

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 to Refuse to Make an Order regarding the partial wind up of the Hydro One Pension Plan, Registration No. 1059104 under section 69 of the *Act*;

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

B E T W E E N:

THE HYDRO ONE MEMBERS’ COMMITTEE

Applicants

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES, HYDRO ONE,
POWER WORKERS’ UNION, and SOCIETY OF ENERGY PROFESSIONALS**

Respondents

BEFORE:

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

Ms Heather Gavin
Member of the Tribunal and of the Panel

Mr. Shiraz Bharmal
Member of the Tribunal and of the Panel

APPEARANCES:

For the Applicants:
Ms Dona Campbell

For the Superintendent of Financial Services:
Ms Deborah McPhail

For Hydro One:
Ms Elizabeth Brown, Ms Lisa Mills and Ms Cassidy McFarlane-Cole

For the Power Workers' Union:
Mr. Andrew Lokan

For the Society of Energy Professionals:
Mr. John Stout

HEARING DATE:
May 8, 2006

REASONS FOR DECISION

This is an interlocutory motion by the Applicants for disclosure by the Respondent Hydro One of "information" requested by the Applicants in a "letter dated March 21, 2006 to counsel for the Respondent Hydro One and in the interrogatories attached to such letter". The Tribunal treats this as a motion for production of documents under Rule 31, and a motion to have the Tribunal determine whether the Respondent Hydro One should answer the interrogatories in question, under Rule 20 of the *Rules of Practice and Procedure for Hearings Before the Financial Services Tribunal*.

Background

This motion is brought in aid of a request for hearing filed by the Applicants pursuant to s.89 of the *Pension Benefits Act, R.S.O. 1990 c.P.8* (the *PBA*). The request concerns a Notice of Proposal, dated July 14, 2005, issued by the Deputy Superintendent of Financial Services, Pension Division (the Superintendent) which proposed to refuse to make an order pursuant to s. 69 of the *PBA* for a partial winding up of the Hydro One Pension Plan Registration #1059104 in relation to those members of the Plan whose employment terminated between January 1, 2000 and December 31, 2002.

The individual Applicants describe themselves, in the *Pre-Hearing Conference Brief of the Hydro One Members' Committee* as acting in this matter "on their own behalf and on behalf of all Hydro management compensation plan employees ("MCP"), executive compensation plan employees ("ECP") and members of the Society of Energy Professionals (the "Society"),whose employment was terminated over the period January 1, 2001 (*sic*) to and including December 31, 2002." The reference to "2001" is clearly a typographical error and should read "2000".

A substantial number of employees of Hydro One left the employment of Hydro One, voluntarily or involuntarily, during the three year period in question. In his Notice of

Proposal, the Superintendent broke down the departures into four groups, which he described as “initiatives”:

(1) A voluntary retirement program, announced in 1999 for implementation in 2000 (The “VRP 2000”). This plan was authorized by the Board of Directors, and approved by the two unions who represented most of the plan members. Some management employees were also included. This initiative was formalized through an amendment to the pension plan and was largely completed by May, 2000, although some employees stayed on until later in the year. The Superintendent found that the program included enhanced pension benefits to the departing employees, which benefits met the requirements of s.74 of the *PBA*, and were funded out of the plan surplus. Hydro One is stated to have accepted 1401 terminations under this program.

(2) A Voluntary Separation Program for Management, implemented in September, 2001, under which 22 management members were terminated. The program was entirely voluntary. No pension enhancements were offered under this program.

(3) A transfer, in March, 2002, of 804 plan members to the Inergi LP Pension Plan. (There is some conflicting information about the number of these employees, and Hydro One acknowledges that any discrepancies should be resolved). There was a further transfer of 238 members from Inergi to the Vertex Customer Management (Canada) Limited Pension Plan, as well as retirements and terminations from Inergi. Applications under s.80 of the *PBA* for the transfer of plan assets to the appropriate plans are still pending, as the Superintendent considers that a decision of the Ontario courts prohibits final approval of the transfers until this appeal of the Notice of Proposal is disposed of. Inergi is an entity through which Cap Gemini Canada Inc. provides services to the respondent Hydro One.

