

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:

**CHRISTINA MARINO and KAREN JONES on their own behalf and as
Representatives of Certain Other Former Management Members of the Hydro
One Pension Plan**

Applicants

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES, HYDRO ONE INC., 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
Mr. Stephen Gleave
Ms Erin Kinlin

For the Power Workers' Union:
Mr. Andrew Lokan
Ms Emily Lawrence

For the Society of Energy Professionals:
Mr. John Stout

HEARING DATES:

October 3, 4, 2006
November 7, 9, 28, 30, 2006
January 31, 2007
February 1, 2007

REASONS FOR DECISION

This hearing was held pursuant to a request for hearing filed by the Applicants as provided by s.89 of the *Pension Benefits Act, R.S.O. 1990, c.P.8* (the "PBA"). The request concerns a Notice of Proposal (NOP), dated July 14, 2005, issued by the Deputy Superintendent of Financial Services, Pension Division (the "Superintendent") which proposes to refuse to make an order pursuant to s.69 of the *PBA* for a partial wind 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 are acting in this matter on their own behalf and on behalf of all Hydro management compensation plan (MCP) employees whose employment was terminated over the period January 1, 2000 to and including December 31, 2002.

Background

Pursuant to the *Electricity Act, S.O. 1998, c.15*, the assets and liabilities of Ontario Hydro's transmission, distribution and related activities, and the associated employees were transferred as of April 1, 1999 to Ontario Hydro Services Company (OHSC). By the same legislation, the OHSC Pension Plan was established as of January 1, 2000, as a successor plan to the Ontario Hydro Pension Plan. As of May 1, 2000, OHSC changed its name to Hydro One Inc. (Hydro One), and its pension plan was renamed the Hydro One Pension Plan (the "Pension Plan").

During the three year period in question, from the beginning of 2000 to the end of 2002, about 90 % of the workforce of Hydro One and its subsidiaries was unionized and covered by collective agreements. Most of the unionized workers were represented by the Power Workers Union (PWU) or the Society of Energy Professionals (the "Society"). The collective agreements between Hydro One and PWU and the Society respectively each provide that the Pension Plan forms part of that agreement. The named Applicants and those they represent were not members of either or any union, and were not covered by a collective agreement.

Hydro One has operated through a number of wholly owned subsidiaries, some of which will be mentioned in the course of this decision. For present purposes, it suffices to note here that, with one exception which is not relevant for this hearing, all employees of these subsidiaries are members of the Pension Plan.

A substantial number of employees of Hydro One left the employment of Hydro One, or of its subsidiaries, voluntarily or involuntarily, during the three year period in question. In his NOP, 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. 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 Pension Plan surplus. Hydro One is stated to have accepted 1,401 terminations under this program. [At the hearing, the number was established as 1,402.]

(2) A voluntary Separation Program for Management, (MCP 2001) implemented in September 2001, under which 22 management members were terminated. [This number was revised to 24 at this hearing.] 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 (Inergi) Pension Plan. 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 NOP is disposed of. Inergi is an entity through which Cap Gemini Canada Inc. provides services to the respondent Hydro One.

(4) Two termination programs occurring in the latter part of 2002, arising out of the merging of two former Hydro One affiliates into one. One program, negotiated with the Society, 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.

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 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

All of the Respondents support the approach of the Superintendent in treating these initiatives as independent of each other, and the conclusions 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. The Superintendent, say the Applicants, should have treated all of the initiatives together, cumulatively, as steps in a single undertaking, a single reorganization of Hydro One. This reorganization was designed to reduce what Applicants’ counsel described as “legacy costs” of a payroll inherited from Ontario Hydro, and to introduce a more competitive attitude within the work force in order to maximize “shareholder value”. That reorganization, 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 under s.74 of the *PBA*, or their equivalent, 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.

As part of the Applicants’ position, they argue that the Superintendent should have included in his analysis several smaller initiatives to reduce labour force numbers undertaken by Hydro One during the period in question. These were a course of “targeted buy-outs” of MCP employees, alleged to have occurred from April, 2000 into sometime in 2001; the termination of a number of the new employees who joined Hydro One as a result of Hydro One’s acquisition of a large number of municipal electrical utilities (MEUs) in 2001; a downsizing of the Engineering and Construction Services (ECS) division of Hydro One which occurred in 2002; terminations which occurred as the result of the sale of the residential business of Ontario Hydro Energy Inc. (OHE) and the closing down of its commercial and industrial business in 2002, and a number of terminations, not allocated to any of the above groups, which occurred throughout the period in question. Hydro One characterizes these latter as “normal-course terminations”, i.e. the types of terminations which occur in the normal course of any business as employees reach retirement age or voluntarily leave to take another job somewhere else, or for some other personal reason.

The core issue of the case of the Applicants, as presented to us, is whether all of the downsizing which occurred at Hydro One during the period in question can be linked together to form merely stages or episodes within a single initiative so as to constitute a single “reorganization” within the meaning of the *PBA*. If so, there can be no doubt that a “reorganization” occurred under any sensible definition of that word as used in the *Act*, and that a “significant number of members of the pension plan”, under any reasonable meaning of “significant”, ceased to be employed by Hydro One as a result thereof. The threshold state of facts required to enable a partial wind-up under s.69(1)(d) of the *PBA* would be satisfied,

leaving only a consideration of whether and how the Superintendent's discretion under s.69 to refuse a partial wind up should be exercised.

The Factual Background

There is no dispute among the Parties that the breakup of Ontario Hydro into a number of components, including what is now Hydro One, occurred as a result of a belief on the part of the then Government of Ontario that the people of the Province would be better served, with respect to the supply and distribution of electricity, by organizations responding to competition and market forces rather than by the then monopoly exercised by Ontario Hydro. There is also no dispute that, from the time of the formation in 1999 of OHSC, the Government expected Hydro One to organize itself to face such competitive forces. More particularly, there is no dispute that, in so organizing itself, the Directors and senior management of Hydro One had to deal with a number of challenges. The Ontario Energy Board (OEB), its regulator, was being given a mandate to regulate Hydro One's permitted rate structure from the point of view of the efficiency of its performance in a competitive market, rather than on the basis of its costs of production as actually incurred. Hydro One's market would likely be opened to competition. Hydro One was expected to be placed on the public market to sell at least a portion of the ownership interest in it, and would, in consequence, be expected to make itself attractive to potential investors. The organization was expected to become a viable commercial entity from the viewpoint of its sole "shareholder", the Province. Even more particularly, there is no dispute that Hydro One's senior management regarded its labour force, inherited from Ontario Hydro, as excessively costly if it was to meet these challenges. From management's viewpoint, there were too many employees, and on average, they were too senior in age. The latter fact in turn meant that Hydro One was paying out higher compensation than it would pay for the same work product from a younger work force, and that the ongoing renewal of its work force with younger workers was being impeded.

At least by early November 1999, senior management was advising the Board of Directors of Hydro One of a proposed staff reduction program. At its meeting on November 25, 1999, the Board authorized its then President to design and implement such a plan. By December 15, 1999, the Chief Financial Officer of Hydro One, Mr. Ng, submitted to the Audit and Financial Committee of the Board a report on accounting treatment of such a program as developed at that point. It indicated that the program would be carried out in 2000, and that the specific methods of reduction would consist of a voluntary retirement package, mostly paid for out of the then surplus in the Pension Plan, targeted voluntary buy-outs, and non-voluntary separations, using the mechanisms of the existing collective agreements. The report stated that the target reduction was at that time about 670 regular staff, but mentioned that OHSC's external actuary had estimated that between 815 and 915 persons would take up the offer of retirement enhancements. That offer was expected to be made on the basis of "Rule of 75", i.e. to those whose age plus years of service would total at least 75. Under the heading of "Targeted Buy-outs", it was stated that it was currently estimated that about 30 "non-represented" staff [which must have meant MCP staff] who did not qualify for early retirement "will be asked to separate from OHSC".

As the proposed staff reduction program was being further refined by OHSC management and its external pension consultants, it was being cleared through the two principal unions, PWU and the Society, to be offered to their members, as well as through the Canadian income tax authorities and the Financial Services Commission of Ontario (FSCO). Tax clearance was necessary because of the intention to fund the voluntary retirement enhancements from pension plan surplus, and hence the necessity of bringing the proposal within the “downsizing” rules for pension plans under the *Income Tax Act*. FSCO clearance was necessary because of the risk that the proposed downsizing might trigger a wind up or partial wind up of the plan. Eventually, the unions and government agencies cleared the proposal to proceed.

