

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 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 (the “Plan”);

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**

- and -

GLENCOE COUNTRY DEPOT

- and -

**MORNEAU SOBECO LIMITED PARTNERSHIP, IN ITS CAPACITY AS IMPLEMENTING
ADMINISTRATOR OF THE MINUTES OF SETTLEMENT APPROVED UNDER DECISION
NO. P0275-2006-2 AND WINDUP OF THE PLAN
(the “Implementing Administrator”)**

Date of Hearing: March 25, 2010

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:

Bethune Whiston for the Implementing Administrator
Mark Bailey for the Superintendent
Andrew Lokan for Gay Lea Foods Cooperative Limited
Donald Huff
Bruce Chambers

DECISION

This case has arisen in the course of implementing the settlement in the above-styled matter, a settlement reflected in an Order of this Tribunal dated April 11, 2008 (the “Original Order”). This settlement also settled a related class proceeding, and was approved by order of the Ontario Superior Court of Justice dated April 17, 2008. The settlement, which was reached after lengthy and arduous negotiations facilitated by a mediator appointed by the provincial government, compromised novel and important legal issues, and resulted in pension entitlements being reduced to a fraction (yet to be finally determined, but expected at the time of settlement to fall within a range of 68.2% - 72.8%) of what the pension plan members and former members had expected to receive under the plan.

The Original Order provided for the appointment of an Implementing Administrator, and provided also that the Tribunal would remain seized of issues respecting the implementation of the settlement. On application by Morneau Sobeco (the “Implementing Administrator”) the Tribunal, by order of April 2, 2009, gave the Implementing Administrator limited party status for

purposes of addressing implementation issues arising under the Original Order. In our April 2, 2009 decision, the Tribunal discussed the nature of its own role in the implementation of the settlement pursuant to the Original Order. We do not repeat that analysis here. Suffice it to say that the Tribunal has a limited but continuing role not only in adjudicating specific disputes under the Claims Bar Procedure established by the settlement, but also in providing guidance and direction to the Implementing Administrator.

The Implementing Administrator has now sought direction with respect to two issues:

- (a) whether the Plan, as modified by the Original Order (and in particular paragraphs 5 and 17 thereof), requires the Implementing Administrator to provide excess contribution benefits to the deferred vested members, or overrides the *Pension Benefits Act, R.S.O. 1990, c. P.8* (the “PBA”) rules with respect to the provision of excess contribution benefits for deferred vested members; and
- (b) whether non-commutable deferred pensions with no option for portability or commutable pensions should be purchased for, (i) members who are unlocated at the date of settlement, and (ii) members that do not respond to communications from the Implementing Administrator, or alternatively, should the Implementing Administrator retain monies for persons under age 61 and purchase non-commutable pensions for those over age 60.

With respect to these issues, we have determined:

- (a) The terms of the settlement do not provide excess contribution benefits to deferred vested members, and accordingly the Implementing Administrator should not provide them; and
- (b) Non-commutable deferred pensions (annuities) with no portability should be purchased for members who are unlocated or who do not respond to the Implementing Administrator’s request for an election.

We provide reasons for our decision below.

Issue (a): Excess Contributions

In our approach to this issue, it is necessary first to consider the key terms of the settlement between the parties. Two provisions of the Original Order are relevant to this issue. The first is paragraph 17, which summarizes member entitlements under the settlement:

Upon completion of the Windup, Members will receive a pension, deferred pension or other benefit in an amount determined in accordance with the Minutes of Settlement and this Order and otherwise in accordance with the terms of the Act. Retired Members’ pensions will be adjusted retroactive to

March 31, 2003 to take into account the Plan's Revised Funded Ratio and any interim payments that they have received from the Plan.

This paragraph makes it clear that the wind up of the Plan will be governed by the Minutes of Settlement and the Original Order (which are, in substance, the same). If the Minutes and Original Order do not speak to the matter, then the provisions of the *PBA* will govern. Paragraph 5 provides additional direction to the Implementing Administrator with respect to the mechanics of implementation:

The Superintendent shall, as a condition of the appointment of the Implementing Administrator, require and the Tribunal hereby orders: (i) that the Implementing Administrator hold no contingency reserve in relation to the Windup of the Plan; and (ii) that the implementing Administrator shall prepare and file with the Superintendent a revised windup report ("Revised Windup Report") which shall be based upon the 2003 Windup Report but revised in order to reflect the terms of the Minutes of Settlement and this Order, including the requirement that no contingency reserve will be held and the use of the assumptions and methods as used in the best estimate scenario from the examination report prepared by Morneau Sobeco LLP ("Morneau Report") updated as appropriate to reflect current information ("Best Estimate Assumptions"). The Implementing Administrator shall not be liable or in contravention of the Act to the extent that it administers the Windup in accordance with the Minutes of Settlement and this Order.