(4) Two termination programs arising out of the remerging of former Hydro One affiliates back into Hydro One. One program, negotiated with the Society of Energy Professionals, was voluntary in nature, and 55 to 61 members ceased to be employed under this program. The other program involved involuntary terminations of between 73 and 86 members of the management group. Neither group was offered grow-in benefits under s.74 of the *PBA*.

The Superintendent concluded that the four initiatives were discrete, and independent of each other. Accordingly, he tested each initiative separately against the requirements of s.69(1)(d) of the *PBA*, to determine whether he should exercise his discretion to order a partial wind up of the Plan. S.69(1)(d) of the *PBA* reads:

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

.....

(d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer.

Applying this methodology, the Superintendent concluded that initiative # (1) represented a “significant number of plan members” and also resulted from a “reorganization of the business” of Hydro One. However, the voluntarily departing employees received enhanced benefits which were at least equal to benefits they would have received on a partial wind up. They also received benefit enhancements which in the context of a partial wind up would be considered distribution of surplus assets. Therefore, he would exercise his discretion against ordering a partial wind up on the basis of this initiative. He concluded that the number of employees terminated under initiative # (2) was not a “significant number” of plan members. With respect to initiative # (3), that transfer was and is intended to include a transfer of plan assets, which transfer is still pending, and thus the terminated employees were transferring to a successor plan under circumstances where s.80 of the *PBA* applies. Therefore the employees’ employment with Hydro One was deemed not to be terminated for the purposes of the *PBA*. Also, subsequent terminations from Inergi could not be considered in an application for a partial wind up of the Hydro One plan. Finally, with respect to initiative # (4), although the “remerging” of the former affiliates back into Hydro One was a “reorganization of the business” of Hydro One as contemplated in s.69(1)(d) of the *PBA*, the number of employees terminated thereby was not “significant”.

The Issues on the Substantive Motion

All of the Respondents support the approach of the Superintendent in treating the initiatives as independent of each other, and in the conclusions that he reached with respect to each of them. The Applicants ask the Tribunal to take an overarching view of what was transpiring at Hydro One in the years in question with respect to employment levels, and treat all of the initiatives together, cumulatively, as steps in a single undertaking to reduce what Applicants’ counsel described as “legacy costs” of a payroll inherited from Ontario Hydro when that entity was broken up into various components, including Hydro One. That undertaking, as executed by Hydro One, resulted in some terminated employees receiving enhanced pension benefits out of the plan funds to which all had contributed, particularly grow in rights, and others being excluded from such enhancement. So regarded, the Applicants assert, the requirements of s.69(1)(d) of the *PBA* are satisfied, in circumstances where any discretion of the Superintendent should be exercised in favour of the partial wind up requested here. The Tribunal understands that, as a part of that argument, the Applicant will be asserting that Inergi should be regarded as some form of *alter ego* of Hydro One for the purpose of

implementing parts of this overall strategy, and that s.80 of the *PBA* should therefore not be held to be a legal barrier to considering the terminations of Hydro One employees who transferred to Inergi, when determining whether s.69(1)(d) of the *PBA* should be invoked to require a partial wind up in this matter.

The Legal Considerations for Ordering Disclosure

In *Monsanto Inc. v. Superintendent of Financial Services*, a decision of this Tribunal dated June 2, 1999 (*Decision # P0013-1998-1*), the Tribunal held that, in matters before the Tribunal, a disclosure order is appropriate, whether for production of documents or response to interrogatories, where:

- (1) the information sought is arguably relevant to an issue in the proceeding and the issue is not a frivolous one;
- (2) the information sought is sufficiently particularized that the party from whom the information is requested should be able to respond efficiently and with a reasonable degree of precision, and
- (3) the information is not privileged.