On January 14, 2000, the then President of OHSC announced the program, in its final form, to employees of OHSC. The voluntary program was known within Hydro One as VRP 2000. Basically, it offered all regular employees of OHSC who during 2000 had or would reach a total of age plus years of service of 75, who retired according to the offer, an unreduced pension enhanced by either five years additional credited service for pension calculation purposes, or three years additional credited service plus six months severance pay, at the employee’s election. Employees were given a time window from February 15, 2000, to March 31, 2000, to elect to accept the offer. Most retirements were expected to occur by May 1, 2000, the earliest date, and all had to occur by December 31, 2000.

The take-up of this offer, 1,402 employees, considerably exceeded all Hydro One’s estimates, but Hydro One decided to allow all qualified employees who desired to participate to do so. The threshold requirements for participation demonstrated that it was targeted at more senior workers. Given the open-ended nature of the offer, there were areas of the enterprise where staff reduction was considered insufficient, and areas where losses were greater than then desirable.

In its early planning for staff reduction, management was also advising the Board that, in addition to VRP 2000, it expected to have to resort to targeted voluntary reductions and, if VRP 2000 and those reductions still did not achieve the desired reduction of surplus staff, involuntary terminations. There is no dispute that, given the unexpectedly large take-up of the VRP 2000 program, Hydro One did not resort to involuntary terminations immediately following that program, as its original planning had thought might be necessary. However, whether, in spite of the success of VRP 2000, there were targeted buy-outs of staff in this period was a matter of dispute.

The ‘initiative’ noted as #2 in the NOP, referred to at the hearing as the 2001 MCP voluntary program (MCP 2001), originated as Hydro One management was preparing its Business Plan for 2002 – 2005. According to the witness Tom Goldie, the Vice President Human Resources at the relevant time, and currently the Senior Vice President of Corporate Services of Hydro One, in addition to the ongoing general pressure to reduce costs, management considered that its overhead levels for general corporate services were excessively high and could not be sustained by current levels of revenue. An offer was made in mid-August 2001, to MCP employees working in the Finance, Human Resources, Corporate Communications

and Corporate Strategy areas of Hydro One, and to one person in the General Counsel's office. Staff taking up the offer could receive one month's salary for each year of service, capped at 24 months. Although management hoped that 50 employees would leave as a result of this initiative, the actual take-up was 24.

A matter not referred to in the NOP, but included in the case made by the Applicants, were some terminations from employment from a group of approximately 200 employees who joined Hydro One between August 2000 and October 2001 as a result of the acquisition by Hydro One of a number of "municipal electrical utilities" (MEUs), as it bulked up the retail distribution side of its business. By *Regulation 124/99* made pursuant to the *Electricity Act, 1998*, a substantial transfer tax that otherwise would have applied to transfers of such utilities to Hydro One was removed for such transfers as were at least agreed to in principle by November 7, 2000. Obviously, the then Government desired to encourage such acquisitions. However, Hydro One identified 81 of these transferred employees as surplus to needs after the acquisitions. As the great bulk of those transferred employees were members of the PWU, a voluntary severance offer complying with provisions in the collective agreement with the PWU was made to those employees. Twenty four accepted this offer. According to a reply to an interrogatory, four others of those acquired through the MEU acquisitions left Hydro One through MCP 2001, six were terminated involuntarily in what we will later refer to as the MCP 2002 program, and one left during the voluntary program in 2002 for Society members. A further 12 of these former MEU employees were among the group transferred to Inergi in the 2002 transfer to be referred to later.

In February 2002, Hydro One instituted a voluntary severance initiative targeted at certain employees of its Engineering and Construction Services (ECS) division. This division had been identified in the previous year as costing Hydro One substantially more than Hydro One would expect to pay for equivalent services in a competitive service market. Hydro One had originally attempted to address this problem by increasing the work week to 40 hours, with no increase in compensation. However, this division was at least predominately represented by the Society, and an attempt to negotiate this result with the Society failed. On February 1, 2002, Mr. Goldie sent an e-mail message to Society and MCP members advising that costs, particularly in ECS, would have to be reduced and that "at this time", approximately 30 Society represented staff would be "impacted". It is agreed that twelve Society-represented members of the Pension Plan left Hydro One as a result of voluntary agreements entered into through the mechanisms established under the collective agreement between Hydro One and the Society. There is a dispute as to whether any MCP members were also terminated under this initiative. However, Attachment 3 to Hydro One's "2003 Cost Savings Report", entitled "2002 Actual Cost Reductions / Productivity" refers to "Rationalization of E & CS Staff (30 Society and 4 MCP staff)" as achieving a saving of 3.4 million dollars. The difference between 30 Society staff and the twelve Society staff referred to above arises from the fact that not all ECS staff had permanent status and were Plan members. We accept Hydro One's own figure on this point, and find that this initiative did terminate four MCP staff.

On March 1, 2002, 804 Plan members were transferred to an organization, Inergi LP, pursuant to an "outsourcing" agreement entered into in December 2001. These employees

were transferred from the information technology, customer care, settlement, supply management, payroll and finance functions. As mentioned above, Inergi LP set up a pension plan that mirrored the Hydro One Plan. It is now agreed among all parties that the Superintendent was correct in classifying this transfer of employees as one to which s.80 of the *PBA* applies, so that for purposes of the *PBA*, their employment from Hydro One is deemed not to be terminated. Accordingly, the transfer does not trigger the partial wind up provisions of the *PBA*.

In the spring of 2002, the operations of one of Hydro One's wholly-owned subsidiaries, Hydro One Energy Inc. (OHE), started to be wound down. This subsidiary had been set up in 1999 with the intention of developing and exploiting opportunities in non-regulated businesses connected to Hydro One's regulated transmission and distribution activities. OHE's business was divided into residential, and commercial and industrial components. While the residential component, the major portion of OHE's business, was profitable, the commercial and industrial end had not been successful. In April 2002, the residential component was sold to a third party, and the commercial and industrial component was wound down over a period ending in September 2002. Eight Plan members left employment with the Hydro One group as a result of this shutdown, including two who transferred employment to the purchaser of the residential component.

In the summer of 2002, the last initiative, or initiatives, which led to downsizing which was the subject of argument before us occurred. On August 6, 2002, the Board of Directors of Hydro One resolved that two of Hydro One's subsidiaries, Hydro One Network Services Inc. (Network Services) and Hydro One Networks Inc. (Networks) should be combined effective January 1, 2003. In the fallout from that merger, a number of Society and MCP Plan members terminated their employment. Hydro One arranged with the Society to offer a voluntary severance plan to Society members. Hydro One did not accept all of the applications for voluntary severance under this Plan, but did accept 53 applications. In the case of non-union MCP Plan members, a group that included the named Applicants, such niceties were unnecessary. Seventy-three Plan members from this group were terminated involuntarily.

Decision

One who seeks to invoke a wind up under s.69(1)(d) of the *PBA* on the basis of a reorganization of the business of the employer must first establish a single reorganization which is the cause of the loss of a significant number of jobs of members of the plan sought to be wholly or partially wound up. The Statute cannot be interpreted to permit an accumulation of losses of employment from two or more "reorganizations", or of losses of employment from a single reorganization with employment losses which do not flow from that or any reorganization, in order to arrive at a "significant number of members of the pension plan", and thus cross the necessary statutory threshold. The Legislature has not seen fit to allow every member of a pension plan whose employment with a plan sponsor has terminated to obtain the benefits potentially available on a wind up, and only on a wind up. Thus, the named Applicants, whose employment, along with that of others, was involuntarily terminated in a downsizing which started in September 2002, have sought to bridge back to

the large number of VRP 2000 terminations and include these, and terminations which occurred between these two downsizings, as products of, and steps within what they allege is a single reorganization in law and in fact. If they can do this, they unquestionably have established the necessary “significant number” of members whose employment has been terminated. In their written or oral presentations to us, the Applicants have not attempted to establish any reorganization other than one starting with the VRP 2000, and ending at the close of 2002, as one which could found a partial wind up in which they could participate by obtaining “grow-in” benefits under s.74 of the *PBA*. Those benefits are what this case is about.

