

FINANCIAL SERVICE 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 Notice of Proposal by the Superintendent of Financial Services dated April 12, 2006 regarding the Participating Co-operatives of Ontario Trusteed Revised Pension Plan, Registration Number 0345736 (“Plan”), as amended;

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

BETWEEN:

**GAY LEA FOODS CO-OPERATIVE LIMITED,
COCHRANE FARMERS CO-OPERATIVE, GREEN LEA AG CENTER INC.,
HURON BAY CO-OPERATIVE INC., INLAND CO-OPERATIVE INC.,
LUCKNOW DISTRICT CO-OPERATIVE INC.,
MADOC CO-OPERATIVE ASSOCIATION,
MANITOULIN LIVESTOCK CO-OPERATIVE,
NORTH WELLINGTON CO-OPERATIVE SERVICES INC.,
ONTARIO FEDERATION OF AGRICULTURE,
ORFORD CO-OPERATIVE LTD.,
SIMCOE DISTRICT CO-OPERATIVE SERVICES,
SUNDERLAND CO-OPERATIVE INC.,
WARKWORTH CO-OPERATIVE SERVICES,
WATERLOO-OXFORD CO-OPERATIVE INC., CO-OPÉRATIVE RÉGIONALE DE
NIPISSING-SUDBURY LIMITED, AND
THE BOARD OF TRUSTEES OF THE PARTICIPATING CO-OPERATIVES OF
ONTARIO TRUSTEED REVISED PENSION PLAN**

Applicants

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES
(the “Superintendent”)**

Respondent

- and -

**JON LAZARUS, TOM PERKES, REG CRESSMAN, DON HUFF,
BRUCE CHAMBERS AND DON KABBES
(the “Named Plan Members”)**

- and -

GLENCOE COUNTRY DEPOT

BEFORE:

Elizabeth Shilton
Member of the Tribunal and Chair of the Panel

Heather Gavin
Member of the Tribunal and of the Panel

Ralph Scane
Member of the Tribunal and of the Panel

APPEARANCES:

For Morneau Sobeco Limited Partnership
Bethune Whiston and others

For the Superintendent of Financial Services
Mark Bailey

For the Named Plan Members
Nicole Brown

Hearing: March 26, 2009

DECISION

On April 11, 2008, the Tribunal issued an order (the “Original Order”) in this matter. That order was issued on consent of all parties after lengthy and complex negotiations involving both this Tribunal proceeding and a related Class Action. With respect to the Tribunal proceeding, those negotiations resulted in detailed Minutes of Settlement, which are described in the preamble to the Order as settling “all matters in issues in this proceeding”. The Original Order was for all intents and purposes a final order, with the exception that under paragraphs 7 and 22, the text of which will be set out below, the Tribunal remains seized of certain limited issues in respect of implementation.

On March 16, 2009, Morneau Sobeco Limited Partnership (the “Implementing Administrator”), which had not been a party to the proceedings at the time of the Original Order, filed a Notice of Motion seeking to be granted full party status, and seeking certain other relief including an order amending paragraph 22 of the Original Order. That request was subsequently revised, and instead the following order was sought:

.....that in interpreting and administering the provisions of paragraph 22 of the Initial Order, the Implementing Administrator shall be deemed to be in compliance with the Initial Order, and the Claims Bar Procedure will be effective to bar any and all Plan Member claims made subsequent to the Claims Bar Date set out in paragraph 22 regardless of whether the Plan Member may have received the Member Profile Statement and other information distributed by the Implementing Administrator or not, provided that:

