

**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** an application by Jerry Coelho, Kerry Wilson and the Trustees of Canadian Bricklayers and Allied Craft Union Members Pension Trust to transfer assets from the Bricklayers & Trowel Trades International Pension Plan, Registration Number 392175 to the Canadian Bricklayers and Allied Craft Union Members Pension Trust, Registration Number 1063478;

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

**B E T W E E N:**

**KERRY WILSON AND  
TRUSTEES OF THE CANADIAN BRICKLAYERS AND  
ALLIED CRAFT UNION MEMBERS PENSION TRUST**

**Applicants**

**- and -**

**SUPERINTENDENT OF FINANCIAL SERVICES AND  
BOARD OF TRUSTEES OF THE BRICKLAYERS & TROWEL  
TRADES INTERNATIONAL PENSION PLAN**

**Respondents**

**BEFORE:**

Paul W. Litner  
Member of the Tribunal and Chair of the Panel

Heather Gavin  
Member of the Tribunal and of the Panel

David Short  
Member of the Tribunal and of the Panel

**APPEARANCES:**

For the Board of Trustees of the Bricklayers & Trowel Trades International Pension Plan  
Mr. Andrew Lokan

For the Superintendent of Financial Services:  
Mr. Mark Bailey

For the Trustees of the Canadian Bricklayers and Allied Craft Union Members Pension Trust:  
Mr. Lorne Richmond

**Hearing Date:**

March 9, 2007

**DECISION ON A PRELIMINARY MOTION**

**A. RELIEF SOUGHT**

The Board of Trustees of the Bricklayers & Trowel Trades International Pension Plan (the “IPF Canada”), a Respondent in the main proceeding, brings a preliminary motion seeking the following relief:

- (a) A ruling that this Tribunal has no jurisdiction to hear the present case because the Applicants in the main proceeding, Mr. Kerry Wilson and the Trustees of the Canadian Bricklayers and Allied Craft Union Members Pension Trust (collectively, the “Applicants”), did not submit a timely request for hearing.
- (b) In the alternative, an order that the hearing of this matter be adjourned pending a decision by the Superintendent of Financial Services (the “Superintendent”) on whether to approve the partial wind-up report effective May 1, 2000, which is currently before the Superintendent.

**B. BACKGROUND**

The facts relevant to a determination of the preliminary issues before us were placed in evidence by way of documents filed with the parties’ written submissions.

This hearing arises from the Superintendent’s refusal to order a transfer of assets from the Bricklayers & Trowel Trades International Pension Plan, Registration No. 392175 (the “IPF Canada Plan”) to the Canadian Bricklayers and Allied Craft Union Members Pension Trust, Registration No. 1063478 (the “CMPT Plan”), pursuant to subsections 80(8) and 80(9) of the Act.

The essence of the dispute between the parties that gives rise to this proceeding is whether, following the withdrawal of several union locals (the “Withdrawing Locals”) from the IPF Canada Plan, the benefits of the members of those Withdrawing Locals ought to be settled by

way of partial wind up, as contended by the IPF Canada, or by way of asset transfer to the CMPT Plan, as contended by the Applicants.

The IPF Canada Plan is a “multi-employer pension plan” within the meaning of the Act. It was established on August 1, 1973 and is administered by a board of trustees (the IPF Canada). The IPF Canada Plan was created to provide benefits for members of the International Union of Bricklayers and Allied Craftworkers (“IU”) and its locals across Canada.

From approximately 1998 onward, certain Ontario locals of the IU engaged in a campaign to secure greater autonomy and/or secede from the IU. To this end, they formed the Bricklayers and Allied Craft Union (the “BACU”) as a rival trade union to the IU. Mr. Kerry Wilson is the current president of the BACU and Mr. Jerry Coelho (who was originally involved in the application to the Superintendent but did not attend the initial pre-hearing conference and is not a party to this proceeding) was formerly president of the BACU. Mr. Wilson and Mr. Coelho were also formerly trustees of IPF Canada.