Although there is no “bright line” test established with respect to the meaning of “reorganization” as found in s.69(1)(d) of the *PBA*, the meaning is wider than that where the word is used in statutes dealing with formal corporate reorganizations. For purposes of the section, a reorganization involves “a major change in the way in which [the] employer carries on its business”. *Stelco Inc. v. Superintendent of Pensions*, (1993), *P.C.O Bulletin*, vol. 4, #1, p. 40 at p.44, (P.C.O.), affirmed, (1994), 115 D.L.R. (4th) 437, 4 C.C.P.B. 108 (Div. Ct), affirmed, (1995), 9 C.C.P.B. 126 (C.A.). It is not fatal to characterization as a “reorganization” that the process of carrying out this “major change” takes place over an extended period of time. In *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)*, (1996), 15 C.C.P.B. 31 (P.C.O), (1997), affirmed, 16 C.C.P.B. 93 (Div. Ct.), the process found to be a single reorganization occurred over a period of three years and five months. Nevertheless, the longer the period of time over which an alleged single reorganization is said to extend, the more difficult it will be to demonstrate that the events of corporate history that occur within the period do coalesce into a unity.

We have not found the theory upon which the Applicants seek to tie the events of the three-year period from the beginning of 2000 to the end of 2002 into a single “reorganization of the business” of Hydro One easy to grasp or state. When we made our first interlocutory order in this matter, dated June 2, 2006, we were under the impression that the Applicants would be seeking to prove that Hydro One was working to an overall master plan throughout the three year period, insofar as staff reductions were concerned. In this, we were acting under a misapprehension, although the nature of our orders was not affected thereby. During the Superintendent’s investigations, the Applicant Christina Marino wrote to a member of the Superintendent’s staff on October 28, 2004, replying to a submission made to the Superintendent by one of Hydro One’s counsel which, among other matters, characterized the Applicants’ position as tying the events of the period into a master plan. In that letter Ms Marino said, “[a]n example is [Counsel’s] defence against the view that the terminations in 2000, 2001 and 2002 resulted from a single master reorganization plan and were all part of the same program. This has never been our view nor has it been portrayed as such in any of our correspondence”. This position was generally reiterated by Applicants’ counsel in her argument. However, we have found it harder to set out what the Applicants’ position is than what it is not.

We believe the Applicants’ theory may be fairly put in the following terms. Start the period at position *alpha*, which is, by definition, undesirable from the perspective of Hydro One. In

this case, the undesirability is a labour force that is too numerous, too senior, and therefore too expensive. Show that the company, Hydro One, at position *alpha*, determined to progress to position *omega*, which by definition is a position where those undesirable features of the labour force have been removed. When the company reaches *omega*, if you find that there has been “a major change in the way the company does its business” as a result of the change between the two positions, without more, there has been a “reorganization” within the meaning of s.69(1)(d) of the *PBA*. In particular, at *alpha*, it is not necessary for the company to foresee *how* or *when* it will get to *omega*, or what *omega* will look like when it is reached. It is merely necessary that it know that it wants to get there.

This minimalist approach to the establishment of a “reorganization” appears to go considerably further than cases to date have gone. In *Stelco*, (*supra*), the PCO emphasized the statements in the Company’s annual report at the beginning of the reorganization period as to the nature of the reorganization which was to take place, and how it would reshape the way in which the Company would operate. In *Imperial Oil*, (*supra*), the PCO emphasized early announcements and speeches by management which announced planned structural changes, including centralisation of control of operating companies, consolidation of business support functions of the divisions within corporate headquarters, disengagement from unprofitable lines of business and rationalization of divisional and headquarters operations. In *London Life Insurance Co. v. Ontario (Superintendent of Financial Services)*, (2001), 26 C.C.P.B. 249, an early press release announced targeted staff reductions in the Company’s administrative staff, across Canada, in the course of the following year of about 400 persons. In fact, there were 384. In all of these cases, the companies in question appear to have started off with a clearer vision of where they wanted to go than we find in the case of Hydro One at the beginning of 2000. We acknowledge that this is suggestive only, not conclusive, for the PCO and courts were not attempting to establish the minimum requirements for a “reorganization”.

In addition, the Applicants’ theory, if we have stated it fairly, really links *alpha* and *omega* only by the continuing determination on the part of the employer throughout the period to reach that pre-defined state of affairs which constitutes *omega*. However, this is merely to assert that a continuing motivation is a sufficient link between events to justify combining them into a single “reorganization”. This is exactly what we understand this Tribunal as denying in *London Life*.

We hold that “a reorganization”, as it is used in s.69 of the *PBA* connotes, among other things, a group of intended events occurring as a result of some form of deliberate guidance, and therefore, that to establish a “reorganization” within the meaning of that section of the *PBA*, it must at least be established that the guiding mind had, at the beginning, at least a rough sense of what the organization would look like at the end of the process, of the approximate duration of the process, and of the route that would be followed to get to the end. We do not suggest that unexpected requirements to respond to unexpected events will be fatal to finding the existence of a single reorganization, but a deviation from a path implies the existence of a path.

We cannot find a linkage between the VRP 2000 terminations and those which occurred in 2001 and 2002, to incorporate it with any of the downsizings which occurred in the two later years into a single reorganization. We find that the VRP 2000 stood on its own. We have reviewed the materials prepared for and by senior management and the Board of Directors prior to the actual implementation of VRP 2000, and the general communications from management to employees. We do not find support for a conclusion that, at the time that initiative was being formulated and implemented, it was regarded as merely the first step of a series of steps which management or the Board proposed to undertake as part of a cohesive plan. We do believe that senior management and the Board considered that VRP 2000 would take them to a new plateau from which the staffing situation of Hydro One would be considered afresh, but we do not believe that either had more than a vague idea as to where they should go from that point, if they had that much of an idea at all.

We also considered a suggestion, arising out of the evidence of Ms Marino, that, as Hydro One originally substantially overestimated the savings in benefit costs which would flow from VRP 2000, the discovery of the error increased the pressure on management to find equivalent savings elsewhere. These required additional savings, it was suggested, drove future reductions of staff, and this constituted a link between VRP 2000 and subsequent downsizings. We agree that the overestimate of savings to be achieved would, when discovered, increase the difficulties faced by management in reducing costs in future, but we can find no evidence directly linking this added cost pressure to the subsequent downsizing initiatives or any of them. In any event, the discovery of the non-existence of the anticipated savings would only go to strengthening the existing motivation to cut costs. The Applicants have clearly shown that the need to cut costs, including labour costs, was at the forefront of management's mind throughout the period in question in this proceeding. Indeed, item #8 of the Agreed Statement of Facts filed by the parties states, "Labour costs were and continue to be a focus of cost reduction by Hydro One." Mr. Goldie acknowledged this again on several occasions during his oral examination. However, a continuing motivation to reduce costs, no matter how strong, cannot provide a linkage between events so as to group them into a single reorganization. This Tribunal came to a similar conclusion in *London Life*, 26 C.C.P.B. 249, 259. and we agree with that holding.

Therefore, we find that the VRP 2000 initiative cannot be incorporated with any subsequent events to create a "reorganization".

Accordingly, the Superintendent was correct in the approach he took in the NOP, that the VRP 2000 is severable from what happened thereafter. We agree with the Superintendent that the VRP 2000, standing alone, constituted a reorganization of Hydro One causing a significant number of members of the pension plan to cease to be employed as a result thereof, within the meaning of s.69(1)(d) of the *PBA*. We also find that the Superintendent properly exercised his discretion against ordering a partial wind up based upon this reorganization, for the reasons stated in the NOP.

As mentioned above, whether or not there were targeted buy-outs to supplement the terminations flowing from VRP 2000 is in dispute between the Applicants and Hydro One.

The witness Tom Goldie testified during his cross-examination and re-examination that there were no targeted buy-outs of employees following the completion of the VRP 2000 initiative. During his cross-examination, he stated that he did not recall any such buy-outs. In his re-examination, he was emphatic that there were none. Mr. Goldie explained the term “targeted buy-out” during his re-examination as follows: “.....the targeted voluntary buy-out for specific non-represented staff is an additional program that would only be made available to staff in certain areas of the company when we know what all the numbers are and would be at management’s discretion as opposed to a broader program.”