- a) Subject to paragraphs c) and d) hereof, the Member Profile Statements contain the information identified in paragraph 22 of the Initial Order to the extent that such information is reasonably available to the Implementing Administrator;
- b) The Member Profile Statements and accompanying documentation contain notice that a copy of the Revised Windup report will be available upon request subsequent to the Claims Bar process, once it has been approved by the Superintendent;
- c) In the case of deceased Members where there is no continuing benefit payable, the Member Profile Statements contain, where reasonably available, the date of retirement, the amount and form of pension elected at retirement, the date of the original Member's death, the survivor's pension commencement date and amount, if applicable, the amounts at the reduced 50% funded level effective on the April 30, 2003 payment and at the 67.3% revised funded level effective on the July 31, 2008 payment, if applicable, and the survivor's date of death, if applicable;
- d) In the case of deceased Members where there is no continuing benefit payable, the Member Profile Statement is distributed where the Implementing Administrator has valid mailing address information for the estate representative in the electronic records it has available to it;
- e) Subject to paragraph d) hereof, the Implementing Administrator has sent out a Member Profile Statement to the last known address of the Plan Member or his or her representative, where such address appears to be valid and is reasonably available to the Implementing Administrator;
- f) The Implementing Administrator has requested, in writing, from the Members to whom it sends Member Profile Statements, contact information for those unlocated Members the Implementing Administrator is aware of; and
- g) Prior to the distribution of the assets in the Plan, the Implementing Administrator has conducted a search through the Human Resource Development Canada National Search Unit for any remaining Members who have been identified but for whom the Implementing Administrator has been unable to locate a valid address using other means; and
- h) The Revised Windup Report prepared subsequent to the Claims Bar process, as approved by the Superintendent, reflects the benefit entitlements of Plan Members, either as initially set out in the Member Profile Statements (or in accordance with the information available to the Implementing Administrator as at the Claims Bar Date where a Member Profile Statement is not formally distributed), or, where a claim was made by a Plan Member prior to the Claims Bar Date, as revised in accordance with the resolution of the claim informally or by expedited adjudication.

This request was described by counsel for the Implementing Administrator as “clarifying what is required in order to comply with the April 11, 2008 Order in the administration of the wind up of the Plan.” Counsel for the Superintendent supported the motion. Counsel for the Named Plan Members took no formal position on the outcome of the motion, although she participated in argument.

While we have not granted the Implementing Administrator’s request in precisely the form sought, we have made an order pursuant to paragraph 7 of the Original Order which substantially resolves the implementation problems brought to our attention in this motion. Our reasons for issuing this order are as follows.

1. Party Status

An application for full party status is, to say the least, somewhat novel at this stage of the proceeding. The Tribunal’s Rules of Practice and Procedure (Rule 38) contemplate that a non-party who seeks to become a party will apply for party status prior to any prehearing conference in the matter, or in accordance with the terms of the Notice of Hearing. In this case, the Notice of Hearing required applicants for party status to file a written application before March 7, 2008, and advised that such applications would be dealt with at a pre-hearing conference on March 17, 2008. It is evident that this deadline had long passed by the time this application was filed. Even more material, of course, is the fact that the hearing date has come and gone, and the matter has effectively been disposed of except for the matters of implementation contemplated by paragraphs 7 and 22 of the Original Order.

It is important to note that at the time of the Original Order, the Implementing Administrator had not yet been appointed. The settlement contemplated that once appeal dates had expired, the Trustees of the Plan would resign, and the Superintendent would appoint an Implementing Administrator to wind up the plan in accordance with the terms of the settlement. On May 26, 2008 Morneau Sobeco was appointed Implementing Administrator and is now responsible for implementing the settlement. The Implementing Administrator seeks status now because various issues have arisen in the course of implementation which makes it advisable to approach the Tribunal and further such issues may arise.

Paragraph 7 of the Original Order provides as follows:

The Tribunal shall remain seized of all issues respecting the implementation of the Minutes of Settlement as reflected in this Order, and shall to the extent necessary adjudicate any disputes that may arise, including, but not limited to, disputes relating to Top-up Amounts as defined below. For greater certainty, the Tribunal can make orders regarding the amount and timing of payments in adjudicating such disputes.

Paragraph 22, which is set out in full in Part 3, below, provides recourse to a single Member of the Tribunal for the adjudication of disputes with respect to disputed claims.

Under the unique circumstances of this case, we are prepared to waive any time limits that may be applicable to this application for party status. We are persuaded that with

respect to the issues that may still arise under paragraphs 7 and 22, the Implementing Administrator clearly meets the legal tests for party status, and it has made this application at the first reasonable opportunity. In view of the fact that these issues are the only ones that have not already been disposed of by the Original Order, however, we are not prepared at this time to grant full party status in the matter. We issued an oral ruling at the hearing granting party status to the Implementing Administrator for the purpose of issues arising pursuant to paragraphs 7 and 22 of the Original Order, without prejudice to its right to renew an application for broader party status should that ever become necessary, and we now confirm that ruling.