We consider that the phrase, “arguably relevant” is illuminated by the decision of the Ontario Superior Court of Justice in *Bensuro Holdings Inc. v. Avenor Inc.*, (2000), 186 *D.L.R.(4th)* 182, 187. The Court there held, “Relevance for the purpose of disclosure within the meaning of Rule 30.02 [of the Ontario *Rules of Civil Procedure*] constitutes a much broader and looser test of relevance than relevance at trial. Relevance for discovery embraces the “semblance” of relevance, and so long as the documents in question “seem” to be relevant to the issues disclosed in the pleadings, they ought to be produced for inspection. The onus lies on the party resisting disclosure to justify its refusal.”

Discussion of the Tribunal’s Decision

At the Pre-Hearing Conference in this matter, held on December 20, 2005, it was agreed that all parties would be provided with all of the documentation supplied by Hydro One and the Applicants to the Superintendent during the course of the Superintendent’s investigation which led to the Notice of Proposal in this matter. The parties were to review those materials and attempt to resolve any further disclosure requests. Any disclosure concerns of the Applicants which could not be resolved with Hydro One were to be determined on this motion, the date of which was fixed.

The Applicants have reviewed the initial material, and followed this review with a request for further documentation, and a series of interrogatories, as set out in the letter of March 21, 2006 referred to in the Notice of Motion herein. Subsequent to that letter, there were further requests for information as the Applicants received replies from Hydro One, ending, as far as the present hearing of this motion is concerned, with a letter from counsel for the Applicants to counsel for Hydro One, dated May 3, 2006, which was sent and received after Hydro One had filed its materials on this motion in

accordance with the time lines set out at the Pre-Hearing Conference. During this period, Hydro One was disclosing information as it became available to its counsel.

It is acknowledged by the parties that much of the information requested by the Applicant in the Notice of Motion, and in requests submitted after the letter of March 21, 2006, referred to in the Notice of Motion, has been supplied by Hydro One, or is in the course of being researched for the purpose of being disclosed. The situation with respect to disclosure is therefore more fluid than was anticipated at the time the return date for this motion was fixed at the Pre-Hearing Conference. Counsel for Hydro One produced a summary of the disclosure issues (the “disclosure summary”) upon which there is currently disagreement between counsel for the Applicants and Hydro One. (On this motion, counsel for the other responding parties confined themselves to very short submissions, and essentially restricted their own roles to that of watching briefs). Counsel for the Applicants accepted the disclosure summary as accurate.

Counsel for the Applicants and for Hydro One advised the Tribunal that they believed that they could resolve between themselves any present issues of disclosure between them, other than those set out in the disclosure summary, and any other such matters which evolved in the future. However, they requested that the Tribunal leave this motion open in case issues arose which they cannot resolve. In the circumstances of this case, the Tribunal accedes to this request, which it will address further on in this decision. Accordingly, at this time the Tribunal will address only the issues set out in the disclosure summary, all of which arise out of interrogatories contained in the Applicants letter of March 21, 2006, supplemented in some cases by the letter of May 3, 2006 referred to above.

The interrogatories stated in the disclosure summary to be in dispute at this time and our decision thereon follow. (The paragraph indicators (a), (b) *etc.* are our own.)

(a) “How many of the 1401 employees stated to have terminated under the 2000 VRP Program actually ceased employment in 2001 or later, i.e. were still receiving salary, pension accrual or other non-pension payments after December 31, 2000?”

(b) “With respect to the 2001 MCP Program.....What was the latest date to which salary continuance was paid for those who participated in the Program?” (This interrogatory was expanded by the Applicants’ letter of May 3, 2006 to seek “information concerning the length of time covered by any severance payments or lump sum incentives”.)