The Applicants argue that extracts from some of the documentation produced by Hydro One suggest that there were targeted buy-outs following VRP 2000. In the “Management’s Discussion and Analysis” section of the 1999 Annual Report of Hydro One, it is stated, “We also recognized a \$60 million charge to 1999 results of operations related to the staff reduction program. This amount consisted of approximately \$40 million for cash incentives payable under the voluntary retirement plan, approximately \$10 million for supplementary pension benefits that cannot be charged to pension surplus and approximately \$10 million for targeted buy-outs. We expect that these provisions will be used during 2000 with a small amount being used in early 2001.” Note 4 to the Consolidated Financial Statements of 1999 also referred to this charge. These figures were further broken down in a document produced by Hydro One entitled “VRP Provision – Updated Projection as at June 26, 2000”. This chart, attached to an e-mail, dated June 26, 2000, from Colin Fraser, Financial Policy and Reporting Advisor, Hydro One Networks, to various recipients, is said to be a detailed result of a follow up on various aspects of the \$60 million provision taken in 1999. It shows an original allocation of \$6.8 million of the total allocation to “Targeted Buy-outs”. Of this amount, \$0.5 million is shown as “Spent to May 31” and \$1.3 million is estimated “to come”. A footnote to this item states that the original estimate was created by polling “BU’s” [business units] in 1999, the figure representing “27 non-represented staff at a standard cost estimate of \$250K each. BU’s have been asked to revisit this estimate and of the 27 staff originally projected, about 18 are no longer targeted.” A somewhat similar chart, titled “VRP Provision – Updated Projection as at July 13, 2000”, omits the column, “Spent to May 31”, but contains a column titled “Updated Projection”, which we find to be an equivalent for the column “Est’d to Come” in the June 26 projection. The figure under this column for “Targeted Buy-outs” is now \$2.6 million. A footnote states, “Projection is based upon a review of specific list of targeted employees and specific terms of departure.”

Rather mysteriously, another e-mail produced by Hydro One, dated October 30, 2000, from one Richard Boisjoly to various recipients, is entitled “VRP Program Board Submission”, and deals with “points to consider when preparing the VRP Board Memorandum and additional information regarding the cost of the program.” It contains a table summarizing the cost of the VRP program “and the current projection.” The current projection for targeted buy-outs was restored to \$6.8 [million], the original budgeted amount for this item. No explanation for the disparity from the earlier e-mails emerged in the evidence before us, nor was Mr. Boisjoly identified.

In an e-mail message dated April 3, 2000, produced by Hydro One, sent by Audrey Hanna, identified as a then employee in Hydro One's Human Resources department, to Colin Fraser, which appears to be a copy of one she sent to Mr. Goldie the same day, under the subject heading, "VRP Payroll Savings – March 31, 2000", submitted a number of statistics. Under the general title, "VRP", she showed "Number of Staff Enrolled in VRP" as "1,400". Under the title "Terminations", she entered the item "Number of Staff with Finalized Termination Agreements" as "13". In a summary box at the end, she showed an entry, "Total Staff Retiring/Terminating" as "1,413". The 1,400 figure is almost exactly the final figure in the VRP 2000 program. She is clearly distinguishing the 13 "Termination Agreements" from the VRP 2000 program figure, but linking them to the general subject heading of the e-mail. It is interesting to note that if one multiplies the 13 "finalized termination agreements" by the standard \$250,000.00 per targeted buy-out, one arrives at a total of \$3.25 million, not far from the total one reaches by adding the \$0.5 million stated to have been spent by May 31, 2000 to the \$2.6 million shown as the "Updated Projection" for targeted buy-outs as of July 13, 2000, namely \$3.1 million.

In his cross-examination concerning this e-mail, Mr. Goldie acknowledged that, reading the e-mail, it did look like there were 13 targeted buy-outs. He added that "I think it may also be the case that [Ms Hanna] has simply accrued those 13 cost savings over the same time frame and put them in this document". This was followed by the following exchange:

"Q. Right. but that's what we're talking about, over the same time frame [as the VRP 2000] that there may well have been targeted buy-outs?"

A. Well, they could have been targeted, but they may also have been these other terminations that I was speaking about because I'm not aware of any targeted buy-outs at that time."

In the "Management Discussion and Analysis" section of the Hydro One Annual Report for 2000, under the heading, "Staff Reduction Program", after referring to the \$60 million provision made in 1999, it was stated,

"With approximately 1,400 employees accepting early retirement, the staff reduction program was substantially completed during 2000 and costs of \$53 million were charged to the provision. In addition, we determined that \$5 million of the provision related to supplementary pension benefits and involuntary severance would not be used and reversed this amount as a credit to the results of operations in the current year."

It appears from e-mail correspondence produced by Hydro One that in mid – 2000, the Company was looking to reverse any excess provision of the \$60 million set aside in 1999, in order to maximize the credibility of its financial statements with securities regulators in Canada and the U.S. and to properly assess its tax position.

A reference back to the “VRP 2000 – Updated Projection as of July 13” document referred to above shows that the original estimate for “Supplementary Pension Plan”, which we take to be the same as the “supplementary pension benefits” referred to in the quoted paragraph, was \$8.7 million, and the “Updated Projection” for the same item was \$7.4 million, a reduction of \$1.3 million. A footnote to this item indicates “excess provision was reversed at 2 qtr. 2000.” An item for “Non-voluntary surplus” originally allocated \$4.3 million to this provision. This was reduced to \$0.1 million in this projection, resulting in a total reduction of \$4.2 million for this item. We conclude that this is the provision for the involuntary terminations originally envisaged by management as a last resort if VRP 2000 and the “targeted buy-outs” did not achieve a satisfactory staff reduction. A footnote to this item states that it “was reversed at 2 qtr. 2000.” If one adds the reversal of the supplementary pension provision to the reversal of the non-voluntary surplus provision, one arrives at a figure of \$5.5 million, which is near to, but does not exactly correspond with the figures in the 2000 Annual Report. In the e-mail from Mr. Fraser of June 26, 2000, referred to above, he recommended the reversal of \$5.5 million of the original \$60 million provision, based upon the above figures. In an e-mail dated June 30, 2000 from a Mr. Kevin She to Mr. Fraser, it is stated that the “reversal entries of \$5.5m from VRP provision” will be processed in June, 2000. Neither the e-mails nor the Report refer to any reversal of the provision for targeted buy-outs. We do not find any problem in the variation between the \$5.5 million referred to in these internal e-mails for reversals and the \$5 million referred to in the Annual Report and financial statements. The latter take all amounts to the nearest \$ million.

Returning to the excerpt from the “Management Discussion and Analysis” section of the Hydro One 2000 Annual Report quoted above, the figures quoted left a balance of \$2.0 million of the original \$60 million charge taken in 1999 against staff reductions, after expenditures and reversals. Note 5 to the Consolidated Financial Statements of Hydro One for 2001, referring to the original \$60 Million provision simply says that \$2 million was charged in 2001. There was no evidence of where the money was spent. This was not a reversal of part of a budgeted provision, as the notes to the statements clearly differentiate between costs charged against the provision and reversals. In argument, counsel for Hydro One pointed to an answer given by Hydro One to an interrogatory from the Applicants. This answer stated that 36 employees who selected the six-month severance pay option under VRP 2000 received their severance in a lump sum after December 31, 2000, and that there were certain other payments made to some employees after that date in respect to service prior to January 1, 2001. It was argued that this established that there was no money left in the total provision to fund targeted buy-outs. However, an answer to an interrogatory cannot be used as evidence as part of the case of the party supplying the answer, and this answer was not adopted by an adverse party as an admission.

We conclude that, on the basis of the internal projections for targeted buy-outs that, as late as October 30, 2000, had not been totally reversed, notwithstanding an anxiety to reverse portions of the 1999 provision where this could reasonably be done, and the statement that \$0.5 million had actually been spent under this head by May 31, 2000, it is more probable than not that there were some targeted buy-outs. The evidence does not enable us to make a more precise finding.