2. The Service Issue

We have been asked to make an order confirming the adequacy of service of the motion materials. We are advised that the Implementing Administrator served all parties, either through counsel where counsel was still retained, or through their designated representatives, with two exceptions: the Board of Trustees, who have now resigned pursuant to the terms of the settlement, and Glencoe Country Depot, which had expressly indicated that it did not wish to receive any further materials. We are satisfied under the circumstances that service was adequate.

3. The Merits of the Motion

As noted above, the Original Order was issued on April 11, 2008. Although the Tribunal's Rules contemplate applications for review of either interim or final orders (Rule 48), no such application has been made. The Implementing Administrator's initial motion sought an order amending the Initial Order, but that request was subsequently withdrawn in light of the fact that the Original Order is intertwined with the orders made in the Class Action proceeding in ways that might be difficult to untangle. Because of the potential that changes to the Original Order might raise expensive and time-consuming complications and require adjustments to the Class Action order as well, all parties urged upon us the desirability of resolving the implementation problems that have now arisen pursuant to terms of the Original Order, and in particular pursuant to paragraph 7 of that Order.

Before examining the scope of paragraph 7, it is important to understand the factual context underlying the motion. The problems that have arisen involve the implementation of the Claims Bar Procedure, set out in paragraph 22 of the Original Order as follows:

Subject to the claims procedure set out in this paragraph, no Member shall have any claim to benefit payments from the Plan except as set out in the Revised Windup Report and the Member Profile Statements as defined below. Any Member who believes that s/he has a claim to benefits from the Plan that is not reflected in the Revised Windup Report or Member Profile Statements, or who believes that a Member Profile Statement is inaccurate or incomplete (including any inaccuracy relating to Top-up Payments) must notify the Implementing Administrator in writing no later than 104 days following the date on which the Member Profile Statements are distributed ("Claims Bar Date"). Claims made to the Implementing Administrator on or before the Claims Bar Date will to the extent possible be resolved informally by the Implementing Administrator and other Parties, as applicable. If such claims

cannot be resolved, any party or the affected Member(s) may bring them forward for expedited adjudication by a single member of the Tribunal. The Superintendent shall direct, as a condition of the appointment of the Implementing Administrator, that the Implementing Administrator shall distribute statements as soon as reasonably practicable, in a form to be approved by the Superintendent (“Member Profile Statements”), which shall include the following information:

- a. The date of birth, date of entry into the Plan, length of credited service, accumulated required member contributions with interest, and relevant earnings history of each Member entitled to benefits;
- b. The name of the Plan and its registration number, the wind up date and notice that a copy of the Revised Windup Report is available upon request;
- c. For each retired Member, the date of pension commencement, an estimate of his/her monthly pension amount, adjusted in accordance with the Minutes of Settlement and this Order under the Best Estimate scenario, marital status at the date of pension commencement, name and date of birth of spouse (if any), and the spousal pension amount;
- d. For each Member entitled to elect a commuted value of his/her benefits, an estimate of the commuted value of each such Member’s entitlement, adjusted in accordance with the Minutes of Settlement and this Order under the Best Estimate scenario;
- e. The Top-up Amounts received by the Member up to three months after the Closing Date; and
- f. A description of this Claims Bar Procedure.

In the course of its efforts to implement this provision, the Implementing Administrator has identified the following difficulties:

- a. Paragraph 22 appears to contemplate that the Revised Windup Report will be available at the same time as the Member Profile Statements are being sent out. Paragraph 22(b) requires that Members be advised that the Revised Windup Report is available upon request. In fact, the Revised Windup Report will not and cannot be prepared until after the Member Profile Statements are distributed, and after any challenges to the calculations shown on those statements are dealt with.
- b. Paragraph 22 appears to contemplate that members could derive useful information about their personal claims (and perhaps the claims of other members) from the Revised Windup Report. In fact, privacy legislation requires that any such personal information be deleted from the report before individual Members could inspect it.
- c. Paragraph 22 contemplates that the Member Profile Statements of all Members will contain certain specific listed information. As a result of incomplete data, some of that information is not currently available for some members. While the Implementing Administrator has made and is continuing to make diligent efforts to gather more information, if it is required to wait until all efforts are exhausted there will be substantial delays affecting all Members. Furthermore, it is likely that despite best efforts, information will continue to be missing for some Members.
- d. Paragraph 22 contemplates distribution of Member Profile Statements to all Members. While the Implementing Administrator has addresses on file for most

Members, it is aware that some of these addresses are not current, and it expects that the mailing of Member Profile Statements will identify additional addresses that are no longer current.

