

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 an expedited adjudication of certain individual benefits claims pursuant to paragraphs 7 and 22 of the Order of the Financial Services Tribunal dated April 11, 2008 (Decision No. P0275-2006-2) (the “Original Order”) issued in this proceeding.

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 (“Superintendent”)

Respondent

- and -

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

- and -

GLENCOE COUNTRY DEPOT

- and -

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

Date of Hearing: April 14-16, 2010

Before:

Elizabeth J. Shilton
Chair of the Panel and Member of the Tribunal

Appearances:

Bethune Whiston for Morneau Sobeco, the Implementing Administrator
Mark Bailey for the Superintendent of Financial Services
Andrew Lokan for Gay Lea Foods Co-operative Limited
Fred Bassett
Cecil Bradley
Bruce Chambers
Donald Huff
Patrick Martin
William Perry
Patrick Sage

DECISION UNDER THE CLAIMS BAR PROCEDURE

This matter arises under the Claims Bar Procedure provided for in the order of this Tribunal (the “Original Order”) issued on April 11, 2008. The Original Order arose as a result of the settlement of the above-styled matter and a related class action. It contemplated that the Participating Co-Operatives Trusteed Pension Plan (“the Plan”) would be wound up in accordance with the terms of the settlement as reflected in that order. Morneau Sobeco was appointed as Implementing Administrator (“IA”) to implement the wind up. Because the Plan was seriously underfunded and the parties wished to put as much money as possible in the hands of Plan members¹ as soon as possible, the Original Order provided that there would be no reserve held back by the IA, as would usually be the case in a plan wind up. Instead, it provided for a Claims Bar Procedure, in which those Plan members who objected to the initial assessment of their entitlements could submit their claims to the IA within a specific time frame, subject to a right of appeal to this Tribunal in the event that the claimant was unsatisfied with the IA’s resolution of the claim. The initial claims process has now been completed at the IA level. Five members have appealed to this Tribunal. This decision addresses those five appeals.

The terms of the Claims Bar Procedure are set out in Paragraph 22 of the Original Order:

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

¹ As used in the Original Order, the term “member” encompasses “all members and former members as defined in the Act and other persons entitled to payment from the Plan on the Windup (collectively, “Members”, which term shall include Retired Members and any spouse or designated beneficiary of the Members whether currently or in the future who may be entitled to benefits from the Plan on the death of a Member)”: para. 15. I have used “member” in the same collective sense in this decision.

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...

Under this procedure, the IA is required to determine individual member entitlements and advise each member of that determination by means of a Member Profile Statement. The IA’s determinations (subject to a right of appeal to this Tribunal) will ultimately be reflected collectively in the Revised Windup Report dealing with the final distribution of the Plan’s assets.² It is clear that appeals are filed on an individual basis. Any individual with a claim against the Plan who did not appeal from the IA’s disposition of that claim in a timely manner is bound by the decision of the IA and has no further claim against the Plan. All five claimants acknowledge that they are pursuing only their own individual claims. Accordingly, the decision which follows addresses the entitlements of these five individuals only; they are not “class claims”, and have no impact on any other Plan member.

In the course of preparing for the hearing, the parties agreed to a timetable for mutual disclosure of documents. While the process was generally cooperative, a disagreement did arise with respect to the disclosure of certain documents, initially on grounds of relevance, and subsequently, with respect to a small number of disputed documents, on the grounds of privilege. This disagreement was addressed in part by conference call on April 7, 2010, and in part by subsequent email correspondence. A provisional disclosure order was made. This order is now confirmed in the following terms:

1. The IA is ordered to disclose documents 2-3, 14-17, 24-25, 30-40, 43-46, 60-67, those portions of document 68 for which privilege is not claimed, and documents 69-72.
2. The IA is not required to disclose documents 26-28, 41-42, and those portions of document 68 for which privilege is claimed.
3. All parties other than the IA shall destroy any copies in their possession or control of documents 41-42.
4. In all cases, document numbers refer to numbers on the list headed “Supplemental Disclosure List of Documents in our possession”, dated April 1, 2010 and provided by the IA to the parties by email.

In making this order, I make no finding with respect to the claim of privilege; once that claim was asserted, it was not challenged by any party.

² See *Gay Lea Foods Co-operative Limited et al v. Superintendent of Financial Services*, FST Decision No. P0275-2006-3, in which the Tribunal addressed the fact that the Revised Windup Report could not be prepared until after the Claims Bar Procedure was completed. The Tribunal ordered the IA to send out the Member Profile Statements, and to advise the members at the same time that the Revised Windup Report was not yet available. It also ordered the IA to prepare the Revised Windup Report after the Claims Bar Procedure is complete.

In the Pre-Hearing Conference Memo dated March 1, 2010, the Tribunal ordered, with the consent of all parties, that documents filed or served in connection with these appeals which contain personal information would be held in confidence and would not form part of the public record. Because there is a public interest in the administration of the *Pension Benefits Act* (“PBA”), the Tribunal is normally reluctant, even on consent, to make confidentiality orders: see *Kernius and Ontario Power Corporation v. Superintendent of Financial Services et al.* FST Decision No. P0303-2008-1. Since this proceeding arises under the Claims Bar Procedure, however, rather than directly under the statute, the Tribunal was persuaded that the privacy interest of the claimants and other Plan members whose personal information might be disclosed in the course of adjudicating these claims outweighed any public interest. In the spirit of that order, it was agreed that the claims would be addressed anonymously. Accordingly, while this decision sets out in some detail the individual facts of the claims, the affected Plan members have been referred to only as Members A-E.

By agreement, the evidence was placed before me in a variety of ways. The core of the evidence was filed in the form of an Agreed Statement of Facts, and a four-volume Agreed Book of Documents. This evidence was supplemented by additional documentary evidence and witness statements filed by various parties, and by the affidavit of Peter Peng, an experienced actuary employed by the IA. Mr. Peng was made available at the hearing, and provided supplementary oral evidence in response to questions from the Tribunal and from other parties. In addition, the claimants provided additional oral evidence without objection in the course of their submissions, and were questioned where necessary by the other parties. In general, the IA took a non-adversarial position that greatly assisted the Tribunal in dealing with these complex issues. All parties were co-operative, well-prepared and presented cogent and helpful submissions.

I have disposed of the individual claims as follows:

Member A: Claim allowed, to the extent that the IA is ordered to apply Method B to the calculation of his entitlement.

Members B, C, D and E: All claims dismissed.

The reasons for my decisions are set out below.

1. BACKGROUND TO THESE PROCEEDINGS

In order to understand the nature of these claims and the legal framework within which they must be resolved, it is necessary to review some of the background to this unfortunate situation. The Plan at issue here provides benefits to the employees of a number of agricultural co-operatives (“co-ops”) in the province. The Plan was originally sponsored by the United Co-operatives of Ontario (“UCO”), although the 1959 Plan text, the earliest Plan text filed in evidence, contemplates that employees of other co-operatives may also become Plan members. The Plan is a defined benefit plan. The current Plan text provides that while the Plan sponsor reserves the right to amend or discontinue the Plan, “[s]ubject to subsection (e) no amendment or discontinuance of the Plan shall reduce the benefits accumulated prior to such amendment or discontinuance”. (A similar provision protecting accrued benefits appears in the Plan text as far back as 1970, and perhaps earlier). Subsection (e) provides that where a participating co-op

leaves the plan at a time when the plan is under-funded, benefits for the “members of that Participating Co-operative” may be “adjusted, in an equitable manner”. In 1994, UCO went bankrupt. The Plan was then formally restructured as a multi-employer plan (“MEPP”), and its assets transferred to a board of trustees constituted under a trust agreement. In accordance with that trust agreement, trustees were appointed or elected by the participating co-ops in accordance with a weighted voting procedure depending on how many members of the plan were employees of each participating co-op. In most cases, trustees were members of senior management of the participating co-ops. Plan members (as distinct from the co-ops that employed them) appear to have played no role in selecting trustees.³

The Plan was in financial difficulties as far back as 1997, and was unable to resolve those difficulties. In 2001 and 2002, the trustees introduced some cost-cutting measures which had serious impact on the pensions and prospective pensions of certain specific members known as “successor members”. In addition, for a number of years prior to the wind up members who left employment covered by the Plan and transferred their pension money out of the Plan (“Transfer Deficiency Members”) received less than 100% of their entitlements because the Plan was under-funded. By the end of March, 2003, it was clear that the Plan would be wound up, and members were so advised. On February 27, 2004 the trustees passed certain Plan amendments (the “2003 Amendments”) which implemented further benefit cuts to specific groups of members effective March 31, 2003, and terminated the Plan effective the same date.

As part of the Plan wind up, the trustees had instructed the Plan actuaries to prepare a wind up report (the “2003 Windup Report” referred to in Paragraph 5 of the Original Order, also known as the “Watson Wyatt Report”). That Report provided among other things for settlement of all member claims at the then-current funded ratio, which at that point was slightly below 50%. I am advised that at this time, all parties were operating on the assumption that the Plan, as a MEPP, was legally entitled to respond to under-funding by cutting benefits. The Plan had been in frequent contact with the Financial Services Commission of Ontario (“FSCO”) on a number of issues relating to its proposed wind up, however, and FSCO was challenging the decisions of the trustees in a number of specific areas. The 2003 Windup Report raised and discussed these areas of dispute, and set out competing positions. The Report, dated February 28, 2004, was filed with the Superintendent of Financial Services (the “Superintendent”) on or about the same date.