We have entered into this lengthy discussion in deference to the importance the Applicants placed on this item in their case. Counsel for the Applicants argued that the targeted buy-outs provided a link between the downsizings which began in early 2000 and those which took place in 2001 and perhaps later. However, even if some of the targeted buy-outs were taking place as late as 2001, this would not of itself link them to any of the downsizing events of the latter year or later, for the purpose of making all of these downsizings part of the same reorganization. Any targeted buy-outs that took place as provided for in the \$60 million provision taken in 1999 were part of the reorganization of which VRP 2000 was the core and by far the major component. They were envisaged in the same initial planning and authorized in the same resolutions as VRP 2000 itself. We have found that VRP 2000 stood by itself as a “reorganization”, and any targeted buy-outs were simply an add-on to this reorganization. There is the problem that in considering the exercise of his discretion with respect to the VRP 2000 terminations, the Superintendent did not address any targeted buy-outs that may have been part of the same reorganization. The enumerated factors which led the Superintendent to decide against ordering a partial wind up might or might not have applied to any or all of the terminations which took place as targeted buy-outs, rather than under VRP 2000 itself. There is no evidence as to the terms of any of these buy-outs, from which we might conclude how discretion should be exercised. We conclude that the number of targeted buy-outs would be swamped by the terminations under VRP 2000, and that the Superintendent’s discretion would not, and should not have been exercised differently with respect to the total reorganization.

With respect to MCP 2001, referred to in the NOP as initiative #2, the Superintendent concluded in the NOP that the number of employees leaving as a result of this initiative was not “significant”. If, contrary to the Applicants’ argument, the Superintendent was correct in severing this initiative from other terminations that occurred throughout the period in question, we do not think that the question of “significance” of the number of terminations arises. Although there was a thinning of management level employees in the targeted areas, we do not find that this was so extensive as to constitute a reorganization within the meaning of s.69(1)(d) of the *PBA*. We also agree with the Superintendent that, if there was a reorganization, the number affected thereby was not “significant”. We find that the Superintendent was correct in refusing to join this particular downsizing with VRP 2000 which preceded it and downsizing initiatives which followed it into a single “reorganization”. We agree with the Applicants that MCP 2001 was driven by the same general cost pressures as was VRP 2000, and as subsequent downsizings would be, but we do not find any other potential linking factor. As was held above, a constancy of motive is insufficient as a link. We consider MCP 2001 to be a result of more refined cost-reduction planning that took place after the results of VRP 2000 were largely known.

We do not think that the downsizing that resulted from the voluntary severance offer to former MEU employees can be linked to other initiatives addressed in this hearing. Of all of the downsizings examined, this is the most remote from those which were driven by a desire to reduce the “legacy costs” inherited from the former Ontario Hydro organization. On the contrary, the job losses which followed the MEU acquisitions arose from synergies created by an expansion of the retail side of Hydro One’s business, whether that expansion occurred as a

result of Hydro One's own entrepreneurial planning or acquiescence to the desires of the then government. Standing alone, the job losses which former MEU staff suffered did not constitute a reorganization. The bulking up of Hydro One's retail distribution system through the acquisition of the MEUs and their transferred employees arguably may have done so, but the subsequent thinning of transferred employees through this voluntary program did not, and in any event, the number of losses cannot be considered significant. We do not have regard to the other employees transferred from MEUs who left Hydro One under the other programs described above in so concluding, as this would involve double counting.

We find that the voluntary severance initiative started in February 2002 with respect to ECS staff cannot be linked to downsizing initiatives before or following it, and that, standing alone, it cannot qualify as a "reorganization" within the meaning of the relevant section of the *PBA*. We believe that the ECS downsizings were similar to those which occurred under MCP 2001, in that they followed from a more detailed appraisal of this division which followed the major general staffing reductions arising out of VRP 2000, and driven by the same general motives. However, again, the common motivation was the only, and insufficient linkage to what went before and after.

With respect to the major outsourcing agreement with Inergi in March 2002, and the consequential transfers of employment, as mentioned above, all parties now agree that s.80 of the *PBA* applies to the employment transfers. The Applicants submit, however, that the outsourcing event itself, and its magnitude, may be taken into account in assessing their argument that the entire downsizing process at Hydro One throughout the three years in question was a *continuum* consisting of a single reorganization. We agree that it may be so assessed for this purpose. However, in so assessing it, we do not find that it contributes to establishing the Applicant's claim. Again, we consider that the decision to outsource the corporate functions in question came from more detailed reviews of the Hydro One organization which management pursued following VRP 2000. It is linked to that which went before and after by the same driving motives to cut costs, but, as before, that is not enough to make a single reorganization. We believe that the outsourcings to Inergi, standing alone, qualified as a "reorganization", but for the reasons stated previously, this did not trigger s.69(1)(d) of the *PBA*.

With regard to the OHE shutdown, we consider this to be an unanticipated event not linked to other cost-cutting measures before or after it, and it therefore does not further the Applicants' argument that there was a single overall reorganization. If the OHE shutdown is considered in isolation, we find that, while it does constitute a "discontinuance of all or part of the business of the employer" within the meaning of s.69(1)(d) of the *PBA*, the number of members of the Plan who ceased to be employed as a result of the discontinuance was not "significant" under any reasonable meaning of the word in the Statute.

The final group of downsizings which were argued before us as being part of an overall reorganization of Hydro One is that which followed upon the merger of Networks and Network Services, in the latter part of 2002. Legally, the merger was effective as of January 1, 2003. However, the merger had been approved by the Board of Hydro One at its meeting

of August 22, 2002. Planning for the consequences of this merger had started earlier. Practical implementation of the merger, insofar as it resulted in the downsizing which was to be attributed to this merger commenced in September 2002, and was mostly complete at least by the end of October 2002, although there are some terminations as late as December 2002. This is the downsizing which led to the termination of the two named Applicants from employment at Hydro One, or at a subsidiary of that company. It is also a downsizing which all of the Respondents acknowledge stands on its own as a “reorganization” within the meaning of s.69(1)(d) of the *PBA*.

“Network Services” was created as a separate entity within the Hydro One corporate family as of January 1, 2001. The original purpose of splitting this out from the original subsidiary, Networks, was to create a major business element which would be unregulated, which could bid for and supply the maintenance and operating needs of Networks, the owner of the transmission and distribution assets, and which could also earn profit for Hydro One by offering its expertise to other utilities.

The intended interplay between Networks and Network Services created the possibility of cross-subsidization between the two entities, if services were transferred between them for more or less than fair market value. This possibility was foreseen by OEB as early as 1999, when that Board issued a draft *Affiliate Relationships Code for Electricity Distributors and Transmitters* (ARC), dated April 1, 1999. The Code itself was dated February 1, 2001. ARC required that inter-subsidiary transactions in services, resources or products take place at fair market value. From an early stage, management recognized that Network Services would have difficulty in meeting this regulatory requirement. In a “Risk Profile” as of June 2000, submitted to the Audit and Finance Committee of the Board of Hydro One by Hydro One’s General Auditor and Chief Risk Officer, the corporate risk of the launch of Network Services was rated as “High”. Among the factors contributing to this assessment was “the ability of Network Services to achieve a competitive cost structure”. This factor crystallized in the summer of 2002, when, by a letter dated July 16, 2002, the OEB advised Hydro One that Networks was in breach of ARC. That letter set out three possible courses to remedy this breach, one of which was to merge Networks and Network Services.

Hydro One asserts that the problem created for it by ARC was not the only factor which ultimately led the Hydro One Board to decide to merge Networks and Network Services. During 2002, Hydro One underwent an overhaul of its senior management and the replacement of its Board, at the hands of the “Shareholder”, the Government of Ontario. Also, in a judgment of the Superior Court of Justice of Ontario, released April 19, 2000, the Court held that the current relevant Ontario legislation would not permit the Province to privatize Hydro One by proceeding with a proposed public offering of the Province’s interest in Hydro One. Although the Government could have amended the legislation to permit the public offering to proceed, and did not publicly announce the abandonment of any current attempt to proceed with privatization until the announcement by the then Premier to that effect in January, 2003, the ultimate decision seems to have been anticipated in their planning by new senior management and the new Board. This removed a motive for attempting to develop new non-regulated profit centres, of which Network Services had been one, within

the Hydro One structure. New management determined to cause Hydro One to concentrate upon its core transmission and distribution business. These factors contributed to the decision to choose a merger of Networks and Network Services from the choices set out by OEB to remedy the breach of ARC.