Pursuant to Paragraph 5, the basis of the plan wind up is a document identified as the 2003 Wind Up Report ("the Report") which had been prepared by the plan's actuaries. That Report was to be revised by the Implementing Administrator, but only on the basis of the Minutes of Settlement and the Original Order.

The issue with respect to excess contribution benefits which is now before us arose in the following way. Excess contribution benefits flow from what is usually called the "50% rule" under the *PBA*. In respect of service prior to January 1, 1987, section 39(1) of the *PBA* requires that the commuted value of a member's deferred pension must be at least equal to the member's required contributions made over the same period, with interest. The excess, if any, of the contributions with interest over the commuted value of a member's deferred pension should be used to provide an additional deferred pension. In respect of service after January 1, 1987, sections 39(3) and (4) of the *PBA* require that no more than 50% of the commuted value of the deferred pension earned over the same period can be based on members' contributions plus interest. Contributions plus interest in excess of 50% of the commuted value of the deferred pension must be returned to the member as a lump sum payment.

The Report contained the following provisions relevant to the application of the 50% rule:

- Under the heading "Active Members", there is a detailed discussion of a dispute with the Financial Services Commission about whether excess contributions should be subject to any reduction applied to pension benefits in general as a result of under-funding, or

whether the excess contribution benefits generated by the 50% rule should be paid out prior to any reduction in benefits. The authors note that “[i]n this report we have reflected the 50% excess contribution refund in the balance sheet as a liability that is subject to the wind-up funded ratio.”

- There is no similar discussion under the parallel heading “Deferred Vested Members”.
- In Appendix F to the Report, which sets out wind-up calculations for individual members (on a “no-names” basis), the list of Active Members includes a column headed “50% Excess Refund”, and sets out the amount owing (if any) to each individual member under this heading.
- The Appendix F list for Deferred Vested Members contains no similar column, and does not allocate any amount for excess contributions to deferred vested members.

The Implementing Administrator did not turn its mind to the absence of any reference to excess contribution benefits for deferred members when it prepared its Morneau Report pursuant to para. 5 of the Original Order in March of 2008 (nor indeed would it have been expected to do so). It was not until late 2009, in the course of administering the Claims Bar Procedure, that it became aware that deferred vested members had not been credited with excess contribution benefits under the 2003 Windup Report. (We were advised that no deferred individual member has raised the issue). The Implementing Administrator now takes the position that excess contribution benefits are a statutory entitlement, and deferred vested members should receive them as well as active members. The Superintendent agrees with this position. It is vigorously opposed, however, by Gay Lea and by Mr. Huff and Mr. Chambers, who all take the view that this issue was compromised in the settlement. We understand that the cost of these benefits for deferred members would be about 1% of plan assets.

Under the terms of Paragraphs 5 and 17 of the settlement, it is clear that the plan wind up is to be governed by the terms of the Report, except as modified by the settlement; only if the matter is not dealt with by those two documents would we turn to the *PBA*. The first issue to be determined, then, is not whether the *PBA* gives deferred members an entitlement to excess contribution benefits. What we must address first is whether and how the Report addresses that issue. As outlined above, that Report provides for excess contribution benefits for active members only; it does not provide for excess contribution benefits for deferred members.

Both the Implementing Administrator and the Superintendent attempted to persuade us that because it did not *expressly* state that it was *not* giving excess contribution benefits to deferred members, the Report should be treated as silent on the issue, and the *PBA* should govern. We do not agree. While it is certainly silent on the issue of *why* it did not give deferred members excess contribution benefits, the Report is not silent on the issue of whether they got the benefit. They clearly did not. The question was not left open to be dealt with once the Report was completed. As the Implementing Administrator has pointed out to us, that Report sets out its purpose in its Introduction:

The principal purpose of this report is to provide the information required for the approval of the Superintendent of the wind-up and the distribution of the Plan assets. Accordingly, the report is designed to be filed with the Financial Services Commission of Ontario in compliance with the Pension Benefits Act of Ontario and the Regulations, as well as any published policies of FSCO pertaining to plan terminations.