The events described above resulted in two separate legal proceedings. The first proceeding was a class action commenced by Statement of Claim filed on February 19, 2003, prior to the 2003 amendments and prior to the formal decision to wind up the Plan. The defendants included the individual trustees, past and present, of the Plan. At the heart of that class action were allegations of negligence, breach of trust and breach of fiduciary duty in connection with the trustees’ administration of the Plan. The second proceeding arose out of a Notice of Proposal (“NOP”) issued by the Superintendent on April 12, 2006, proposing to refuse to approve the 2003 Windup Report. In that NOP, the Superintendent took the position that notwithstanding the Plan’s MEPP status, the Plan was *not* permitted to reduce accrued benefits because the terms of the Plan text precluded any reduction of accrued benefits on wind up. In the NOP, the Superintendent proposed: (i) to refuse to register the 2003 Amendments; (ii) to order the participating co-

³ The legal implications of these facts were a matter of dispute in both the Tribunal and the class action proceedings, and were ultimately settled without adjudication and without admission of liability.

operatives to put sufficient funds into the Plan to pay all Plan benefits; and (iii) to order the Plan to refrain from cutting benefits. The Plan applied for a hearing before this Tribunal to challenge this NOP.

The parties then commenced lengthy and intensive settlement negotiations facilitated by a provincially-appointed mediator. The Ontario Government, which was prepared to make a substantial contribution to the Plan's liabilities if a settlement could be reached, participated in those negotiations. To assist in the negotiations, the Superintendent appointed Morneau Sobeco to prepare an examination report under s.106 of the *Pension Benefits Act* ("PBA"). The purpose of that report was to review the 2003 Windup Report, to attempt to resolve some disputed issues addressed in that report, and to assess the current funding status of the Plan. That report is referred to in Paragraph 5 of the Original Order as the "Morneau Report" (also known as the "s.106 Report"). From the parties' perspective, the Morneau Report was an up-to-date 'reality check' on the Watson Wyatt Report, and an essential tool for them to assess realistically the impact of the additional financial contributions on the table in the settlement negotiations.

The negotiations resulted in a compromise in which most of the participating co-ops made additional contributions to the Plan, accompanied by a significant contribution from the provincial government. Both legal proceedings were ultimately settled within a common framework in which most Plan beneficiaries will get pension payouts which are still not finally determined, but which are expected to fall somewhere between 68.2% and 72.8% of their full entitlements.

As is clear from the above account, the settlement of this matter and the settlement of the class action were intimately intertwined. The Original Order was made expressly "contingent upon the granting of an order, in the form of a judgment, approving the settlement of the Class Action by the Ontario Superior Court of Justice". The Minutes of Settlement, appended as a Schedule to the Original Order, reinforce this link by making the settlement conditional "upon the Plaintiffs to the Class Action and the Named Plan Members, through their solicitors, signing a release in favour of the Settling Employers and the Trustees" (para. 27), and "extinguishing" the liability of the "Settling Employers arising out of any matter at issue or that could be or could have been at issue in the Class Action" (para. 29). In turn, the court order dated April 17, 2008 approving the settlement of the class action ("the "Approval Order) provides that:

... any administrator of the Plan appointed pursuant to section 71 of the *Pension Benefits Act* (the "Implementing Administrator") shall administer the wind up of the Plan in accordance with the Settlement Agreement and the Order of the Financial Services Tribunal, in respect of FST File No. P0275-2006 dated April 11, 2008 (the "FST Order"), and the Implementing Administrator shall be barred from pursuing any claim for overpayments from a retired Class Member that had their monthly pension reduced after retirement. [para. 16]

The Approval Order expressly releases the IA from any liability, provided that it administers the Plan "in good faith in accordance with this Judgment, the Settlement Agreement or the FST Order." The "Settlement Agreement" referred to in the Approval Order is the Agreement settling the class action, a document separate from the Minutes of Settlement which settled the Tribunal proceeding.

2. THE ROLE OF THE IA AND THE ROLE OF THE TRIBUNAL

It is against that background that we must understand the role of the IA and the Tribunal pursuant to Paragraph 22 of the Original Order. Under that paragraph, as discussed above, the IA is assigned the role of determining individual member entitlements. The Tribunal's role is to "adjudicate" claims made by members who dispute the IA's initial determinations. This casts the Tribunal in a role it does not normally play in a plan wind up: the role of direct 'court of appeal' from the determinations of the plan administrator (in this case, the IA).

How is the IA to determine individual entitlements? In an ordinary wind up, an administrator determines individual member entitlements by reference to the plan documents, and to the applicable law. In this case, the IA's task was considerably more complex. The legal proceedings which preceded the Original Order contested both the validity of key Plan documents and the application of the law to those documents. Those disputes were settled between the parties on very specific terms. The IA's role was to implement the wind up in accordance with the terms of that settlement.

For purposes of determining individual member entitlements, the gist of the settlement is reflected in two paragraphs of the Original Order. Paragraph 15 provides as follows:

On the Windup of the Plan, all members and former members as defined in the Act and other persons entitled to a payment from the Plan on the Windup (collectively, "Members", which term shall include Retired Members and any spouse or designated beneficiary of a Member whether currently or in the future who may be entitled to benefits from the Plan on the death of the Member) shall be entitled to payment of the benefits to which they are entitled under the terms of the Plan (after taking into account the effect of the 2003 Amendments), adjusted retroactively to March 31, 2003, and reduced in accordance with the Plan's funded ratio as calculated by the Implementing Administrator in the Revised Windup Report, as it may be subsequently adjusted in accordance with accepted actuarial practice ("Revised Funded Ratio").

Paragraph 17 supplements that paragraph by providing that:

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.

Also relevant is Paragraph 5, which sets out a 'road map' for the IA in carrying out its administrative task:

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.

Under the terms of Paragraph 5, the IA is directed first to the 2003 Windup Report, and then to the terms of the Minutes of Settlement and the Original Order to determine to what extent dispositions made in the Watson Wyatt Report were modified by the settlement. In doing so, the IA is directed to take into account the “assumptions and methods” it used to produce the ‘best estimates’ scenario reflected in the Morneau Report (although the grammar of Paragraph 5 becomes somewhat confusing at the point, and it is not clear whether the relevant “assumptions and methods” are conceptualized as already addressed in the settlement, or whether the Morneau Report is seen as an independent source of guidance for the IA.)

The IA, supported by the Superintendent, argues that in making the entitlement decisions as it has done, it has simply followed that road map. On its face, however, Paragraph 5 does not directly govern individual entitlements. While it is obvious that the parties intended Paragraph 5 to reflect and harmonize with the overall settlement, to the extent that Paragraph 5 may conflict with Paragraphs 15 and 17 of the Original Order, it is those latter paragraphs that would govern entitlements. I hasten to add, however, that I do not find any conflict.

The general contours of the settlement are clear. What is at issue in these claims, however, is not the general contours of the settlement. What is at issue is how the IA applied that settlement in the cases of the specific Plan members who have brought forward these appeals. The claimants take the position that their claims were not properly dealt with under that procedure. The IA argues that in all cases, it simply applied the terms of the settlement.

What is the role of the Tribunal in these circumstances? The parties made submissions about the scope of the Tribunal’s jurisdiction in dealing with these claims. I do not propose to review those submissions in detail. In my view, the Tribunal’s role is quite straightforward. In general terms, the Tribunal’s task is to review the individual cases and determine whether or not the IA properly determined the claimants’ entitlements under the Plan, or whether errors were made. In doing so, the Tribunal is subject to the same constraints as the IA. It is not open to the IA to look behind the terms of the settlement; likewise, it is not open to the Tribunal. It is not open to the IA to determine whether the claimants were fairly dealt with in the settlement; likewise, it is not open to the Tribunal. It is not open to the IA to apply the provisions of the *PBA* to individual claims, unless the provisions of the settlement do not address the matter at issue. Likewise it is not open to the Tribunal to apply the terms of the *PBA* to resolve issues the parties have already settled. In general, the IA’s job was to apply the terms of the Plan, as modified by the settlement. The Tribunal’s role is similar.

I turn now to the claims of the individual member claimants.

2. THE CLAIM OF MEMBER A

Member A was employed since April 1985 with the Ontario Federation of Agriculture (“OFA”), a participating employer in the Plan, and was a Plan member from April 1, 1986 until he terminated his employment with the OFA on October 5, 2001. When he left the OFA, he was offered the usual termination options pursuant to s.42 of the *PBA*. For reasons that are not material here, he delayed making his election; ultimately, in January of 2003, he elected to transfer the commuted value of his pension out of the Plan into a locked-in account (“LIRA”). He was advised by letter of March 26, 2003 that because the Plan was underfunded, he would receive at that time a “settlement” of only 53.3% of the commuted value of his pension. That value was calculated at approximately \$240,000 as at March 27, 2003; 53.3% of that amount was transferred to a LIRA, leaving a balance owing of 46.7% (approximately \$112,000). At issue here is how that additional 46.7% of the commuted value of his pension should have been treated by the IA.

I have emphasized above the individual nature of these claims; they are not “class claims” and the decision here has application only to Member A. Nonetheless, the nature of Member A’s claim cannot be understood without understanding the situation of the Transfer Deficiency Members, a group into which Member A falls. Transfer Deficiency Members met the following criteria: (i) they had terminated their pensionable employment prior to the wind up date; (ii) they had elected to transfer the commuted value of their entitlements out of the Plan; and (iii) only a portion of their commuted values had been transferred out of the Plan because it was underfunded.

The term ‘Transfer Deficiency Member’ is not used in the *PBA*. The terminology is borrowed from Regulation 909 under the *PBA*, which defines “transfer deficiency” as follows:

“transfer deficiency” means that amount by which the commuted value of a benefit determined in accordance with subsection 19(1) exceeds the transfer value of that benefit determined in accordance with subsection 19(2).

Subsections 19(1) and 19(2) of the Regulation have the combined effect of limiting the amount of commuted value that can be transferred out of a Plan to a percentage corresponding with what the regulation describes as the “most recently determined transfer ratio”: roughly equivalent to the current funded level of the Plan. Under s.19(7) of the Regulation, where the full commuted value is not transferred immediately, the balance is required to be transferred within five years after the date of the initial transfer. Since the Plan here had been underfunded for a number of years, some 114 members had commuted their pensions without receiving the full commuted values on transfer. These transfer deficiencies, including that of Member A, were frozen in the Plan by the wind up effective March 31, 2003.