We have mentioned these events preceding the merger of Networks and Network Services because all of the Respondents attribute the 2002 Society Voluntary Separation initiative and the MCP 2002 involuntary severances to this merger, as being a realization of synergies arising out of it. Accordingly, they argue that this merger, and consequently the terminations resulting from it cannot possibly be linked to any of the previous downsizing initiatives, and especially to VRP 2000. Not only could the merger itself not have been envisioned at that time, because in 2000, Network Services did not exist as a separate entity from Networks, but the critical events which triggered the merger could not then have been foreseen.

No doubt there were redundancies caused by the duplication of functions in the pre-merger subsidiaries, but we do not believe that elimination of these redundancies is the sole explanation of the terminations which occurred in the last third of 2002. With respect to those terminations of employees represented by the Society, the agreement between Hydro One and the Society required Hydro One to offer the severance option to all Society-represented employees in Hydro One, except those employed by Hydro One Telecom Inc. and OHE. Hydro One was to “exercise reasonable discretion based on business needs” in deciding whether or not to accept applications from employees desiring to take up the offer, and indeed, according to Mr. Goldie’s evidence, and submissions made by the Society, a number of Society-represented employees who applied to terminate under this offer were refused. However, allowing for this degree of control by Hydro One over who went and who stayed, we conclude that it is improbable that all who went from the Society-represented group were those whose positions had been made redundant by the merger. As for the MCP employees who were involuntarily terminated, there is little direct evidence to either corroborate or refute the suggestion that it was redundancy of function which determined who was selected for termination. On the basis of the affidavits filed by Ms Marino and Ms Jones, it seems unlikely that their functions at the time of their terminations, as Senior Actuarial Analyst and as a Senior Financial Advisor respectively, were duplicated in another subsidiary. Ms Marino stated in her affidavit that she was the only person at Hydro One providing Hydro One with “actuarial support company-wide”. Neither Hydro One nor any other respondent sought to establish, either by direct evidence or by cross-examination, that the merger created a redundancy in their respective positions, in that those positions were being substantially duplicated in the other subsidiary immediately before the merger. We conclude that, with respect to some of the Society-represented and MCP staff who terminated at this time, the merger was an excuse, rather than a reason to further thin out staff, particularly staff with some seniority.

However, this conclusion does not tie the terminations in the last four months of 2002 back into prior terminations to constitute a single “reorganization” extending over the period from the beginning of 2000 to the end of 2002. It merely corroborates that the same driving motivations as existed in 2000 were still operative near the end of 2002.

Therefore, on our understanding of the meaning of “reorganization” in s.69(1)(d) of the *PBA*, discussed above, the Applicants must fail in their quest for a partial windup based upon the terminations which took place in the three year period pointed to by them. However, as mentioned, all of the Respondents treat the merger of Networks and Network Services as a reorganization standing on its own. (The Applicants did not take a position on this). The Respondents treat the terminations of the named Applicants and those others who terminated voluntarily or involuntarily in the Society Voluntary Separation initiative or the 2002 MCP terminations respectively as occurring as a result of this reorganization. We agree. Therefore, we decided that the Superintendent’s conclusion, in the NOP, that this merger, while a reorganization, did not invoke s.69(1)(d) of the *PBA* as the number of terminations was not “significant”, should be re-examined, particularly in the light of some comments made by this Tribunal in *London Life (supra)*.

Before we enter upon this examination, there are some other issues raised by the parties that it is convenient to discuss here, as the resolution of these issues may be relevant to the results we should reach upon such examination.

The first issue is whether and to what extent the fact that the Plan is incorporated into the relevant collective agreements existing between Hydro One and the PWU and the Society respectively should be taken into account in resolving the matters before us. As mentioned, the two unions, together representing roughly 90% of the Plan membership at any given time, have strongly supported the NOP. Their expressed concern is that many of the several initiatives during the three year period in question which we have referred to above were specifically bargained with one or both of the unions, or were carried out according to downsizing provisions contained in the collective agreements. The unions and Hydro One argue that, in bargaining the terms by which downsizings will take place, both employers and unions make trade-offs, not only between employer and union, but as between various goals or goods that each might wish to seek on behalf of its constituency. Where employees are leaving a pension plan when they terminate, the extent of their present and future rights with respect to that plan is a factor which both parties to a collective agreement must weigh. Where, for what are considered by the bargaining parties, especially the representatives of the employees, good reasons to accept some equivalent, not necessarily in the pension area, for what employees might obtain if the representatives pressed for a wind up or partial wind-up, this should be respected by regulators. Otherwise, employers and unions cannot bargain with any confidence that the balancing of interests upon which each side relied in striking the bargain will not be upset by subsequent regulatory action.

This argument, in the context of disputes involving s.69 of the *PBA*, comes into play only when it has been decided that the threshold requirements for a windup or partial windup have been met, and the issue is whether the Superintendent should exercise his or her statutory discretion against issuing a wind up order. We agree that the Superintendent may weigh the existence of collective agreements in considering the proper course to follow, but the weight to be afforded by this consideration will vary with the circumstances. At this point, we simply note that the Applicants were not represented by either or any union at any time during the period in question, and it was neither argued nor proved before us that they sought

or received any *quid pro quo* for a surrender or waiver of any wind up entitlements which the law might afford to them.

Another argument which the Respondents PWU and the Society advanced against interference with the NOP by us was that we should afford “deference” to the decision of the Superintendent. The Submissions of the PWU put its position as follows. “[The] Superintendent should be entitled to significant deference under s.69 in determining whether the statutory pre-conditions are met and if so, whether a partial windup should be ordered. The Superintendent and his staff have expertise and experience in conducting s.69 investigations, and are given discretionary power under the *Act* to make discretionary policy-driven decisions with respect to winding up pension plans. His decision should be respected, unless there is “good reason” to not do so.” The Society said that “the Tribunal should not perform the Superintendent’s job nor review his exercise of discretion without good reason.”

In our view, there is little equivalence between the position this Tribunal should take with respect to decisions of the Superintendent, and the considerations taken into account by courts in deciding the extent, if any, to which they will give weight to decisions, or the reasons for decisions, of inferior tribunals.

In carrying out his or her duties under the *PBA*, the Superintendent has an investigative role as well as a quasi-judicial function. The Superintendent not only investigates, but formulates the issues which arise under the *PBA* as a result of those investigations, and then decides those issues on the basis of the same investigations. When a Notice of Hearing is filed, the Tribunal is required to hold a “hearing”. The Tribunal complies with this statutory duty by hearing the evidence that the parties adduce *de novo*. Some of that evidence may, and often will be evidence already unearthed by the Superintendent in his investigative role, but the parties may lead evidence before the Tribunal which was not before the Superintendent at the investigative and issue-formulating stage, or at the decision-making stage of the Superintendent’s function. Some of the arguments which are presented to the Tribunal may have been submitted to, or occurred to the Superintendent prior to the hearing, but it will not be surprising that some were not, or had not been formulated so cogently. At this hearing, we had from seven to nine counsel in attendance at any one time seeking to assist us, a blessing the Superintendent will rarely enjoy, and did not in the earlier investigative stages of this dispute.

The Tribunal’s powers, and in our view, its duty, are set out in s.89(9) of the *PBA*.

At or after the hearing, the Tribunal by order may direct the Superintendent to carry out or 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 may substitute its opinion for that of the Superintendent.

Insofar as actions “the Superintendent ought to take” are determined upon fact, where the Tribunal, having heard the oral evidence, which might be more extensive than that

considered by the Superintendent, under oath, and tested by cross-examination, and considered documentary evidence which might be more extensive than that considered by the Superintendent in formulating the NOP, comes to a different conclusion on the facts than did the Superintendent, there is no basis in reason or in the statute to refrain from acting upon its own view. In matters of law, if the Tribunal's interpretation is, *a priori*, no better than that of the Superintendent, it is, on the same basis, no worse. Where the Tribunal differs in its interpretation of a point of law from that of the Superintendent, we think that the *PBA* is clear that the Tribunal should make its view prevail.

Where the question is one of a policy directive issued by the Financial Services Commission of Ontario or by the Superintendent under the Commission's authority or directly under some statutory authority, this Tribunal has, to the best of our recollection, accepted and applied that policy where relevant to a matter before it, and to that degree affords deference. In cases where the Tribunal agrees with the Superintendent's conclusions on fact and law, and the issue is the manner in which the Superintendent has exercised a statutory discretion, the Tribunal might be inclined to afford deference. That is not the situation in this case, and therefore we will not comment further.