With respect to these two matters, Hydro One indicated that it was prepared to supply the last date of service for purposes of the Hydro One pension plan for these employees, but argued that anything beyond this was irrelevant to the determination as to whether a partial wind up of the plan was justified. Given the legal propositions governing disclosure set out above, we do not agree. Unless we are prepared to rule now that the hypothesis, sketched above, advanced by the Applicants as the basis of their substantive

case has no chance of success, the Applicants must have an opportunity to make their case. We are not prepared to so conclude on the basis of what has been presented to us to date. The Applicants, if they are to succeed in establishing their thesis that the terminations which occurred under the various initiatives set out above should be cumulated and treated as the result of a single initiative, will probably have to knit together many apparently disparate pieces of information. It appears to us to be unfair to ask of them at this time to justify how any of the particular pieces of information they are seeking here will contribute to establishing their case when as yet they do not have the entire factual picture before them. It is not patently apparent to us at present that the information sought cannot contribute to the establishment of their argument, and we can conceive of some answers which might be forthcoming which might so contribute. The information sought in (a) and (b) above should be supplied.

(c) “As we [the Applicants] understand it, Cap Gemini Canada Inc. first began providing services to Hydro One through an entity it called “Inergi” effective March 1, 2002. The agreement to provide these services is set out in the agreement dated December 21, 2001 between Inergi and Hydro.....Apparently, under this agreement 804 Hydro employees were transferred to Inergi and became members of a mirror plan known as the Inergi Plan.

How many of these employees subsequently left Inergi and were re-employed by Hydro?

We [the Applicants] note that page 1 of Tab 4(4) of the Hicks materials suggests that this information regarding “returnees” was to be provided to the Superintendent, but there is no breakdown in the materials provided to us netting out the number of the transferred employees who subsequently returned to Hydro. (ACKNOWLEDGED WAS CONTAINED IN HYDRO ONE’S DISCLOSURE PER MAY 3, 2006 LETTER) [The portions in capital letters above and following are annotations to the disclosure summary by counsel for Hydro One, not part of the interrogatory].

Did returning employees remain members of the Inergi Plan?

THIS INTERROGATORY WAS EXPANDED BY (b)(iv)(b) OF THE MAY 3, 2006 LETTER AS FOLLOWS:

What was the job classification of the “returnees”? When did they return to Hydro One and did they rejoin the Hydro One Plan at or after their return? If they did rejoin the Hydro One Plan when did they do so? Did they ever actually become members of the Inergi Plan? Please note that we also require an explanation of the codes used on the documentation already produced.”

The above multiple-pronged interrogatory, and the two interrogatories which we will reproduce below all pertain to initiative #3, set out above, involving the transfer of

Hydro One employees to Inergi and to the Inergi pension plan. Hydro One argues that the entire issue of the transfer of employees to Inergi is irrelevant to the question of whether the Hydro One plan should be partially wound up, because the provisions of s.80 of the *PBA* apply to prevent employees so transferred from being regarded as ceasing to be employed by Hydro One, for the purposes of considering whether s.69(1)(d) could or should be invoked with respect to the Hydro One plan.

Our difficulty with this argument, as employed in this interlocutory motion, is that it assumes the conclusion which Hydro One will ask us to reach on this issue when the substantive motion is argued. The Applicants have indicated that they will challenge this conclusion, and have also indicated in general terms the direction their argument will take. It appears to us at this time that their argument, if it is to succeed at all, will be more likely to be successful with a factual groundwork than if formulated in the abstract. The information that they seek in this set of interrogatories is intended to supply some of that groundwork. Therefore, we are not willing to prejudge this issue on this motion, as the Applicants would possibly be foreclosed from mounting the best argument which might be open to them. Accordingly, information concerning the circumstances surrounding the transfer of employees to Inergi is arguably relevant to the case that the Applicants seek to prove.

The portions of the interrogatory which we have labeled (c) which read, “Did returning employees remain part of the Inergi Plan? and ”Did they ever actually become members of the Inergi Plan?” in turn assume that Hydro One has a sufficiently close relationship to Inergi to have access to this information from Inergi’s internal records, a relationship which is not admitted by Hydro One, and which we cannot prejudge here. Hydro One need not answer these portions of the interrogatory, but should otherwise answer any portions of the balance of it to which it has not already replied.