In the normal course, a transfer deficiency would be paid out on wind up by ‘topping up’ the amount a member has already received, either to 100% of his entitlement or, in a plan where benefit cuts are permissible or required due to insolvency, to the final funded ratio of the plan. Here, however, the matter is not so simple. Member A’s rights cannot be determined without

taking into account the settlement, and in particular the impact of the 2003 Amendments, which came into effect after the initial transfer of Member A's commuted value. Specifically at issue is s.2 (d) of those Amendments, which provides as follows:

All early retirement subsidies in respect of deferred vested members and deferred successor deferred members [sic] (including the *Transfer Deficiency Members*) shall be eliminated, except that the pension benefit for such a member shall be unreduced if the member in fact had 35 or more years of service at the date of termination of employment [*emph. and closing bracket added*].

The key issue is what impact, if any, this amendment had on the balance of Member A's commuted value which remained in the Plan at the time of the windup.

The parties have stated this issue as follows:

What was [Member A's] Plan entitlement as of March 31, 2003? Is that entitlement properly described as the:

- (a) Untransferred portion of his commuted value ("CV"), reduced by the wind up funded ratio ["Method A"];
- (b) Untransferred portion of the CV deemed a deferred pension and recalculated to proportionately reflect the 2003 Amendment reduced by the wind up funded ratio ["Method B"]; or
- (c) CV of full pension prior to the January 15, 2003 election recalculated to reflect the 2003 Amendment, reduced by a percentage equal to the wind up funded ratio less the percentage already transferred ["Method C"]?

Member A favours Method A. Under this approach, the 2003 Amendments have no effect on his remaining pension entitlement. It is treated simply as a debt from the plan to the member. The member would receive 67.3% (or whatever turns out to be the final funded ratio) of the amount owed, adjusted for interest owing in the interim. In the alternative, Member A argues in favour of Method B. Under this method, the amount owing is treated as a deferred pension. The 2003 Amendment is applied to this deferred pension to reduce its value by the value of the early retirement subsidies on the portion of the commuted value remaining in the Plan (approximately 40%).⁴ Member A would then receive a payout equal to the remaining 60% of the amount owing, adjusted by the funded ratio of the plan. The IA favours Method C. This method resembles Method B in that the first step is to treat the amount owing to Member A as a deferred pension, and apply the 2003 Amendments to strip out 40% of its value. At that point, however, Method C parts ways with Method B. Instead of applying the final funded ratio to the amount owing, it starts again from the beginning, applying the final funded ratio to the commuted value of Member A's entire pension, *recalculating that commuted value* to remove the value of early retirement subsidies from the entire pension. The starting point for calculating payout to Member A becomes not \$240,000, but 40% less than that. To this newly recalculated amount, the IA takes a 'top up' approach, subtracting what Member A already received on March 27, 2003. However, as an apparent concession to the fact that Member A received his first payment prior to the effective date of the 2003 Amendments, he is 'credited back' the value of the early

⁴ This is an approximate figure calculated on the basis of the data presented in the evidence and used simply for purposes of this discussion.

retirement subsidies received on the first 53.3% of the commuted value (or to put it another way, “the commuted values of the early retirement subsidies on the portion of the deferred pension transferred out to the LIRA would not be used to offset his entitlement at the settlement date” (Submissions of the IA, para.67(c)). Because of the impact of interest calculations applied at different times, it is difficult to illustrate the impact of these three methods by the use of equations. The bottom line, however, is roughly as follows: Method A would yield approximately \$112,000⁵, Method B approximately \$65,000 and Method C approximately \$29,000, after interest is applied.

In support of Method A, Member A argues that the 2003 Amendments had no effect whatsoever on his entitlement from the Plan. As we have seen, the relevant provisions of those Amendments remove early retirement subsidies “in respect of deferred vested members and deferred successor deferred member [sic] (including the Transfer Deficiency Members)”.⁶ Member A argues that by March 31, 2003, the effective date of the Amendments, his pension benefits had already been commuted. Accordingly, he could no longer be characterized as a “deferred vested member”. What the Plan owed him had been converted into a simple debt, no longer carrying with it properties like early retirement subsidies. He acknowledges that this debt, like all payments out of the Plan, will be reduced by the Plan’s funded ratio. But as a matter of interpretation, the 2003 Amendment simply cannot be intelligibly applied to him or to his remaining entitlement in the Plan. He was *not* a deferred vested member at the material time; he no longer had any early retirement subsidies to remove, and accordingly the trustees could not remove them.

At first blush, this is a plausible argument. On March 31, 2003 Member A was certainly no longer in the position of an ordinary deferred vested member. He had irrevocably made his transfer election to take the commuted value. Under no circumstances would he have been entitled to claim a deferred pension if the Plan had continued. The problem with the argument, however, is that the language of s.2(d) of the Amendments does not stop at “deferred vested member”. It is quite specific that it applies also to Transfer Deficiency Members. The term ‘Transfer Deficiency Member’ is not used in the Plan prior to the 2003 Amendments, and is not specifically defined in the Amendment. From its context and its usage in the 2003 Windup Report, however, it is clear that it encompasses Member A and others similarly situated. The drafting of the amendment, which places these members under the broad umbrella of ‘deferred vested members’, may be conceptually inelegant, but there is no mistaking its intention. I find that the 2003 Amendments do apply to Member A.

That conclusion rules out Method A. It does not assist us, however, in choosing between Method B and Method C. As noted above, these two methods take a common approach to the first step in calculating Member A’s entitlement; they agree that the 2003 Amendment strips out the value of the early retirement subsidies from the portion of the commuted value which remains in the Plan, leaving only 60% of the remaining commuted value as the amount still owing to the Member on March 31, 2003, before any adjustment for the final funded ratio. Where the Methods differ is on what happens next. Under Method B, the amount owing should

⁵ The fact that this figure is similar to the transfer deficiency on March 27, 2003 is coincidence; it is arrived at by applying the estimated final funded ratio to that transfer deficiency, and applying interest to October 9, 2009, presumably the date the calculations were done.

⁶ An exception was made for deferred members with 35 years of accumulated service, but Member A did not qualify for this exception.

be treated like any other deferred pension and paid out at the final funded ratio. Under Method C, a much more complex approach is required, in which Member A's entitlements are taken back to the drawing board, the 2003 Amendments are applied to his entire pension entitlement *as if* that calculation had been done on March 31, 2003 instead of March 27, 2003 when it in fact was done, and a portion (but not all) of the amount previously paid to him is deducted from the newly recalculated amount owed.

For sheer consistency of approach, Method B has a clear edge. Under Method B, the 2003 Amendments have the effect of 'deeming' an amount which is technically a transfer deficiency to be a deferred pension. Section 2(d) of the Amendments then "eliminates" the value of early retirement subsidies from that "deferred pension". The resulting amount is then treated like any other deferred pension, and paid out at the funded ratio. Method B recognizes that Member A's pension was actually valued and commuted at the latest on March 27, when 53.3% of that value was transferred to a LIRA: it treats what was done prior to the effective date of the amendment as irrevocably done, but accepts the recharacterization of the remaining portion of the commuted value still on the books of the Plan as a deferred pension instead of a transfer deficiency. If the amount owing to Member A had been left to be dealt with as a transfer deficiency, it would have been appropriate to make further payouts on a 'top up' basis. But by amending the Plan as they have, the trustees have chosen to treat a transfer deficiency as a deferred pension instead. If it is treated as a deferred pension for purposes of stripping it of the value of the early retirement subsidies, logic dictates that it should also be treated as a deferred pension for purposes of payout.

How does Method C work? Like Method B, Method C starts first by applying the 2003 Amendments to the portion of the commuted value remaining in the Plan, and "eliminating" the value of early retirement subsidies on that "deferred pension". However, Method C then pushes those amendments one step further. In effect, Method C applies the 2003 Amendments to the entire pension entitlement, including the portion already removed from the Plan. In my view, those Amendments cannot reasonably be interpreted as having that effect. The Amendments did not come into effect until March 31, 2003. On that date, as Member A has argued, 53.3% of the value of his pension had already left the Plan. To apply the amendments to the portion that had already left the Plan is to give them an effect retroactive to a date *prior* to March 31, 2003. This clearly cannot be done in light of the fact that the amendment has been given an express retroactive date of March 31, 2003. On that date, the Plan still had some purchase on the remaining transfer deficiency – enough purchase, I have found, to "deem" it a deferred pension and reduce it – but it certainly had no further purchase on the amount removed.

To the extent that Method C requires a recalculation of the commuted value of the entire pension, it misapplies the 2003 Amendments. It then compounds its error by taking an inconsistent approach to calculating the payout. It treats the transfer deficiency as a deferred pension for purposes of applying the Amendments to eliminate the value of early retirement subsidies. For purposes of payout, however, it treats the amount owed as a transfer deficiency, and takes a 'top up' approach to payout. Furthermore, it applies the Amendments to the entire pension amount for purposes of (re)calculating a starting point to determine Member A's overall pension entitlement, including the portion already paid out. It then gives partial – but only partial – recognition to the immunity of the portion already paid out by deducting the value of the early retirement subsidies already received by Member A from the amount he has already received

under the top up approach. These inconsistencies, in my view, are fatal to the logic of Method C.

To be fair, the IA did not put a great deal of energy into defending the logic of Method C on its own terms. What it did argue was that Method C was the method the IA was required to use in accordance with paragraph 5 of the Original Order. In other words, the IA argued that Method C flowed inexorably from the 2003 Windup Report as interpreted by the Morneau Report, and therefore any other approach was precluded.