Counsel frankly acknowledges that paragraph 22 could have been better drafted; the issues involved here could have been foreseen at the time the order was drawn up. Hindsight is perfect, of course, and we must deal with the situation as we find it. The Implementing Administrator is seeking assistance in determining an appropriate course of action in view of the practical reality that although paragraph 22 cannot be complied with *strictu sensu*, it is critical to the success of the settlement that the Claims Bar Procedure be effective.

The Claims Bar procedure was an important term of the settlement. In the usual wind up situation, there is no claims bar process. Instead, an amount is held in reserve by the plan administrator as insurance against the possibility that claims may emerge after the distribution of funds has taken place. Reserves are sometimes held back for years before distribution. In this case, because many plan Members were already retired on pension and because they were already getting significantly less than 100% of their plan entitlements, the parties settled on the basis that there would be no reserve held back (see paragraph 5 of the Original Order). Instead, there would be a Claims Bar process which would ensure that all claims would be dealt with in a timely fashion and there could be no late-emerging claims.

When negotiating this Claims Bar procedure, the parties also negotiated extensive procedures to ensure that to the extent possible, all those who might have claims under the plan would be fully aware of the terms of the settlement. Extensive (and expensive) steps were taken to make and maintain contact with the over 2500 plan members who might have any claims against the plan, and ensure that they had notice of both the Tribunal and related Class Action proceedings. Detailed court and tribunal-approved Notices of Hearing were sent directly to the plan Members for whom addresses were available. In addition, notices were published in thirteen different national and local newspapers prior to the Tribunal and Class Action hearings, advising of the proceedings and indicating that all members for whom contact information was available would receive personal notices in the mail. The notice advised Members who did not receive personal notices to contact the law firm of Koskie Minsky. The consequences of failure to do so were clearly set out: the notice advised that “if you fail to do so, you will not receive important letters by mail, you will not share in the Proposed Settlement and you will not be able to pursue your rights in these matters in the future.”

The implementation difficulties identified by the Implementing Administrator have now jeopardized the efficiency of the Claims Bar process and introduced an element of uncertainty into that process which has at least the potential to cause it to fail, and will certainly impede its smooth and timely implementation. Plan members are aging, and we are advised that several plan members have already died without receiving the pension adjustments to which the settlement entitles them. We are urged by all parties to assist, if we can, in moving the process along. The question facing the Tribunal on this motion is whether the wording of paragraph 7 is sufficiently flexible to allow us to do so.

It is clear that if the issues raised by the Implementing Administrator arose in the context of an individual dispute, we would be forced to address them. The question is whether we can address them before any individual dispute crystallizes. In our view, the wording of paragraph 7 is broad enough to permit us to do so. We are satisfied that in light of the language of the Original Order, the Minutes of Settlement, and the practical realities of this situation, paragraph 7 contemplates that the Tribunal will play a continuing, if limited, role not just in adjudicating disputes but also in providing, in the words of Superintendent's counsel, guidance and direction to the Implementing Administrator in implementation matters.

What the Implementing Administrator is seeking in this motion is guidance and direction in implementing the Claims Bar procedure in light of the identified difficulties. It seeks clarification that it will be acting appropriately if it complies with paragraph 22 of the Original Order in the only way possible under the circumstances: by taking reasonable and diligent steps, based on the tools at its disposal, to complete the Member Profile Statements based on information reasonably available, by distributing them to those Members and their representatives for whom contact information is reasonably available, within the timeframe contemplated by the Original Order and Minutes of Settlement, and by advising members that the Revised Windup Report cannot be made available until it has been completed, which will not be until after the Claims Bar process is complete. It seeks a ruling that if it complies in this way, the Claims Bar will be effective against all Members, as provided in paragraph 22.