What followed was a lengthy and bitter battle between the IU and the BACU over the bargaining rights held by the Ontario Provincial Conference of the IU. Although the evidence before us was not clear on this point, there was agreement among the parties that the BACU ultimately acquired the bargaining rights over a number of Ontario locals of the IU effective August 31, 2004.

Effective May 1, 2000, the BACU secured changes to the collective agreements applying to members of the IU locals in Ontario, whereby pension contributions that had previously flowed to IPF Canada Plan from IU locals in Ontario were redirected to the CMPT Plan, a plan newly established by the BACU. We were advised by the parties that Locals, 6, 7 and 25 of the IU initially disputed this change and did not form part of the IU locals which withdrew from the IPF Canada Plan as of May 1, 2000.

In response to the cessation of contributions in respect of the Withdrawing Locals, IPF Canada declared a partial wind up of the IPF Canada Plan effective May 1, 2000 (the “Partial Wind Up”). The Partial Wind Up was initially declared by the IPF Canada by resolution dated June 29, 2000 and notice of the Partial Wind Up was given to FSCO on November 9, 2000. However, issues related to the Partial Wind Up continued to be deliberated by the IPF Canada and a Partial Wind Up report (the “Report”) was not filed with FSCO until August 9, 2002, and has since been revised. In December 2003, the IPF Canada confirmed its decision to proceed with the Partial Wind Up.

By letters dated December 3, 2003 and April 6, 2004, counsel for the Applicants requested that the Superintendent: (i) appoint an administrator to replace the IPF Canada; and (ii) decline to approve the Report filed by IPF Canada in respect of the Partial Wind Up. Following that request, a lengthy exchange of correspondence occurred between the IPF Canada and the CMPT (through their legal counsel) to the Financial Services Commission of Ontario (“FSCO”), making submissions on the Report and the Applicants’ request for an asset transfer from the IPF Canada Plan to the CMPT Plan.

On March 17, 2005, a FSCO Pension Officer wrote to the Applicants’ counsel, in response to his letters dated December 13, 2004 and February 18, 2005, and advised:

The decision to partially wind-up the pension plan effective May 1, 2000, was made by the duly established administrator. Partial wind-up notice was provided to FSCO by letter dated November 9, 2000. The partial wind-up report and amendments were also filed with us by the duly established administrator. FSCO reviews applications filed by administrators and does not have the authority to rescind the administrator's decision to partially wind-up the pension plan.

The administrator has not filed a rescindment of the partial wind up amendment or report. ... We will therefore not be requesting the administrator to transfer assets to the CMPT plan and will be continuing our review of the filed partial wind-up report.

The Applicants did not request a hearing in response to the March 17, 2005 letter from FSCO. Instead, by letter to the FSCO Pension Officer dated April 4, 2005, the Applicants' counsel requested that the Superintendent reconsider the decision set out in the March 17, 2005 letter.

By Notice of Proposal dated September 13, 2005 (the "NOP"), the Superintendent proposed to refuse to order an asset transfer from IPF Canada Plan to the CMPT Plan. The Applicants' request for a hearing was filed on September 27, 2005.

## C. ANALYSIS

### 1. *Jurisdiction of the Tribunal*

The IPF Canada urges us to accept that we have no jurisdiction to hear this matter as the Applicants' request for hearing was not timely, as required under the Act. Under the Act, a party seeking a hearing must request the hearing within 30 days of the decision in respect of which the hearing is sought. The IPF Canada submits that absent such a timely request, the Tribunal has no jurisdiction to hold a hearing.

The Tribunal's jurisdiction to hold a hearing is set out in section 89 of the Act. In particular, subsections 89(6) to (8) of the Act provide as follows:

#### Notice requiring hearing

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

#### Power of Superintendent

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

#### Hearing

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

In his correspondence to FSCO, the Applicants' counsel at various times requested that the Superintendent order an asset transfer from the IPF Canada Plan to the CMPT Plan in respect of the Withdrawing Locals. The IPF Canada submits that the Applicants' asset transfer request was clearly declined by FSCO in its March 17, 2005 letter. In that letter FSCO gave reasons for denying the request, and stated that "we will therefore not be requesting the administrator to

transfer assets to the CMPT Plan and will be continuing our review of the filed partial wind-up report”.