I do not agree. Let us look closely at how the matter of the Transfer Deficiency Members was actually dealt with in those documents. The situation of the Transfer Deficiency Members is extensively discussed in the 2003 Windup Report: see, for example, p.3, 6-7 and Appendix F, under the heading 'Transfer Deficiency Members'. The Report identifies a dispute between the trustees and FSCO with respect to how these members should be treated in the wind up. The trustees argued that these members should not receive any additional payments, since they had already received payments larger than the expected funded ratio of the Plan (at that time, below 50%). It would appear, then, that the trustees did not see the amounts owing as deferred pensions; they were transfer deficiencies, pure and simple, and should be treated as such. FSCO, by contrast, took the position that the transfer deficiencies were deferred vested pensions, and should be paid out on the basis of the final funded ratio on Plan wind up. The Report then states:

In this report we have determined the residual deferred vested pension owing to Transfer Deficiency Members after the partial settlement and calculated the wind-up liability in the same manner as all other deferred vested pensions. However, in the wind-up balance sheet the liability is assumed to be zero in accordance with the view of the Trustees while the commuted value is shown as the liability in accordance with the guidance received from FSCO, for purposes of comparison. If necessary, Transfer Deficiency Members will have similar options as Deferred Vested Members.

There is no discussion of the issue now raised by Member A: the issue of whether and how the 2003 Amendments affected the Transfer Deficiency Members. I am advised that the individual amounts calculated in the Watson Wyatt Report under the heading "Total CV" in Appendix A for Transfer Deficiency Members reflect a calculation which strips early retirement subsidies from the portion of the commuted value remaining in the Plan. For Member A, the amount shown is \$65,343.51 (an amount consistent, perhaps coincidentally, with Method B). However, there is no clue in the Report itself as to the basis for that calculation; it would be apparent only to an actuary. In my view, then, the Watson Wyatt Report is entirely inconclusive on the issue before us.

What about the Morneau Report? On page 5 of that Report, we are advised that with respect to Transfer Deficiency Members, the report reflects the trustees' position (presumably in preference to FSCO's position, although that is not spelled out). There is no analysis of why Morneau made that choice (I was advised that they did so because they were directed to do so by the negotiating parties). The Report does not tell us how Morneau interpreted that position, nor does it tell us how the trustees reconciled a pure "transfer deficiency" position (if that is in fact the gist of their position) with the characterization of transfer deficiencies as deferred pensions in the 2003 Amendments. Like the Watson Wyatt Report, the Morneau Report simply does not address that question. The Morneau Report acknowledges liabilities to the Transfer Deficiency Members, an

acknowledgement consistent with either Method B or Method C. The text of the Report provides no clue as to how those liabilities have been calculated. Once again, I am advised that the figures used in setting out the liabilities owing to individual Transfer Deficiency Members are necessarily based on stripping out the value of the early retirement subsidies from the transfer deficiencies, as they were in the Watson Wyatt Report, an approach consistent with either Method B or Method C. I am further advised that the numbers reflected in the report of assets and liabilities in the Report are consistent only with Method C. There is no way a reader of the report would know this, however; only an actuary who was familiar with the data and the issues could sort this out.

In our decision of April, 9, 2010 on an earlier issue arising in this matter, we found that the Watson Wyatt Report had settled the question of whether deferred members were entitled to credit for excess contributions benefits, leaving no room for the application of the *PBA* to that issue. The basis of that finding was that the 2003 Windup Report had definitively dealt with the matter at issue to the detriment of the deferred members, making it part of the settlement. This is not the situation here. Here, the Watson Wyatt Report expressly left the matter open. The Morneau Report, whatever role it might have been intended to play on issues where it clearly and unequivocally adopts a position, does not provide any clear textual guidance on the issue before us. I have no reason to doubt that Morneau did apply Method C in that report, as it has done again in its capacity as IA. I do not interpret the Original Order, however, as requiring the unquestioning application by the IA or by this Tribunal of every assumption implicit in performing the calculations set out in either the 2003 Windup Report or the Morneau Report. If that were the case, the right to appeal a claims assessment would be an empty right indeed, since the outcome would be pre-determined.

It is not our job to read the entrails of the 2003 Windup Report or the Morneau Report. Our job is to apply the settlement as a whole, as reflected in the Original Order. The issue raised by Member A is not determined either by the Watson Wyatt Report or by the Morneau Report. I am therefore not persuaded that the Original Order requires that this issue be resolved by the application of Method C.

In my view, Method B is the method most consistent with the terms of the 2003 Amendments, and therefore with Paragraphs 15 and 17 of the Original Order. Method B should have been applied in Member A's case.

3. THE CLAIMS OF MEMBERS B, C, D and E

a. Background to the Turnbull-Cooper Issue

I turn now to the issues raised by the other four claimants. These claimants fall into a group known as successor members. The parties have stated the issues in connection with these members as follows

Turnbull Retiree Members [Members E and D]

- (a) Should the Cooper-recommended reduction in [Member E's] pension, which was in pay pursuant to the Turnbull recommendation, be reversed?

- (b) Should the Cooper-recommended reduction in [Member D's] pension, which was in pay pursuant to the Turnbull recommendation, be reversed?

Active Successor Members [Members B and C]

- (a) Should the Cooper-recommended reduction in [Member B's] pension, which was quoted pursuant to the Turnbull recommendation, be reversed?
- (b) Should the Cooper-recommended reduction in [Member C's] pension, which was quoted pursuant to the Turnbull recommendation, be reversed?
- (c) Is the 2003 Amendment effective to reduce the benefit entitlements and in particular to eliminate the special DC benefit (as described in the Implementing Administrator's letters to [Member B and Member C] dated November 12, 2009) in respect of [Member B and Member C]?
- (d) Should Member B's date of hire for "Service" and "Actual", which is identified on file as May 7, 1973, be retroactively revised to January 2, 1969?

The issue with respect to Member B's date of hire has now been resolved between the parties, and these reasons do not address that issue. Member B has, however, raised without objection additional issues with respect to the application of the portions of the 2003 Amendments eliminating the early retirement subsidies to his individual situation.

Members B, C, D and E are successor members under the Plan. They had all been initially employed by UCO, the original plan sponsor. They subsequently became employed by "successor employers" within the meaning of what is now s.80 of the *PBA*. Two of the claimants, Members B and D, became employees of EDS, which began performing data processing services for UCO in 1986. Both of these members made the transition to EDS in 1986. In 1994, Members C and E became employees of Growmark, which took over the business of UCO after that company went bankrupt; in 1996 they too became successor members.⁷ Under the Plan, successor members no longer accumulate new pension credits. However, they continue to be members of the plan as long as they continue to be employed by the successor employer, and to accrue service for purposes of entitlement to certain rights under the plan, including early retirement subsidies. Members B and C were still active successor members of the Plan on the date of wind up. Members D and E had already taken retirement prior to the effective date of the wind up.

The Plan text from 1992 to date spells out a special method of calculating pension benefits for successor members.⁸ Section 18 provides:

The following conditions shall apply to the Members of the Plan who are Employees of a Co-operative which sells, assigns or otherwise disposes of all or part of its operation and who become employees of the entity acquiring all or part of its operation and who become employees of the entity acquiring all or part of the operation of a Co-operative:

...

⁷ Members C and E were covered by a collective agreement; contributions to the Plan continued to be made on their behalf after the transition until the collective agreement expired, at which time they became successor members.

⁸ These provisions continued virtually unchanged in the Plan text until the 2003 Amendments.

(b) If the entity acquiring all or part of the operations of such a Co-operative maintains a registered pension plan for its employees and if the entity does not assume liability for all benefits accrued under the Plan to the date the entity acquires all or part of the operation of such a Co-operative, then:

- (i) each Member affected shall not be considered to have terminated employment with the Co-operative employing such Member,
- (ii) each Member so affected, shall be credited with the greater of 2 times his regular contributions to the Plan, With Interest and the Commuted Value of the Member's accrued regular pension, plus the accumulated value of any additional contributions, where applicable,
- (iii) the total amount credited to each Member shall then be used to provide such Members with a paid-up pension to commence at their Normal Retirement Dates. Paid-up pensions will be calculated on the basis of the actuarial assumptions adopted at the valuation of the Plan last preceding the calculation. If such paid-up pension is less than \$10 per month, the amount credited to such a Member shall be paid to him in cash.
- (iv) the paid-up pension so provided to each Member shall not be capable of surrender or commutation unless such Member leaves the employ of the entity acquiring all or part of the operations of the Co-operative.
- (v) on termination of service before Normal Retirement Date, with the entity which employs such Members, such Members shall become entitled to the benefits determined in accordance with SECTION 10-TERMINATION OF SERVICE BEFORE RETIREMENT DATE OTHER THAN BY DEATH. The members period of employment with such an entity shall, for the purposes of the Plan, be included as Years of Service.

Based on the evidence before me, it appears that there was no such specific provision in the plan governing successor members prior to 1992. Nevertheless, employees who made the transition to EDS in 1986 were accorded similar rights, presumably pursuant to s.80 of the *PBA* [then s.29 of the predecessor statute] and the provisions of the Plan applicable to employees of co-operatives who left the plan, which provided a similar (although not identical) benefits (see, for example, s.17(c) of the 1982 Plan text).

At all material times up to 1997, the Plan actuary was John Turnbull. It was Turnbull's practice, with the concurrence of the plan administrator, to provide letters to successor members at the time they made the transition from a participating co-op to the successor employer, advising them of the value of the pension to which they would be entitled at age 65. While the letters received by the four claimants all state that they provide "approximate" amounts, they do not contain any warnings that they are subject to change. For example, the letter sent to Member D advised him that "[a]s a result of your participation in the Plan, you are entitled to a paid-up pension approximately equal to \$47,402.20 per year. These letters (the "Turnbull letters") were

obviously intended to convey concrete and accurate information about future pension entitlements.