In this case, we do not consider that any matters of policy are in issue. What is in issue is the legal scope of the words "a significant number of members of the pension plan" as they appear in s.69(1)(d) of the *PBA*.

Early jurisprudence with respect to "significant", as it appears in s.69(1)(d) of the *PBA*, treated significance as being determined by some ratio of the number of plan members being terminated to the total active membership in the pension plan in question. In 1993, the Pension Commission of Ontario (PCO) broadened the test for significance and found an absolute number of 700 terminations to be "significant", without reference to the total number of plan members. This approach was upheld by the Ontario Divisional Court and Court of Appeal. See *Stelco Inc. (supra)*. This case was later followed in this respect in 2001 by this Tribunal in *London Life*. In the latter case, an absolute number of 384 employees terminated within the period of the reorganization was sufficient to establish significance. In *Stelco*, the PCO commented (at p. 45) that "the use of the term "significant" implies a more general and flexible standard and the need to consider the particular circumstances of each case on its merits". In the Divisional Court (at p. 110), Southey J., writing for the Court, commented that ["significant"] "does not lend itself to a precise meaning".

In *London Life*, the Tribunal at least suggested the possibility of another step in the evolution of the means by which significance might be determined. In that case, the terminations resulting from the reorganization, found to number at least 384, were confined to the administrative staff of the company. Having determined that the 384 terminations were, standing by themselves, "significant", so as to meet that threshold requirement for a wind up under s.69(1)(d) of the *PBA*, the Tribunal went on to say,

"In this case, the significance of the number 384 may be properly assessed by comparing that number to the total number of active

members of the Plan who were administrative employees at the relevant time. The limitation of the comparison to active members is appropriate since clause 69(1)(d) of the Act is triggered when a significant number of “members” of a pension plan “cease to be employed” by their employer (see also the definitions of the terms “member” and “former member” in section 1 of the Act). It is logical, therefore, to determine the significance of the number of members who ceased to be employed against the number of members who were employed at the time.

The limitation of the comparison to members who are administrative employees also makes sense as the purpose is to determine the significance of the number of employees of the Plan who have ceased to be employed as the result of a reorganization that is limited to the administrative side of the business and the employees involved in that side of the business represent a substantial portion of the members of the Plan.”

The Tribunal then went on to discuss the number of administrative staff in the Plan under various assumptions, and, taking the number 384 as a percentage of the possible range of total active Plan members who were administrative staff at the relevant time, arrived at percentages ranging between 14.9 and 12.8. The Tribunal then said,

“...384 is a “significant number” of employees ceasing to be employed in the course of a year as a result of a reorganization when that number represents a percentage, of the relevant base of Plan members, that comes anywhere within this range, i.e. even if it is as low as 12.8%.”

At the hearing, when the possible application of these passages from *London Life* to the facts of the present case was raised by us, there was argument as to whether the above passages were mere *obiter dicta*, and, in any case, whether they had any relevance to the present case given the factual disparities.

With respect to the latter, it is true that in the case before us, the terminations flowing from the reorganization created by the merger were not restricted to one group, as both MCP and Society-represented staff were affected. If the analysis is restricted to MCP members who were terminated, being the group from whom the Applicants are drawn, it is doubtful whether that group represents a “substantial portion” of the members of the Plan. To find an absolute number of 73 persons (or even 126 persons if the 53 Plan members who terminated under the

Society 2002 Voluntary Separation Program were to be added in) would be a quantum lessening of the numbers which the authorities to date have considered, on a non-comparative basis, to be significant. We do not feel justified in taking this step in the present state of evolution of the tests for significance.

We do not consider that we are bound by the quoted passages from *London Life*, and their direct applicability to the case before us is not important. What we believe *is* important is that an experienced panel of the Tribunal, having arrived at a result on a basis which was clearly compatible with existing authorities, nevertheless added a suggestion that there might be another way to establish a “significant number of members of the pension plan” who have ceased to be employed as a result of a reorganization of the employer’s business other than by a comparison of the number terminated with the number of plan members, or than by an appraisal of the total number of employees who lost their jobs. For similar reasons, we do not think it matters whether the quoted observations of the Tribunal were *obiter dicta*. We do not believe that the quoted passages were intended as either an exhaustive or definitive analysis. We regard the possibility suggested by the Tribunal in *London Life* as an invitation to explore the question further in an appropriate subsequent case.

We believe that this is an appropriate case to further consider the cautious suggestion in *London Life* that significance might be determined by reference to some sub-group within a plan, rather than to the totality of plan membership or to the raw number of terminations flowing from a reorganization. The MCP group, whether or not it constituted a substantial portion of the Plan membership, was at least not a trivial portion of it. It constituted about 10% of total active Plan membership. It was unprotected by the collective agreements, a fact which was of great importance with respect to the terminations in the last four months of 2002, flowing from the merger of Networks and Network Services. As mentioned above, the members of the group had no opportunity to consider trade-offs for any rights they might have under a wind up. There is no evidence that they received any compensating benefit for loss of those rights. As a matter of employment law, they would receive statutory severance benefits, and they might also receive greater severance benefits at common law. However, it has been held that severance benefits and benefits which might accrue upon a wind up compensate for different types of losses suffered by an employee, and that qualified employees are entitled to both. *Imperial Oil Ltd. v. Atlantic Oil Workers Union, Local #1*, [2006] N.S.J. 120 (N.S.C.A.). We are not bound by this decision from another province, but it is of persuasive authority, and we will follow it.

Ms Debra Vines, the Manager of Compensation and Benefits for Hydro One, testified that, as of December 31, 2002, there were 3,913 active Plan members, of whom 379 were MCP staff. The PWU represented 2,761 and the Society represented 773 active Plan members. When we add back into the 2002 year-end figure the 22 MCP members who were terminated in the MCP 2002 initiative who elected entirely lump sum payments and who were therefore classified as “terminations/retirements” for purposes of counting class members¹, there would be about 401 MCP Plan members in early September 2002, when the MCP terminations started under that initiative, and when the reorganization flowing from the merger commenced in fact. The number may not be exact because there may have been some

¹ Of the remaining 51 MCP members terminated under the MCP 2000 initiative, 43 were classified as “terminations” and 8 were classified as “retirements” for Plan purposes in 2003, 2004 and 2005. For our purposes, we regard these terminations as taking effect in the period from September 1, 2002 to December 31, 2002, inclusive.

other terminations or hires in this group during the four month period for which we do not have figures, but we conclude that it is improbable that if such exist, they would be of a number that would make any difference to our conclusions. Thus, about 18% of the active MCP plan members existing immediately before the reorganization stemming from the merger started to take effect in practice lost their jobs as a result of that reorganization. If the MCP group had a pension plan unto itself, this percentage would be well within the range of terminations considered “significant”, on the existing authorities. However, it did not, and the question becomes, can and should s.69 of the *PBA* be interpreted to permit one particular group to be notionally segregated out from other plan members in order to determine whether the number of terminations of members of that group resulting from a reorganization represents “a significant number of members of the pension plan”?

The arguments of all of the Respondents, and indeed, of the Applicants, either implicitly or explicitly assume that, if the number of persons ceasing to be employed is to be compared to anything to establish significance, the comparable group is the total active plan membership. The argument was put most explicitly by Hydro One in its *Final Submissions*.

“166. There is no support in section 69 (1) (d) for this view in *London Life* that the comparable group can be limited to those active plan members in a particular classification or part of the business.

167. It was open to the legislature to include the phrase “a significant number of members of the pension plan in a classification, group or affected part of the business” in qualifying the meaning of a significant number of plan members. It did not. There is no qualifier on the term “a significant number of members of the pension plan” to limit the comparable group to anything less than total active plan membership.”

The weakness of this argument is that it is easy to stand it on its head. It was also open to the Legislature to refer to a significant percentage of the total active membership of the pension plan, if that is what it intended, and the only thing it intended.

We assume that, when the Legislature used “significant”, a word “which does not lend itself to a precise meaning”, without adding an explanatory gloss, in order to set a quantitative threshold of job losses to permit a wind up directed by the Superintendent, it did so deliberately, with full awareness of the word’s lack of precision. We further assume that the Legislature did this because it was aware that it was unlikely that it could foresee all of the situations which might arise in the future, and preferred to allow the factors for the implementation of its general intentions to be hammered out by the judicial and *quasi-judicial* process on a case by case basis, as new situations are considered.