IPF Canada further urged us to accept that the NOP issued on September 13, 2005 was a reconsideration of FSCO’s March 17, 2005 decision, and not the decision of the Superintendent which triggers hearing rights under section 89 of the Act.

Both the Applicants and the Superintendent submit that the NOP was not a reconsideration of a final decision, but rather the NOP is the decision which triggers hearing rights under section 89 of the Act.

We agree with the position of the Superintendent and the Applicants on this issue. In this case, neither the Superintendent nor anyone with the delegated authority of the Superintendent issued the NOP, and thus no hearing rights are triggered. The author of the March 17, 2005 letter was a FSCO Pension Officer without the direct or delegated authority to issue a Notice of Proposal to Make an Order triggering hearing rights. This is consistent with FSCO’s *Delegation Policy (FSCO Number 61)* effective on and after May 13, 2003, which sets out the powers delegated by the Superintendent to FSCO staff. That Delegation Policy does not delegate to Pension Officers the authority to issue a Notice of Proposal to Make an Order. Such powers are therefore reserved exclusively to the Superintendent.

FSCO’s March 17, 2005 letter is similar to the letter at issue in the Tribunal’s decision in *Horgan v. Ontario (Superintendent of Financial Services)*, (2000) 26 C.C.P.B. 237 (“*Horgan*”). In *Horgan*, the Tribunal determined that it did not have the jurisdiction to hold a hearing in respect of a letter issued by a Pension Officer because the Pension Officer did not have the statutory authority (delegated or otherwise) to issue a decision on behalf of the Superintendent.

Therefore, the March 17, 2005 letter is not a decision of the Superintendent triggering hearing rights because the Pension Officer who issued the letter did not possess the authority to issue a Notice of Proposal to Make an Order on behalf of the Superintendent.

The NOP issued on September 13, 2005 was, however, clearly a decision of the Superintendent and it triggered explicit hearing rights under the Act that were exercised by the Applicants within the prescribed 30 day time period. Accordingly, we find that the Tribunal has jurisdiction to hold this hearing.

## 2. *Adjournment of the Hearing*

IPF Canada also submits that this hearing should be adjourned pending the Superintendent’s decision on whether or not to approve the Report filed in respect of the Partial Wind Up. In essence, the IPF Canada argues that the Superintendent must do “first things first”. Since the Partial Wind Up request and the Report were filed (in 2000 and 2002 respectively) well prior to the date of the Applicants’ request for an asset transfer from the IPF Canada Plan to the CMPT Plan (first made in 2004), the IPF Canada argues that the Report must be fully dealt with prior to the Applicants’ asset transfer request.

In support of its position, IPF Canada relies on *Huus v. Ontario (Superintendent of Pensions)*, [2000] O.J. No. 2066 (Div. Ct.); aff’d [2002] O.J. No. 524 (C.A.) (“*Huus*”), to argue that because the Partial Wind Up comes both logically and temporally before the asset transfer request, the

issue of the contents of the Report must be resolved before the asset transfer request. In *Huus* the court held that the status of a partial wind up request which predated an asset transfer should have been resolved before the asset transfer was approved by the Superintendent. For these reasons, the IPF Canada requests that the present hearing be adjourned until after the Superintendent has decided whether or not to approve the Report (and presumably until after all rights of appeal from that decision have been exhausted).

The Applicants opposed the adjournment request, relying extensively on the fact that IPF Canada's Report has not yet been approved by the Superintendent. They assert that IPF Canada has not been able to get the Report approved in over five years and urged us to accept that there is no basis to believe that IPF Canada can ever do so.