The Turnbull letters were based on an interpretation of the Plan text which subsequently came under scrutiny with respect to two issues. The first issue relates to the basis of calculation for pension entitlements at age 65. Section 18(b)(ii) of the Plan provides generally for a “paid-up pension” to be provided from the lump sum generated by the greater of two options: (1) 2 x member contributions, plus interest [called the “DC option”], or (2) the commuted value of the member’s accrued regular pension [called the “DB option”]. The preferable option would depend on the employee’s age, service and salary level on the date of transition; in most cases, and in the case of all four claimants, the “greater” amount was the DC option. The pension quotation provided in Turnbull letters were based on the DC option. It was Mr. Turnbull’s practice to calculate the relevant amounts based on interest rates then applicable: i.e., he used the long term bond rate then in effect both to calculate the value of the DC lump sum at age 65, and to convert that amount to an annual or monthly pension. The second issue relates to the availability of early retirement subsidies for these pensions. The Turnbull letters provided a specific pension amount only for retirement at age 65. In addition, however, the Letters advised successor members about the impact of early retirement. Members B and D, who made their transition in 1986, were told the following:

Early Retirement:

You may apply to receive your pension, if you retire on or after age 55 and the completion of at least 15 years of total service. If your pension commences prior to age 60, it will be reduced. The reduction is equal to .25 of 1% for each complete month that commencement of the pension precedes the date on which you will attain age 60, or if earlier, the date on which you would have completed 35 years of service.

The Turnbull Letters sent to Members C and E in 1996 provided similar but more detailed information with respect to the availability of subsidized early retirement. The early retirement portion of the Letters clearly reflects Mr. Turnbull’s view that successor members were entitled to the benefit of the early retirement subsidies set out in the Plan text regardless of whether their pensions had been calculated under the DB option or the DC option. The Plan paid pensions to successor members based on the Turnbull interpretation of the Plan: (1) calculations of pension entitlements done at the time members made the transition to their new employers were honoured at the time of retirement; and (2) successor members were given the benefit of early retirement subsidies, regardless of whether their pensions were calculated under the DC or the DB option.

Mr. Turnbull ceased to be the plan’s actuary in 1997, and was eventually replaced by Anthony Cooper. There were no immediate changes in the Turnbull practice for successor members. It appears, however, that the Plan was beginning to question the Turnbull approach. There was evidence that in 1999, the Plan consulted two actuaries in addition to Mr. Cooper about issues in connection with the pension entitlements of successor members. An April 15, 1999 memo from Ellement & Ellement to Nancy Fletcher (identified elsewhere as the Plan’s Director, Administration) was filed in evidence, which confirmed the Turnbull method of calculation with respect to early retirement subsidies, and advised the Plan that based on inquiries at the previous

actuary's office, the trustees would honour pension calculations made at the time of transition. A June 10, 1999 letter from Hart Actuarial Consulting Ltd. to Nancy Fletcher expressly interprets the Plan text as "impl[y]ing that the calculation date to determine the unique [i.e. DC option] paid-up pension should be the current date which would be the date of sale which should also correspond to the date that the employee stopped contributing to this Plan". The Hart letter does, however, question the basis for applying early retirement subsidies to pensions paid out under the DC option. A follow-up letter from Hart dated July 14, 1999 emphasizes the need for change in the Plan provisions with respect to successor members. This letter reiterates Hart's view that early retirement subsidies should not be offered to successor members taking their pensions under the DC option. With respect to the DC option itself, however, the letter confirms that "the actuarial assumptions (mortality and interest) established at the date the member becomes an employee of a successor employer are used for all future calculations for the same member." The letter notes a range of problems created by this approach, and suggests that the Plan be amended to change it. In the meantime, the letter proposes what it calls "administrative procedures" which would change the practice pending plan amendment. The letter notes that "[i]n some cases, the administrative procedures will have to be altered to account for past promises which the Plan had made in writing", clearly a veiled reference to the Turnbull Letters based on the previous practice.

It was not until 2001 that any changes were actually made to the practice. At that time Cooper, who was obviously seriously concerned about the plan's ongoing under-funded status, raised the issue with the trustees, and advised them that in his view, the pensions of successor members were being improperly calculated. In Cooper's view, the interest rate calculations should have been made at the time of retirement and not at the time of the employee's transition to the successor employer. In addition, Cooper disagreed with Turnbull about the application of early retirement subsidies to the pensions of successor members. As we have seen, the Turnbull letters were premised on the view that successor members were eligible for early retirement subsidies regardless of which option (i.e. the DC option or the DB option) was used to calculate their pensions. Cooper took the view that only those whose pensions had been calculated using the DB option were eligible for those subsidies; those whose paid-up pensions had been calculated using the DC option should have had their pensions subjected to standard actuarial reductions if they took early retirement.

Mr. Cooper reviewed all previous calculations applicable to successor members, both those who were still active (i.e. still employed by a successor employer) and those who had already retired and whose pensions were in pay. Active successor members (approximately 200) were given the bad news in late 2001 and early 2002. They were told that the information provided to them in the Turnbull Letters had been only an estimate; those estimates were now outdated and were being replaced with new estimates based on current interest rates. Unlike the Turnbull Letters, these new letters made it crystal clear that the new figures now being provided (the "Cooper cuts") were themselves only estimates; calculations made with respect to the DC option would be redone at the time of retirement, and would change depending on interest/annuity rates. The letters are also structured so that information provided about early retirement subsidies applies only to the DB pensions, although they do not spell out explicitly that the Plan does not intend to follow its previous practice of applying early retirement subsidies to DC pensions.

Initially, it appears that the trustees did not intend to recalculate pensions in pay. Under severe financial pressure, however, the board reversed that decision. In November of 2002, retired successor members (approximately 54) were sent letters advising that “errors” had been made, their pensions would be cut, and that they would be expected to repay any overpayment. In some cases, as we shall see when we examine the individual situations of the claimants, the Cooper cuts were staggering: in the case of Member D, for example, his pension in pay was cut by more than 70%.

b. The Situations of the Individual Claimants

All four claimants gave evidence of how the Cooper cuts applied in their cases, and of the impact of those cuts on their pensions and their lives.

Member B was still an active successor member on the effective date of the plan wind up. He was initially employed by UCO on January 2, 1969. On November 28, 1986, Member B became employed by EDS, where he remains an active employee. At the time of his transition to EDS, by letter dated November 24, 1986, the Plan’s prior administrator advised him that he was entitled to a paid-up pension equal to approximately \$67,644.54 per year [approximately \$5637/mo.] commencing at age 65. He was advised that his pension would be reduced by 0.25 of 1% for each complete month that the pension commencement date preceded age 60, or if earlier, the date he would have completed 35 years of total service (UCO + EDS). As a result of some concerns about whether or not his pension met Revenue Canada standards, by letter of November 19, 1994 to the plan administrator Member B requested information on several topics including his date of hire, early retirement provision, pension amount etc.. The Plan Administrator’s response, by letter dated December 1, 1994, confirmed that he was entitled to an annual pension of approximately \$67,644.54 at age 65.

In May of 2002, as a result of the Cooper review, Member B received a detailed memorandum from the plan administrator. The memo was described as “an update to previous correspondence about your future pension with this Plan”. It advised him that the best monthly pension to which he would be entitled at age 65 was \$1,869. This amount was about 1/3 of the amount he had been quoted at the time of his transition. This memo clearly indicated that the information provided was only an estimate, and was subject to recalculation at the time of retirement, subject to interest rates and annuity values in the future.

Member B has now been advised that effective March 31, 2003, he has had further reductions to his pension entitlements. The 2003 Amendments had two negative effects on active successor members; they eliminated the ‘2 x contributions’ DC option as well as eliminating most early retirement subsidies. In addition, like all Plan members, Member B will have his entitlement cut back by the ultimate funded ratio of the plan. According to the IA’s calculations, he is now entitled to an annual pension at age 65 of \$14,066.52 before taking into account the reduction based on the funded ratio, instead of the \$67,644.54 set out in his Turnbull Letter. Applying the current estimate of 67.3% to that figure, he can expect a pension of \$9,466.77, a mere 14% of the pension he was advised he would get at the time he made his transition to EDS, and again in 1999.

The reduction in Member B's pension prospects has had significant consequences for him. Through his witness statement, he testified that based on the representations he had received from the Plan as to what his retirement pension would be, and prior to receiving notification of the Cooper cuts, he had made certain risky investment decisions, in consultation with an investment advisor, and suffered substantial investment losses when the technology investment bubble burst in May of 2002. He testified that he would not have exposed himself to these losses if he had not had a firm basis for believing that his pension entitlement was solid. In addition, he testified that his wife has had to continue working in a high stress job because of his pension losses, and that he too has had to work longer than he had planned in a stressful work situation.

Member C was also still an active successor member on the Plan's wind up date. He was employed by UCO on October 25, 1965. On March 15, 1996, he became a successor member by virtue of his employment with Growmark Inc., a successor employer. At that time, by letter dated May 6, 1996, the Plan's prior administrator advised him that he was entitled to a paid-up pension equal to approximately \$19,940.00 per year [\$1661.66/mo], commencing at age 65. His pension would be reduced by 0.25 of 1% for each complete month that the pension commencement date preceded age 60, or if earlier, the date he would have completed 35 years of total service (UCO + Growmark Inc.). Again by letter dated October 2, 1997, at his request, the Plan's prior administrator confirmed to him that he was entitled to an annual pension of approximately \$19,940.00 as of November 1, 2000, the date he would have 35 years of combined service with UCO and Growmark Inc. On February 15, 2001, the Plan's prior administrator responded to Member C's telephone request for information about his entitlement, and confirmed that since he had attained the required age 55 and had more than 35 years of service, he could retire at the pension quoted in the October 2, 1997 letter at any time he wished to commence payment. He did not retire at that time.