It was intended to be filed with the regulator as a road map for the plan wind up. It was intended to be relied on for that purpose. And as Mr. Lokan has forcefully submitted to us, it *was* relied on, as the bedrock of the settlement between the parties. Paragraph 5 of the Original Order makes this clear; the Implementing Administrator was directed to base its wind up on the Report *except* to the extent that it was modified by the settlement. No party suggests that any other term of the settlement (or the Original Order) addresses this issue. There is no room in this process for the correction of errors (if this was an error) in the Report, except as contemplated by the Claims Bar Procedure. There was certainly no understanding that the Report would stand only to the extent that it complied with the *PBA*; any such assumption would have completely undermined the settlement, the essence of which was that it would compromise disputes about rights and entitlements under the *PBA*.

In our view, under the terms of the settlement, deferred members are not entitled to excess contribution benefits.

Issue (b): Unlocated Members

All parties agree that the settlement and the Original Order are silent on the issue of what steps the Implementing Administrator should take with respect to plan members who cannot be located or who fail to respond to requests from the Implementing Administrator for direction on what they wish done with their pension entitlements. Accordingly, we must deal with this question in accordance with the policies set out in the *Pension Benefits Act*, as those policies can be given effect within the framework of this settlement. As we understand it, this issue affects two groups of plan members, some 50 for whom the plan has been unable to obtain valid addresses, and approximately 450 others who have failed to respond to other mailings, and who, the Implementing Administrator anticipates, may also fail to respond to requests to indicate how they wish their pension benefits to be paid out. As discussed in our April 2, 2009 decision, the Implementing Administrator has already expended considerable time, effort and funds attempting to locate and verify the addresses of all plan members, and does not anticipate that further efforts will yield any additional information. All parties who addressed the issue submitted that the most suitable option under all the circumstances was the purchase of non-commutable annuities for unlocated or unresponsive members. (Gay Lea took no position on this issue). We agree with these submissions.

Section 73(2) of the *PBA* contemplates that on plan wind-up, all active and deferred (i.e. non-retired) plan members will be offered the portability options for their pensions provided by s.42(1), including the options either to annuitize or to transfer the commuted value of their pensions to a locked-in account or another pension plan. Section 72(1) requires members to be provided with wind-up election forms in which they can indicate their selection of portability

option. Section 72(2) provides that a member who is given a wind up benefit election form and who does not make an election within the prescribed period of time (90 days) shall be deemed to have elected a pension. Such a pension would normally be provided through the purchase of a non-commutable annuity.

In the normal course, then, the statute contemplates that plan members who fall into the 'unresponsive' categories will be treated as if they had made a decision not to commute; they would have non-commutable annuities purchased for them. There is no reason why that rule should not be applied in this case to any member who fails to respond to the election form the Implementing Administrator will send them. In our view, unlocated members should be treated in the same way. In a more typical wind-up, members who cannot be located would likely have the value of their benefits retained by the administrator in a reserve fund. That course of action is not possible in this case because the settlement expressly provides that no reserve should be held back. Accordingly, it is necessary to deal with the entitlements of these members once and for all. The purchase of a commutable annuity would leave the option open for these members to commute if and when they finally surface. However, a commutable annuity would cost the plan more to purchase; in what the parties have called a 'zero sum game', this additional cost would be borne by the other pensioners. Peter Peng, the actuary for the Implementing Administrator, has testified that there would be little value added for the unresponsive members flowing from that additional cost: many of them will never show up, and of those that do, based on past experience, most will choose an annuity in any event. The non-commutable annuity is clearly the least costly and most practical option, and is not precluded by the settlement.

This problem would, of course, have been simpler if Ontario had a central depository for the pension benefits of members who cannot be located. The absence of any such depository is an issue which was addressed by the Report of the Ontario Expert Commission on Pensions, and there is an expectation that Ontario may eventually create such a central depository. While such a depository is not likely to be created soon enough to meet the needs of these parties, our order leaves open the possibility that the Implementing Administrator may return to us for further directions on this issue if it becomes necessary and/or desirable in the event of relevant changes to the law.

Order

We order that the Implementing Administrator shall interpret and apply the Original Order in accordance with these reasons, and in particular:

- (a) Shall not provide deferred members with excess contribution benefits; and

- (b) Shall purchase non-commutable annuities for plan members who cannot be located or who do not respond when given the opportunity to elect a portability option, unless in the meantime there are relevant changes to the law that make it necessary or desirable for the Implementing Administrator to return to us for further directions.

DATED at Toronto, Ontario, this 9th day of April, 2010

“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