It is now trite law that s.69 of the *PBA* is remedial legislation, designed to protect workers who have lost employment and membership in a pension plan, but in considering the effect of the remedial aspect upon the interpretation of this section, we must bear in mind the balanced approach to the interpretation of pension legislation required by the Supreme Court of Canada.

See *Monsanto Canada Inc. v Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, at Paragraph 38 of the judgment of Deschamps J. Reading the section overall, we believe that the legislature intended that the benefits of a wind up ordered by the Superintendent should be available only when one of several serious events out of the usual course of the employer's business or the employer-employee relationship have occurred.

With the very general considerations mentioned in the previous paragraph in mind, we are also aware that pension plans may now be very complex with respect to the employees they protect. They may range from plans covering a single employer with a relatively homogenous work force to plans covering multiple operating subsidiaries of a holding company. They may cover, as in this case, management and non-management, or union and non-union employees. They may cover members belonging to more than one union, and those unions may not be *ad idem* in their approach to the pension considerations at issue in the face of forthcoming lay-offs. We conclude that the legislative intent of the section is best furthered by equipping the Superintendent with a scalpel, rather than restricting her or him to a blunt instrument. Therefore, we adopt the path at least suggested by *London Life*. We hold that, in an appropriate case, it is permissible, in applying s.69(1)(d) of the *PBA*, to segregate a category of employees from the total membership of a plan, and judge the significance of the number of employees within the segregated category who have ceased to be employed as a result of the discontinuance of all or part of the employer's business or the reorganization of the employer's business by comparing that number to the total number of members in that category. The circumstances in which such segregation will be appropriate may be rare, but that is an issue to be explored in future cases as different factual situations are examined.

For the reasons previously mentioned, we believe that this is an appropriate case to segregate the MCP employees from other plan members. We find that those who were involuntarily terminated in the MCP 2002 initiative, from September 2002 to the end of 2002 constituted a significant number of members of the pension plan for the purpose of applying s.69(1)(d) of the *PBA*.

This finding requires us to turn to the remaining employees of the Hydro One group of companies whose employment ceased as a result of the reorganization occurring in connection with the merger of Networks and Network Services, i.e. those who terminated pursuant to the 2002 Society Voluntary Separation Plan. Should they be included with the MCP group, if the latter group is held to be entitled to benefit from a partial wind up?

We conclude that the Society-represented employees who ceased to be employed as a result of their participation in the 2002 Society Voluntary Plan should not be included as beneficiaries of any partial wind up which might be ordered consequent upon the reorganization flowing from the merger of Networks and Network Services. With the MCP members who were terminated following upon that reorganization segregated into a separate category, the Society-represented Plan members must stand on their own. Whether those 53 terminated Society members are compared to the total active Plan membership at the beginning of September 2002, or even to the total Society-represented membership at that time, if we could find reason to separate out Society members from the remaining Plan membership (which we cannot),

they do not represent a significant number of members of the Plan, within the meaning of the *PBA*. These Society-represented members have not been prejudiced by our decision to separate out the MCP members who were terminated following upon the same reorganization. Had we not held that the significance of the MCP member terminations could be determined by comparing them to the number of their segregated group within the active Plan membership, but rather tested the total of Society-represented and MCP members who terminated following upon the merger against the total active Plan membership, we would have concluded that the number of terminations was not significant, either as a percentage of total active membership or as an absolute number. Such a finding would have been in accord with the submissions of all of the Respondents.

If we are in error in our conclusion immediately above that the Society-represented members who terminated following upon the merger must be considered separately from the MCP members who terminated, we also conclude that in the exercise of our discretion, the members represented by the Society should be excluded from the partial wind up. The arguments adduced by the respondent unions and by Hydro One as to the dangers of regulators interfering with collective agreements apply strongly in this case, to the extent that they are applied to the interests of members covered by those agreements. We consider that we should defer to the opinion of the union representing the employees who were terminated as to what bargain was in the best interest of those employees, viewed as of the time the bargain was made, and exercise our discretion as to the terms of the partial wind up so as to leave that bargain inviolate.

We therefore conclude that the MCP employees of the Hydro One group of companies who ceased to be employed during the period from the beginning of September 2002, to the end of 2002 as a result of the reorganization flowing from the merger of Networks and Network Services constituted a significant number of members of the Pension Plan, and that the Superintendent would have been entitled, under s.69(1)(d) of the *PBA*, to order a partial wind up of the Pension Plan, limited to those employees.

We also find that there is no reason to exercise any discretion against ordering such a wind up. In so holding, the question of deference to the exercise of a discretion conferred upon the Superintendent does not arise. It is clear that, in formulating the NOP, the Superintendent was acting upon the assumption that the significance of the number of members who cease to be employed as a result of a reorganization must be determined either by comparison with the total plan membership, or as a relatively large independent number. We hold this to be an error in law, and we have held that we will not defer to the Superintendent in matters of law. The Superintendent never found that the threshold requirements to order a wind up on the basis of the reorganization following from the merger of Networks and Network Services had been met, and therefore never reached the stage of considering how to exercise his discretion had he found otherwise.

At a Pre-Hearing Conference held June 30, 2006, the Parties agreed to frame the issues in this appeal as set out in the Conference Memorandum dated August 15, 2006, and reproduced

below. Our answers to those issues, in accordance with the discussion of our reasons for decision related above, are also stated.

(a) Did a reorganization or reorganizations of Hydro One's business take place between January 1, 2000 and December 31, 2002? If so, what is the effective date or period of time covered by the reorganization?

There were three reorganizations within this time period. These were the reorganizations resulting from VRP 2000, from the outsourcings to Inergi, and from the merger of Networks and Network Services. With respect to the VRP 2000 and the Inergi outsourcing reorganizations, it is not necessary to identify the time periods covered. The reorganization resulting from the merger effectively occurred from September 1, 2002 to December 31, 2002, inclusive.

(b) If the answer to (a) is yes, did a significant number of members of the Plan cease to be employed by the employer as a result of the reorganization or reorganizations?

Yes, in the case of all of the reorganizations.

(c) How should the Hydro One members who were transferred to Inergi on March 1, 2002 and returned to work with Hydro One during 2002 be taken into account, if at all?

It is not necessary to answer this question.

(d) Are any of the Hydro One members who ceased to be employed in the relevant period excluded from consideration under s.69(1)(d) by virtue of these cessations of employment being voluntary?

It is not necessary to answer this question.

(e) If the answers to (a) and (b) are yes, should the Superintendent be directed to order a partial windup or partial wind ups?

The Superintendent should not be directed to order a partial wind up with respect to the reorganizations stemming from the VRP 2000 and the Inergi outsourcing. The Superintendent should be directed to order a partial wind up with respect to the reorganization occasioned by the merger of Networks and Network Services, limited to MCP Plan members whose employment was terminated effective as of a date between September 1, 2002 and December 31, 2002, inclusive.

(i) Should the age and service characteristics of the individual whose employment was terminated be taken into account?

Yes, in accordance with the provisions of the PBA.

(ii) Should any differential benefit treatment between Plan members terminating during the relevant period be taken into account?

Differences in treatment between MCP and other Plan members are relevant in determining that the significance of the number of terminations of MCP Plan members should be evaluated in relationship to the number of active MCP Plan members.

(iii) How, if at all, is the specific category of employment of Plan members relevant to this enquiry?

See the answer to Question (e) (ii).

(f) If a partial wind up is ordered, who should be included and what form should it take?

See the answer to Question (e).

Disposition

The Superintendent is directed to refrain from carrying out the Notice of Proposal herein dated July 14, 2005. The Superintendent shall order a partial wind up of the Plan with respect to MCP members of the Plan whose employment was terminated effective as of a date between September 1, 2002 and December 31, 2002, inclusive.

Costs

If any party wishes to apply for an order for costs in this matter, it may do so by written request filed with the Tribunal and served on the other parties within 30 days of this decision. The other parties shall have 14 days to file and serve written responses to any such request.

Dated at Toronto this 1st day of August, 2007

“Ralph Scane”

Ralph Scane
Member of the Tribunal and Chair of the Panel

“Heather Gavin”

Heather Gavin
Member of the Tribunal and of the Panel

“Shiraz Bharmal”

Shiraz Bharmal
Member of the Tribunal and of the Panel