Member C was one of the first to be advised of the Cooper cuts. In a personalized statement mailed September 26, 2001, the Plan's prior administrator advised him that his entitlement had been recalculated and it was determined that he was entitled to a monthly pension equal to the \$1,387.65 a month, based on the DC formula. It was noted that the DC amount could not be estimated with certainty until closer to retirement as the pension amount would change depending on interest rates and annuity values in the future.

Member C also experienced further reductions in his entitlement as of March 31, 2003. His pension has now been recalculated on the basis as of the 2003 Amendment which eliminated the DC option for successor members. Since he already had 35 years of service, he did not, like Member B, lose the value of the early retirement subsidies. He will also, like all members, be subject to reduced benefits based on the final funded ratio.

Member C lost his employment in 2003 when Growmark permanently ceased operations. He commenced his retirement pension on March 1, 2005, after his severance pay and EI entitlement ran out. At that time, his pension was paid out at 50% (\$539.62/month) based on the plan's then-estimated funded ratio. In June of 2008, this was subject to the general increase to the then-funded estimate. Member C is currently collecting a pension of \$726.33, approximately 44% of the \$1661.66 set out in his Turnbull Letter. Member C too has suffered hardship as a result of the fact that his pension was drastically reduced from what he had been led to believe he would receive. He was forced to sell personal possessions and move to cheaper housing, and his wife

had to get a full time job in order to obtain medical benefit coverage. He had to take a part-time job, and his RRSPs have been substantially depleted. He continues to be financially responsible for a fourteen-year old son.

Member D was already retired on pension at the time of the Cooper cuts in November of 2002. He had been employed by UCO on January 8, 1968. On December 1, 1986, he became an employee of EDS, a successor employer. When he left UCO he was a Senior Systems Analyst; as an employee of EDS, he continued to work on the UCO account and on the UCO premises for the rest of his career. By letter dated November 24, 1986 (Member D's Turnbull Letter), the Plan administrator advised him that he was entitled to a paid-up pension equal to approximately \$47,402.20 per year, commencing at age 65. The letter advised that his pension would be reduced by 0.25 of 1% for each complete month that the pension commencement date preceded age 60, or if earlier, the date he would have completed 35 years of total service (UCO + EDS). Enclosed with the letter was a detailed worksheet explaining the calculations. Although the worksheet is labeled "estimated calculation", there is nothing in it to blunt the force of the unequivocal representations made in the letter.

In 1999, Member D received an offer of an early retirement package from EDS. As part of his decision-making process about whether he could afford to take this package, he sought information from the Plan administrator as to his pension entitlement. On July 27, 1999, he was advised by letter that he was entitled to a monthly pension of approximately \$3,584.00, payable in the Normal Form (Single Life Pension Guaranteed for Five Years, with a Joint and Survivor 60% Continuing Pension), commencing with the January 31, 2000 payment. This calculation accorded with the quote provided at the time he made the transition to EDS once the early retirement reduction formula set out in his Turnbull Letter was applied (he was then 55.76 years of age). While the letter did contain a reservation with respect to "clerical error", it spelled out that "you will continue to receive the monthly pension for as long as you live". Member D testified that based on the information quoted in this letter, he chose to accept the early retirement package, and retired effective January 31, 2000. At that time, he had completed approximately 31.98 years of combined UCO/EDS service.

On November 5, 2002, Member D was sent a letter from the Plan administrator, advising him of the Cooper cuts in his case. He was told that his pension would be reduced to \$1,044.73 effective the November 30, 2002 payment, a cut of more than 70%. He was also advised that he had received an overpayment of \$86,362.04, which he would be expected to repay.

When the Plan was wound up effective March 31, 2003, his benefit, already drastically reduced by the Cooper cuts, was then further reduced to the then funded-ratio: 50%. In two stages, his pension had dropped from the \$3,584 a month on which he had based his retirement decision to \$522.37 per month. He has since had some small relief: effective with the July 30, 2008 payment, the IA has adjusted upward all monthly pensions for retirees based on a new revised estimated funded level of 67.3%. Member D's monthly pension is now \$703.11, less than 20% of the pension on which he based his retirement decision.

Member D testified (via his witness statement) that "on July 1, 2003, after 6 months of searching, I was able to find work as a truck driver in order to survive on the reduced pension. Although it was part time, I worked 5 days per week, so I had to give up my volunteer job [as a

driver for the Canadian Cancer Society]. Truck driving had now become a full time job, and I typically work 40 to 45 hours per week. I continue to work at that job, and will do so as long as I need to, or as long as I am able. With the many times' reduced pension, I will have to work as long as I am able to work in order to provide for my wife and myself." Member D is now 66 years old. He testified that he would have continued to work if he had known that his pension was not what he had been quoted. In his witness statement, he testified:

Had I known that my pension would be inadequate, I would have delayed my retirement and continued to work to further build up my EDS pension benefits and RRSPs in order to enjoy a later retirement. In doing so I would have reaped the benefits of the seniority I had amassed over almost 32 years, such as continued salary increases at the level I had attained at EDS, increased vacation time, benefits package etc.. By re-entering the workforce, I have started over again at the bottom, at a much lower income level and vacation entitlement.

He has also lost the opportunity to earn further service in the Plan, which might have made him eligible prior to the wind up for the unreduced pension available to employees with 35 years of service.

Like Member D, **Member E** was already retired at the time of the Cooper cuts. He was employed by UCO on September 9, 1974. On March 15, 1996, he became a successor member by virtue of his employment with Growmark Inc., a successor employer. By a letter dated May 6, 1996, the Plan's prior administrator advised him that he was entitled to a paid-up pension equal to approximately \$15,784.00 per year, commencing at age 65. The May 6, 1996 letter advised him that "[t]his amount has been calculated by using the greater of 2 times your required contributions to the Plan, with interest to age 65, and the present value of your regular pension, with interest to age 65. Any voluntary additional contributions you may have made, with interest to age 65, are included in these calculations. These calculations are based on the assumptions adopted for the valuation of the Plan as at September 30, 1993." The letter confirmed that his pension would be reduced by 0.25 of 1% for each complete month that the pension commencement date preceded age 60, or if earlier, the date he would have completed 35 years of total service (UCO + Growmark Inc.).

In 1998, Member E began making plans for retirement, and sought confirmation from the Plan administrator about his pension entitlement. On June 10, 1998, the administrator confirmed by letter the approximate monthly pension benefits payable to him at February 1, 1999, October 1, 1999, and May 1, 2000 (\$1,118.00, \$1,144.00, and \$1,167.00 respectively). By letter of April 21, 1999, the administrator confirmed Member E's approximate monthly pension payable at October 1, 1999, March 1, 2000, and October 1, 2000 (\$1,144.00, \$1,160.00, and \$1,183.00 respectively). These amounts were consistent with the information he had been given at the time of his transition to Growmark. Member E testified (via his witness statement) that he and his spouse did some serious number crunching, including estimating his public pension benefits, and decided that he could afford to retire based on that amount of pension. He advised the Plan administrator that he would be retiring at the end of June. By letter dated May 16, 2000, the Plan administrator informed him that his early retirement pension, commencing July 1, 2000, would be approximately \$1,173.00 per month, since he was approximately 56.4 years old. On his

retirement, he began to receive a monthly pension in that amount. At that time, he had completed approximately 25.56 years of combined service with UCO and Growmark.

Member E commenced his early retirement pension of \$1,173.95 effective the July 30, 2000 payment, payable in the Normal Form (Single Life Pension Guaranteed for Five Years, with a Joint and Survivor 60% Continuing Pension). In November of 2002, he was advised that his monthly pension would be reduced to \$692.69 effective the November 30, 2002 payment, an amount slightly more than half what he had expected and had been receiving. He was also advised that he had received an overpayment which he would be expected to repay. Member E's monthly pension was further reduced to \$346.35 per month effective March 31, 2003, based on the plan's estimated funded level of 50%. The July 30, 2008 adjustment brought his pension back up to \$466.19. Now, at age 66, he is receiving a pension approximately 40% the size of the pension on which he had retired.

Member E testified, via Exhibit H attached to his submission and supplementary oral submissions, that he would not have retired if he had not been led to believe that his pension would be at least \$1,000/month; "I retired on the assumption that \$1173.00 per month would be the amount I would receive for the rest of my life". As a result of the drastic reduction in his pension in pay, he and his spouse have suffered considerable hardship. They have not been able to get needed dental services and eye glasses, and have had trouble paying for medications. His RRSPs have been nearly depleted. He testified that he and his spouse are able to manage at all only because they had moved to northern Ontario; if they had continued to live in southern Ontario, they would have had to go on welfare. "It was a nightmare", he concluded.

c. The Positions of the Parties

These claimants are all acutely aware that they, like all members of the Plan, will have to live with smaller pensions than they had originally anticipated. They understand that as a result of the settlement, all plan members have had their entitlements cut to the final funded ratio of the Plan. Difficult as this will be to adjust to, they are not seeking exemption from the general pain. However, they have all suffered additional deep cuts in addition to the general reduction. All successor members were subjected to the Cooper cuts. Those who were still active at the time of the wind up were then hit with further cuts flowing from the 2003 Amendments. As a result, they are now told that they will have to live with pensions ranging from 14% to 44% of the amounts they were originally promised. It is these additional cuts that are the subject of their complaints.