(d) “When did Hydro first conceive of an outsourcing agreement for the services ultimately outsourced to Cap Gemini?”

When was Cap Gemini selected to be party to an outsourcing agreement?”

The second question in this interrogatory should be answered, for the reasons given in our discussion of (c) above. It has a semblance of relevance to the Applicants’ argument with respect to Hydro One’s relationship with Inergi. However, the first question need not be answered. The question of when an endeavour was “first conceived” is too vague, and violates the second part of the *Monsanto* test for the making of disclosure orders, as set out above. It may have been “first conceived” in a casual discussion at a water cooler between some members of junior management, on an occasion no one now recalls.

(e) “What was the relationship between Hydro, Inergi, Cap Gemini Canada Inc. and Vertex and what corporate interconnections are there between these entities? Do any employees designated as Inergi employees or as Vertex employees work at Hydro’s offices? How many?”

This interrogatory need not be answered. “Relationship” in the first question is again too vague a concept to meet the second test in Monsanto. Would “friendly” or “businesslike” be adequate answers? Similarly, “corporate interconnections” could mean many things. A contract could arguably be a “corporate interconnection”. As to the second and third questions, even given the broad test of relevance we are adopting here, the answers to these questions would have neither relevance nor weight in establishing or refuting the Applicants’ thesis.

The Continuance of this Motion

As mentioned above, the parties have requested us to keep this motion open, in order to resolve any further issues of disclosure which they cannot resolve among themselves. We have agreed to do so, but this action should not be regarded as a precedent for other cases. We have mentioned that disclosure is still ongoing, and there appears to be, laudably, a very high degree of co-operation between counsel for the Applicants and for Hydro One in working out disclosure issues. (We do not intend to suggest any lack of co-operation by other counsel, but only to note that, at least to this point, they have not considered it necessary in their clients’ interests to become significant players in the disclosure issues.) We consider that we should match this co-operative approach.

This motion is adjourned *sine die*. If either the Applicants or Hydro One consider that disclosure issues remain which the Tribunal must resolve, either may apply to the Registrar to set a date to reconvene the motion hearing. However, all parties are emphatically reminded that the Tribunal has set aside a four day block of time, commencing October 3, 2006, for the hearing of the substantive appeal in this matter, and will not depart from this scheduled time lightly. If this motion for disclosure is to be resumed, the practical time limitations upon such resumption imposed by these fixed hearing dates must be respected.

For the purposes of any continuation of this hearing, the usual written process should be simplified. Hydro One and the Applicants should file a joint statement of the issues upon which they wish the Tribunal to rule. If and to the extent that they cannot agree upon a joint statement, they should each file their version of the issues in dispute. Each party should serve on all other parties a succinct statement of their argument on the issues, and file it with the Registrar. The parties other than Hydro One and the Applicants may serve and file such statements if they choose. There will be no written reply arguments, and we intend that the submission of arguments will take place more or less simultaneously. If it appears to the Registrar that this direction is becoming a source of contention among the parties, she may set a common time for all parties’ filings with her to become due.

Costs

The Applicants have requested costs from the Respondent Hydro One. No other parties have requested costs on this motion. There is no basis under the Tribunal's *Rules of Practice and Procedure* and its *Practice Direction on Cost Awards* of August 1, 2004 for making such an order here. In the first place, the Applicants were not successful on all of the requests for disclosure which they made in this motion. Also, there was nothing in the conduct of Hydro One with respect to the disclosure process or the conduct of this motion which we could characterize as unreasonable or delaying in nature. Even where its positions were rejected here, those positions were properly arguable.

There is no order as to costs of this motion to this date. Should the Tribunal reconvene to continue this motion, as referred to above, it is open to the parties to make submissions on costs from this point.

DATED at Toronto, Ontario this 2nd day of June, 2006.

"R.E. Scane"

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

"S. Bharmal"

Shiraz Bharmal, Member of the Tribunal
and of the Panel

"Heather Gavin"

Heather Gavin, Member of the Tribunal
and of the Panel