus rights” under s.8 of *Regulation 909*, now O.Reg. 350/02, as amended, made under the *PBA*.

To order a wind-up in order to secure grow-in rights for plan members, which rights are designed to protect plan members who will be adversely affected by the wind-up or partial wind-up of their plan, seems to be internally contradictory. This appears especially so where those members are continuing their employment and continuing to accrue retirement benefits under a successor plan created by their employer, with service credits accumulated under the former plan being carried forward into the successor plan. The “surplus rights” afforded by s.8 of *Regulation 909* are indeed valuable to employees in a wind-up situation as they impose restrictions upon payment to the employer of any surplus that might be found to exist at the time of the wind-up, even if the employer is entitled under the terms of the plan to the beneficial ownership of any surplus funds which might exist at that time. The Section does not transfer to plan members or retired members any beneficial interest in such funds that they would not have under the plan or trust terms, but in practice, it supplies them with a negotiating weapon in bargaining with employers for a share in any surplus. Again, we believe this bargaining tool was afforded to plan members to give them additional protection against jeopardization of their retirement provision in situations where their ongoing employment and/or ability to continue in a pension plan is at risk. It also discourages employers from winding up their company pension plan simply to remove surplus.

We believe that the fact that there might be immediate beneficial consequences to an employer or to employees resulting from a declaration of a wind-up does not require the Superintendent to order a wind-up every time he or she has jurisdiction to do so under the *PBA*. Otherwise, the discretion apparently conferred upon the Superintendent by s. 69 would in practice be removed in most cases. In general, the Superintendent should be exercising his or her discretion in such a way as to best promote the policy of ensuring, to the extent possible under the *PBA*, that employees under pension plans will be able to enjoy their anticipated benefits upon retirement. In so concluding, we do not believe that we are in any way retreating from the line of cases which has established that the Superintendent, and this Tribunal, must jealously protect the rights of members of pension plans. The “rights” provided by s.74 of the *PBA* and s.8 of *O. Reg. 909* are only “rights” if a wind-up is instituted.

The consequences of a wind-up should not be the grounds for ordering it. In summary, we conclude that the Superintendent was correct in refusing to order a wind-up upon the Applicant's motion.

The Applicant has not challenged AIG's legal right to continue to take contribution holidays in an ongoing plan, or to make the conversion from a defined benefit plan to a defined contribution plan. Rather, she has argued that it is necessary for the Superintendent to wind up the plan to protect members' potential rights to surplus should the conversion and transfer of assets be approved. We are in no position to rule on either the transfer of assets issue or the "ownership of surplus" question, as the Superintendent has not formally ruled on these questions, and these issues were not argued in this proceeding. To accept the Applicant's position, however, would essentially read into the *PBA* the requirement that the Superintendent wind up any plan in which there is a surplus and a conversion is proposed. This would require a greater indication of legislative intent than we have found.

We wish to advert briefly to the evidence tendered by AIG regarding the very recent applications to amend the relevant plans to return the former members of the AIG Plan to that Plan, at least temporarily. The Applicant objected to evidence of these proposed amendments being introduced on this appeal. As we are deciding this appeal adversely to the Applicant's position without reference to this evidence, we need not rule on its admissibility in these proceedings. However, we will go so far as to say that we believe that, had we found that, at the time the Applicant applied for a wind-up order, the Superintendent should have granted it, the proposed amendments would not have been allowed to affect our decision. Not only is it not certain that the Respondent AIG would not have changed its mind and withdrawn the proposed amendments, but, even with the most solemn undertakings, as a matter of policy, the Superintendent, the Tribunal and the courts should not have to deal with a moving factual background in carrying out their supervisory roles. Parties should be discouraged from keeping their best positions in reserve in their applications for approval of changes to pension plans. We do not suggest that this is what happened here, but the policy should apply generally except in most unusual circumstances.

Costs

Counsel made oral submissions with respect to costs at the close of the hearing. The Respondent Superintendent did not seek costs. The Applicant and the Respondent AIG each submitted that aspects of the conduct of the other in these proceedings justified an award of costs in their favour. We see no value in elaborating upon these submissions. It was plain to us that the course of these proceedings had given rise to an unhappy (and hopefully, short-lived) reciprocal exasperation as between these parties. From our viewpoint, we were very well served by all counsel, and the alleged transgressions of any of the parties fell far short of meeting the criteria for awarding costs against a party set out in Rule 45 of the Tribunal's *Rules of Practice and Procedure*. There will be no order as to costs.

Disposition

We order the Superintendent to carry out the proposal contained in his Notice of Proposal dated October 22, 2004 and refuse to wind up the AIG Plan under s. 69 (1) (a) of the *PBA*.

Dated the 6th day of September, 2005

“Ralph Scane”

Ralph E. Scane, Member of the Tribunal
and Chair of the Panel

“Martin Brown”

Martin Brown, Member of the Tribunal
and of the Panel

“Louis Erlichman”

Louis Erlichman, Member of the Tribunal
and of the Panel