The claimants argue that the Cooper cuts should never have been made to their pensions. They argue that the Turnbull interpretation was a reasonable one, adopted and consistently applied by the trustees for many years.⁹ They argue that the Plan, or the IA standing in the shoes of the Plan,

⁹ Member B argued that the Cooper cuts flowed not merely from a change in practice, but from a 2001 Plan amendment. He argued that this amendment violated the provisions of the Plan text prohibiting a reduction in accrued benefits (s.17(a)). I disagree that the 2001 Plan amendment to which he refers was connected to the Cooper cuts; in my view, that amendment simply eliminated the '2 x contributions' DC option for service *after* January 1, 2001. In any event, the claimants' position is no different even if the Cooper cuts has been implemented by Plan amendment; the critical issue, as discussed below, is how those cuts were addressed in the settlement. Furthermore, it is by no means clear what position the parties would have taken about how the prohibition against reduction of benefits would have applied to any 2001 Plan amendment; they certainly took vigorously opposing positions on how those provisions applied on Plan wind up.

should be estopped from applying the Cooper interpretation to their situations, since they reasonably relied on the pension information with which they were originally provided. In addition, Members B and C, the active successor members, argue that the 2003 Amendments should not be applied to their cases. They feel strongly that what has happened to them is unfair and unjust. They point out that even though they had long since ceased to be employed by participating co-ops, they were never given any option about whether or not they continued to participate in the Plan.

The IA's primary response to these arguments is a simple one. The IA argues that in calculating the entitlements of successor members, it was simply applying the terms of the settlement as required by the Original Order. The IA argues that the issue of the change from the Turnbull to the Cooper methodology was definitively resolved in favour of the Cooper cuts, which were used, to the knowledge of all parties, in the 2003 Watson Wyatt Report and again in the Morneau Report. Furthermore, the IA argues that the Cooper interpretation of the Plan documents was the correct one. In the IA's view, the Turnbull approach was simply wrong, and the trustees acted appropriately in correcting the errors once they were brought to their attention. On the estoppel issue, the IA argues that the Tribunal has no jurisdiction, sitting under the Claims Bar Procedure, to apply that doctrine. In any event, the IA argues, estoppel would operate only as against the trustees, and not as against the IA.

The Superintendent supports these arguments. In addition, he argues that estoppel is never appropriate in the pension context. He argues that pension plan administrators are bound by their fiduciary obligations simply to apply the plan documents; they have no discretion to meet equitable claims like those of estoppel. Gay Lea also weighed in on this issue, arguing that individual claimants have no right to challenge what it described as "the architecture of the settlement", including the Cooper cuts and the 2003 Amendments. Gay Lea also argues against the application of estoppel. Gay Lea submits that the Tribunal has no jurisdiction to apply such a doctrine. In addition, Gay Lea submits that even if estoppel were applied, the appropriate remedy would not be the one sought by the claimants – reinstatement of their pensions as originally calculated. Gay Lea argues that to get relief, the claimants would have to prove damages flowing directly from their reliance on pension commitments made to them, and have not done so.

I have enormous sympathy for these successor members. Whether or not they have been made to bear a disproportionate burden of the Plan's underfunding, it is nevertheless clear that they have suffered a series of harsh blows to their financial security in retirement. Pension promises that were made have not been kept. This should not have happened, regardless of whether or not the Plan was legally permitted to cut benefits. With reluctance, however, I have come to the conclusion that the issues the successor members have raised can no longer be adjudicated. They were compromised in the settlement to the class action and the Tribunal litigation. The IA had no alternative other than to keep the Cooper cuts in place, and to apply the terms of the 2003 Amendments to the active successor members. This Tribunal must do the same.

d. The Effect of the Settlement on the Cooper Cuts

The issue of the Cooper cuts did not arise directly before the Tribunal, since that issue was not addressed in the NOP. However, it was squarely at issue in the related class action. More than six pages of pleadings in the *Fresh as Amended Amended Statement of Claim* [sic] address the

plight of the successor members (called therein the “UCO Members”, since they had all formerly been employees of UCO), detailing the impact of the Cooper cuts on both active and retired successor members. In addition, the pleadings identify the issue of repayment of alleged ‘overpayments’. The Statement of Claim pleads that:

The retroactive revisions by the Co-Op Trustees and Cooper to the methodology and interest rate assumptions used to calculate UCO Members’ accrued pension entitlements were negligent, a breach of the Plan and their fiduciary duties owed to all Plan Members and the UCO Members in particular. As a result of these actions, omissions and errors of the Co-Op Trustees and Cooper, the Plan Members have suffered a loss. [para.111]

Part of the relief sought is:

a declaration that the pensions promised to the “UCO Members”...on termination from the Plan were in accordance with the Plan terms, an order restoring the pensions of the UCO Members to their original levels subject to the requirements of the Pension Benefits Act...and an order enjoining the Co-op Trustees from collecting alleged ‘overpayments’ pertaining to UCO members (para.1(i), *Fresh as Amended Amended Statement of Claim*).

What happened to these specific claims on behalf of the UCO members? The Approval Order expressly bars the IA from “pursuing any claim for overpayments from any retired Class member that had their monthly pension from the Plan reduced after retirement” [para. 16]. It does not, however, order the Cooper cuts reversed. The Approval Order approves the Settlement Agreement between the parties as “fair, reasonable and adequate and in the best interest of Class Members”, and declares that Agreement binding on all class members. It expressly releases “Released Persons” (a term which includes the Plan trustees) from all “Settled Claims”, a term defined in the Settlement Agreement in painstaking detail to cover any conceivable claim against a “Released Person” arising from the plan at common law, equity or by statute, and in particular as it concerns “the matters at issue or that could have been at issue in the Action”. Other than as set out in the Approval Order, it dismisses the action “with prejudice” [para. 21]. The Settlement Agreement recites that “The Parties intend by this Agreement to finally resolve, terminate and conclude any and all Settled Claims under the terms of this Agreement, and further intend that the Released Persons shall receive complete releases and final peace from all such Settled Claims on behalf of the Class Members”.

There was evidence before me that the situation of the UCO members was expressly discussed at the approval hearing before Mr. Justice Cullity. All Plan members had been advised that they could attend at the hearing and make submissions on the fairness and adequacy of the proposed settlement. Member D decided to attend the hearing and make submissions. In accordance with instructions provided in the notice of hearing, he provided the plaintiffs’ lawyers with a written submission and attended the settlement hearing on April 16, 2008. He was given the opportunity by Justice Cullity to speak to his submission, and did so, making it clear that he did not oppose the settlement, but that he did not feel the situation of the successor members had been adequately addressed. Although Justice Cullity did not rule on his submission, Member D testified that Justice Cullity advised him that he could raise this issue in the Claims Bar Procedure. Others present at the hearing generally confirm that such a comment was made, including counsel for the IA, who made a note on her court papers to the effect that “[Member

D] – retiree-reduction in monthly pension 2 times – can get review as part of Claims Bar Procedure”.¹⁰ There was no discussion, however, of what was meant by the remark. Unfortunately, Justice Cullity’s order contains no exception for the UCO Members issue. The issue is therefore subject to that order and settled by that Order. The claims of the successor members (the “UCO Members”) were clearly “matters at issue” in the class action, and were not resolved in their favour by the settlement. The class action was dismissed “with prejudice”, and both the Approval Order and the Settlement Agreement provide for comprehensive releases from claims which were not resolved in the class members’ favour. No steps were taken to leave the Turnbull-Cooper issue to be resolved in another forum. From the perspective of the class action, then, the issue is ‘water under the bridge’.

Is there any basis on which I could find that the issue is still open for purposes of this proceeding before the Tribunal? I do not believe that there is. The IA was required to deal with the successor member claims in the overall context of the settlement of the class and Tribunal proceedings. This Tribunal must do the same. As noted above, the two settlements were intimately linked. The Tribunal settlement was contingent on the signing of releases settling the class action. The IA could not comply with its instructions from the Court, the Superintendent and this Tribunal unless it applied the settlement of the class action. It was clearly and unequivocally understood by all parties to both settlements that the Cooper methodology had been used in the 2003 Windup Report, and again in the Morneau Report, and would be used in determining individual member entitlements.

In view of my disposition on this issue, I need not resolve the Turnbull-Cooper controversy, nor deal with the submissions on the application of estoppel either to proceedings under the Claims Bar Procedure, or the administration of pension plans in general. In fairness to the extensive and able submissions of the claimants, however, I do have some comments to make on those issues. First, in my view the claimants have put forward a credible argument in support of the Turnbull interpretation of the Plan documents. On the issue of how to calculate the DC option, both Ellement & Ellement and Hart Actuarial Consulting found support in the Plan text for the Turnbull interpretation. In addition, Eckler Partners Ltd. took an independent look at that issue, and found the Turnbull interpretation a plausible reading of the Plan. Clearly all these actuaries had more difficulty with Turnbull’s application of early retirement subsidies to pensions calculated using the DC option. On a close review of the Plan’s history, however (which does not appear to have been done by these actuaries), I am by no means convinced that Turnbull misinterpreted the Plan text on this point. It is a difficult interpretative question, made more difficult by the fact that s.18 of the Plan, which specifically addresses the rights of successor members, was engrafted on Plan terms already in place. When there is interpretative ambiguity of this kind, courts and tribunals may resort to evidence of actual practice to determine what meaning responsible parties themselves have given to documents. In this case, the practice clearly favours the Turnbull interpretation.

Furthermore, I am not persuaded that estoppel can never apply in the pension context. In my view, there is no reason why a Plan administrator exercising fiduciary duties should not apply

¹⁰ This handwritten note actually appears in a copy of the Agreed Statement of Facts filed at the Tribunal hearing, which had taken place a few days prior. The note was made beside a paragraph reciting that “As of March 25, 2008, neither counsel for the Named Plan Members nor counsel for the Superintendent have received any notification that any person will be objecting to the Proposed Settlement.”

estoppel principles to prevent injustice being done to individual plan members. The policy behind the doctrine of estoppel is to prevent injustice to persons who have reasonably relied to their detriment on authoritative representations. If the capacity to take into account estoppel principles is confined exclusively to the courts, persons harmed by detrimental reliance would in all cases have to resort to litigation. In my view, this is not the law. This does not mean, of course, that pension plans cannot change their interpretation of plan documents or their interest rate assumptions; they can and do so all the time. However, I have difficulty with the proposition that they can apply new interpretations and new approaches retroactively to plan members who may have made irreversible life decisions in reliance on promises already made. If I had not been persuaded that my hands are tied by the settlement reached between the parties, I would have been inclined to give relief based on the principle of estoppel to the two retiree successor members. In my view, they clearly established detrimental reliance. I accept, of course, Gay Lea's caveat that the issue of appropriate remedy would still remain to be resolved, and that providing a remedy for detrimental reliance would not necessarily entail restoring the originally promised pension.