The Superintendent supports the position of the IPF Canada in the main proceeding, but opposed its adjournment request. Both the Superintendent and the IPF Canada agree that the decision to declare the Partial Wind Up is a separate matter from the approval of the Report. Both agreed that the Superintendent has no jurisdiction to revoke or rescind a decision by the IPF Canada to partially wind up the IPF Canada Plan, and both take the position that the Superintendent's NOP (refusing to order the requested asset transfer) is valid whether or not the Report is approved as filed.

Section 68 of the Act allows the administrator of a multi-employer pension plan to voluntarily wind up the plan in whole or in part. Section 69 allows the Superintendent to order the full or partial wind up of a plan under certain prescribed conditions.

Whether the plan is wound up voluntarily or by order of the Superintendent, the administrator of the plan is required to file a wind up report under subsection 70(1) of the Act. This report must be approved by the Superintendent before any payments may be made out of the pension fund according to subsection 70(2). Under section 70(5), "the Superintendent may refuse to approve a wind up report that does not meet the requirements of this Act and the regulations or that does not protect the interests of the members and former members of the pension plan." The Superintendent's decision to approve or not approve a wind up report is subject to the right to request a hearing before the Tribunal.

In this case, the Superintendent has considered and made a formal decision on the asset transfer request made by the Applicants. That decision is contained in the NOP. The fundamental issue to be addressed in the main proceeding before this Tribunal and arising from the NOP is whether the Partial Wind Up can occur or if the Applicants are entitled to an asset transfer under the Act. The Superintendent's approval of the Report is a separate matter, albeit related to the Partial Wind Up.

In asking the Tribunal to adjourn this proceeding pending approval of the Report, the IPF Canada is asking us to assume that the Partial Wind Up will occur or at least defer that issue until another day, while the parties focus on issues related to the content of the Report. With respect, that is "putting the cart before the horse". The Superintendent cannot be asked to approve the contents of the Report without knowing which members are included in the Partial Wind Up—an issue which can only be resolved after the fundamental issue (of Partial Wind Up versus asset transfer) is decided.

Without deciding whether the IPF Canada's arguments on the substantive issue (based on *Huus*) ultimately have merit, we do not believe that it is necessary to determine the fundamental issue of Partial Wind Up versus asset transfer at this (preliminary) stage of this hearing. Leaving aside the merits of the parties' submissions on the issue of whether the Superintendent must deal with the Partial Wind Up request prior to the asset transfer request and the NOP, we are of the view that the interests of the parties and the affected plan members would be best served if these arguments are made in the Tribunal's hearing of this matter, after the parties have had an opportunity to gather all relevant evidence and present that to the Tribunal together with their full legal arguments on the issue. We have heard no evidence of the effect which the requested asset transfer or Partial Wind Up will have on the members of the IPF Canada Plan. Without that evidence, we are not willing to adjourn this proceeding, which would delay the resolution of the fundamental issue even further, and perhaps render this proceeding moot and the Applicants without a remedy.

In this case, the interests of economy and efficiency do not support the adjournment request. It is more sensible for the Tribunal to determine the fundamental issue of whether an asset transfer or Partial Wind Up should occur in the main hearing of this matter, and not on a preliminary motion based on limited evidence and without the benefit of full legal argument. This issue is squarely before the Tribunal in this proceeding and will have to be dealt with in some manner before the Report, which is a separate matter, can be finalized.

#### **D. DISPOSITION**

Accordingly, we dismiss the motion of the Respondent inviting us to decline to proceed further with this matter.

The Registrar will contact the parties to set up a continuation of the pre-hearing conference to address the scheduling of the hearing and other outstanding procedural matters.

DATED at Toronto, Ontario this 24<sup>th</sup> day of April, 2007.

"Paul Litner"

Paul W. Litner

Member of the Tribunal and Chair of the Panel

"Heather Gavin"

Heather Gavin

Member of the Tribunal and of the Panel

"David Short"

David Short

Member of the Tribunal and of the Panel