We are satisfied that if we were adjudicating a dispute under paragraph 7 in response to a complaint of non-compliance based on these facts, we would dismiss that complaint. We are persuaded that a broad and practical interpretation of paragraph 22 best reflects the clear intention of the parties that the settlement be implemented expeditiously, fairly and with due regard to the need for certainty in light of the lack of a claims reserve. We are also persuaded that there will be no prejudice whatsoever to the vast majority of members who can be contacted but for whom information may merely be incomplete, since they can provide additional information, and can challenge the Implementing Administrator's calculations if they chose to do so. For those relatively few Members who cannot be contacted despite best efforts to do so, we are advised that they will not lose their entitlements. The Claims Bar means that they may lose the right to challenge the calculations. The Implementing Administrator has assured us, however, that if any group-based challenges affecting such members are successfully brought forward under paragraph 7 or 22, they will be given the benefit of any adjustments granted to the group. All Members have had ample opportunity to come forward, and these members will also have a further opportunity to come forward until the Claims Bar date. In view of the painstaking steps the parties to the settlement and subsequently the Implementing Administrator have taken to bring this matter to their attention, we are satisfied that there is no injustice either to the equities or to the language of paragraph 22 by applying the Claims Bar to their situations as well as to those of all other Members.

We are satisfied, therefore, that the course of action proposed by the Implementing Administrator complies with paragraph 22.

4. ORDER GRANTED

Accordingly, we order that:

1. Service of the Motion Record is adequate and that no further service is required ;
2. The Implementing Administrator is granted party status for the purpose of issues arising under paragraph 7 and 22 of the Original Order;
3. The Implementing Administrator shall interpret and apply the provisions of paragraph 22 of the Initial Order in accordance with these reasons. For greater certainty, the Implementing Administrator shall:
 - a) subject to paragraphs c) and d) hereof, distribute Member Profile Statements containing the information identified in paragraph 22 of the Original Order to the extent that such information is reasonably available to the Implementing Administrator;
 - b) include in the Member Profile Statements and accompanying documentation a notice advising that a copy of the Revised Windup report will be available upon request subsequent to the Claims Bar process, once it has been approved by the Superintendent;
 - c) in the case of deceased Members where there is no continuing benefit payable, include in the Member Profile Statements such information as may be reasonably available, including the date of retirement, the amount and form of pension elected at retirement, the date of the original Member's death, the survivor's pension commencement date and amount, if applicable, the amounts at the reduced 50% funded level effective on the April 30, 2003 payment and at the 67.3% revised funded level effective on the July 31, 2008 payment, if applicable, and the survivor's date of death, if applicable;
 - d) distribute the Member Profile Statements to the last known address of the Plan Member or his or her representative, and in the case of deceased Members where there is no continuing benefit payable and the information is available, to the representative of the deceased member's estate.
 - e) request, in writing, from the Members to whom it sends Member Profile Statements, contact information for those unlocated Members the Implementing Administrator is aware of; and
 - f) as soon as practicable, and in any event prior to the distribution of the assets in the Plan, conduct a search through the Human Resource Development Canada National Search Unit for any remaining Members who have been identified but for whom the Implementing Administrator has been unable to locate a valid address using other means; and

- g) prepare, subsequent to the Claims Bar process, a Revised Windup Report as approved by the Superintendent, which reflects the benefit entitlements of Plan Members, either as initially set out in the Member Profile Statements (or in accordance with the information available to the Implementing Administrator as at the Claims Bar Date where a Member Profile Statement is not formally distributed), or, where a claim was made by a Plan Member prior to the Claims Bar Date, as revised in accordance with the resolution of the claim informally or by expedited adjudication.

DATED at Toronto, Ontario, this 2nd day of April, 2009.

"Elizabeth Shilton"
Elizabeth Shilton
Member of the Tribunal and Chair of the Panel

"Heather Gavin"
Heather Gavin
Member of the Tribunal and of the Panel

"Ralph Scane"
Ralph Scane
Member of the Tribunal and of the Panel