As I have already indicated, however, the parties to the settlement compromised the issue of the Cooper cuts as part of the overall agreement, before these claims reached either the IA or the Tribunal. Whether Turnbull was right or wrong, use of the Turnbull methodology is no longer an option. Accordingly, the claims based on the Cooper cuts must be dismissed.

f. The Application of the 2003 Amendments to Active Successor Members

The two active successor members, Members B and C, have also raised the issue of the impact of the 2003 Amendments on the value of their entitlements. In discussing Member A's claim, we have seen that s.2(d) of the 2003 Amendments eliminated early retirement subsidies from the pension entitlements of deferred vested members. Section 2(e) did the same for "active and successor" members as follows:

All early retirement subsidies in the Plan prior to March 31, 2003 shall be eliminated in their entirety in respect of active and successor members. However, if the member has in fact fully satisfied certain specific age and service criteria as at March 31, 2003 a modified set of early retirement reductions will apply. The specific age and service criteria and the modified set of early retirement subsidies are as follows:

- The pension is unreduced if the member is in fact at least age 55 and has 35 years or more of service as at March 31, 2003.
- The pension in respect of service prior to January 1, 2001 is also unreduced if the member is in fact at least age 60 and has 15 or more years of service as at March 31, 2003.
- The pension is reduced if the member is in fact at least age 55 and already has at least 15 but not 35 years of service at March 31, 2003. The reduction is ¼% per month from retirement to age 65 in respect of service prior to January 1, 2001 and ½% per month to age 65 in respect of service after January 1, 2001.

- The pension is actuarially reduced if the member does not fully meet the above specific age and service requirements at the wind-up date.

Under this provision, the value of pensions is actuarially reduced for all active employees, with the exception of those who meet any of the criteria outlined in the first three bullet points.

In addition, s.2 (f) eliminates what it describes as the “test against contributions” for all active plan members to whom it applied, including successor members, as follows:

The provisions of the Plan relating to benefits on termination of employment or death prior to eligibility for immediate retirement whereby the commuted value of the accrued pension is tested against the employee’s regular contributions with interest shall be eliminated from the Plan with respect to any active or deferred vested member (including a successor member) at wind-up. In lieu thereof the member will be entitled to the commuted value of the accrued pension without the test against contributions.

While this provision is not well drafted, its impact is clear. Under the Plan prior to the amendment, successor members had been entitled to a pension based on the greater of two options: the DB option (the commuted value of the regular pension) or the DC option (2 x contributions plus interest). The amendment eliminates the DC option. As we saw in the discussion about the impact of the Cooper cuts, the DC option had been the most beneficial one in most cases involving successor members; its removal had the impact of further reducing their pension entitlements.

Member B (on behalf of himself and Member C) has requested that I review the application of the 2003 Amendment to their case. He feels strongly that the 2003 Amendments unfairly targeted active employees, and in particular active successor members. He produced data which showed, in his view, that the active employees had borne an unfair share of the burden of the funding shortfall. When added to the Cooper cuts, he argued, active successor members were hit hardest of all.

In addition, Member B made a series of arguments directed specifically to the issue of early retirement subsidies. (Member C met the requirements in the 2003 Amendments for the ‘grandparenting’ of the subsidies, and they were therefore not eliminated in his case.) As I understand it, Member B makes essentially three arguments in support of his position that he should continue to get the benefit of the early retirement subsidies. First, he argues that notwithstanding the wording of the 2003 Amendments, he is eligible for early retirement subsidies by virtue of the “grow in” rights provided by s.74(1)(c) of the PBA. Second, he argues that the 2003 Amendments were not registered until January 26, 2009. Prior to that date, he had reached age 55 and 35 years of services (with his adjusted service date, he reached that milestone on April 28, 2004.) He argues that it is unfair to ‘backdate’ the Amendments to wipe out retroactively his eligibility for early retirement subsidies. Third, he argues that the trustees have the authority under the Plan text to waive age and service requirements in “exceptional circumstances”. He argues that the Tribunal has the authority to provide such a waiver in place of the trustees; he further argues that the Plan wind up constitutes an “exceptional circumstance”, and that this provision can and should be applied in his favour.

In addition, he makes an argument about how early retirement subsidies should be calculated and applied in his case. He argues that the text of the 2003 Amendments does not reflect the trustees' actual intention; in his view, the trustees intended to apply the early retirement reductions only from age 60, not age 65. He argues that pursuant to s.19(1) of the *PBA*, the Tribunal has the authority to 'correct' this error in the text of the Amendments and apply the actual decision of the trustees.

I have carefully considered all of these arguments. With respect to Member C's general 'fairness' argument, I have already made it clear that the issue of the 'fairness' of the 2003 Amendments is not before me. Like the IA, the Tribunal must apply the terms of the settlement as reflected in the Original Order. That Order explicitly addresses the issue of the validity of the 2003 Amendments. Paragraph 15 makes it clear that member entitlements are to be determined taking into account the 2003 Amendments. Paragraph 24 explicitly directs the Superintendent to register the 2003 Amendments. It was not open to the IA, nor is it open to this Tribunal, to do anything other than to apply those amendments to all members who are affected by them. They removed the DC option for active successor members, and they must be given that effect.

I turn, then, to the arguments directed specifically to the elimination of early retirement subsidies as set out in those amendments. Member B's first argument is a statutory argument: that notwithstanding the language of the Amendments, s.74(1) of the *PBA* entitles members in Member B's situation to the benefit of the early retirement subsidies. Section 74(1), known as the "grow in rights" provision, reads as follows:

A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

- (a) a pension in accordance with the terms of the pension plan, beginning at the earlier of,
 - (i) the normal retirement date under the pension plan, or
 - (ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or
- (c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

Under this section, according to Member B, he is entitled to the early retirement subsidies.

The IA does not dispute that Member B had the requisite combination of age and years of service to qualify for grow-in rights. The IA argues, however, that grow-in rights do not change the impact of the 2003 Amendments in Member B's case. If the 2003 Amendments had not been enacted, Member B would have qualified for an unreduced pension based on age and years of service on April 28, 2004, the date he met both the age 55 and 35 years of service eligibility

criteria under the former Plan text; he would have “grown into” that right under s.74(1)(b). The 2003 Amendments reduced the scope of this right by providing that only those with the requisite age and service combination *as of March 31, 2003* were eligible for unreduced pensions. Member B did not meet the criteria on that date; the impact of the statute does not change this.

In his written submissions, Member B appears to acknowledge that the 2003 Amendments have the effect of taking away the right of most active members to claim grow-in rights to unreduced pensions and early retirement subsidies. Indeed, he points to passages in the trustee minutes which suggest that they were deliberately designed to have that effect. That was not fair, he argues, and should therefore be ignored. Member B’s “grow in rights” arguments therefore circles back to the ‘fairness’ argument, which, as I have already determined, is not before me. I must therefore reject this argument.

What of Member B’s second argument, that it was unfair to backdate the Amendments and deprive him of eligibility? This too is a ‘fairness’ argument and must be rejected for that reason. As a free-standing argument, however, I would also reject it on its merits. The *PBA* expressly contemplates that plan amendments may be given effect retroactive to their date of registration (s.13(2)). Furthermore, while it is true that the Amendments were not registered until 2009, they were discussed by the trustees in 2003, and formally enacted in February of 2004, prior to Member B’s 55th birthday. Registration was long delayed as a result of the litigation and the dispute over their validity. Whatever their intrinsic fairness or unfairness, there is therefore no unfairness in applying them as of their effective date.

Member B’s third argument is that the age and service requirements should be waived in his case under the “exceptional circumstances” provisions of the Plan text. He directed his arguments towards the version of that Plan text that was in effect in 1986, the time of his transition to EDS. There is no comparable provision in the current Plan text; it appears to have been removed some time between 1994 and 1997. As the Superintendent pointed out, the 1986 Plan text would not apply to a determination as of the date of wind up or the date of hearing. There is no basis, therefore, on which discretion to waive the age or service requirements could be exercised either by the IA or by this Tribunal. Even if the provision had remained in the Plan text however, I would not have applied it to waive age and/or service requirements for any individual in the circumstances of this case. Through the 2003 Amendments, the trustees have made it crystal clear what their intentions were with respect to age and service requirements on Plan wind up; they were imposing a rigid cut-off as of March 31, 2003, and specifically provided that full actuarial reductions would apply to any member who did not “fully meet” the age and service requirements spelled out as exceptions to the general rule. Any finding that the Plan wind up was an “exceptional circumstance” justifying an individual waiver of those requirements would fly directly in the face of such clear language.

I have rejected all three of Member B’s arguments that he should be entitled to the benefit of the early retirement subsidies. Accordingly, it is not necessary to address the legal merits of the difficult argument Member B has made that I should disregard the text of the amendment in calculating those subsidies in favour of the “real intent” of the trustees. I should say, however, that I have difficulty with the argument on the facts. It is far from clear to me that the language of the Amendments does not reflect the trustees’ intent.

Accordingly, I must dismiss all claims as they relate to the IA's application of the 2003 Amendments to the active successor members.

4. ORDER

In accordance with these reasons, I order that:

1. The Claim of Member A is allowed to the extent that the IA is ordered to apply Method B to the calculation of his entitlement.
2. All the Claims of Members B, C, D and E are dismissed.

DATED at Toronto, Ontario, this 13th day of May, 2010

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