

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”)**

DECISION RE REQUESTS FOR REVIEW: CLAIMS BAR PROCEDURE

1. On May 13, 2010, the Tribunal issued a decision in this matter, dismissing the claims of Members B, C, D and E (the “Applicants”). The May 13th decision was issued pursuant to Paragraph 22 of an order made by the Tribunal in this matter on April 11, 2008 (the “Original Order”). The circumstances under which the Original Order was made are fully set out in the May 13th decision. The Applicants have filed Requests for Review of the May 13th decision, seeking that it be set aside and that their claims be allowed. The Superintendent of Financial Services (the “Superintendent”), the Implementing Administrator (the “IA”), and Gay Lea Foods Cooperative Limited (“Gay Lea”) (collectively, the “responding parties”) have all filed responses, seeking dismissal of the Requests for Review, arguing that the Applicants have not satisfied the threshold test that would entitle them to seek review, and that there are no proper grounds for review. Donald Huff also filed a response opposing the Requests, arguing that further delay is unfair to other plan members.

2. While the Applicants have filed separate requests, the grounds upon which the requests are based fall into two main categories. The first ground relates to the Tribunal’s conclusion that the so-called “Cooper cuts”, which resulted in drastic reductions to the pension entitlements of the Applicants and other plan members, could not be reversed in the Claims Bar Procedure. The basis for that conclusion, as set out on page 27 of the May 13th decision was that “the parties to the [class action] settlement compromised the issue of the Cooper cuts as part of the overall agreement, before these claims reached either the IA or the Tribunal.” This ground affects all four Applicants. The second ground relates to the issue of whether the IA properly applied the statute and the plan text (as amended) in calculating the pension entitlements of Active Successor Members. The Tribunal found that the IA had properly calculated the pensions, and dismissed the Applicants challenges on their merits. This ground affects Members B and C only. With respect to both grounds, the Applicants argue that the Tribunal’s conclusions are wrong in fact and law.

3. I have dismissed the Requests for Review on both grounds. I set out my reasons below.

The Tribunal’s Approach to Requests for Review

4. In the normal course, once the Tribunal makes an order, that order is final. Part XI of the Tribunal’s *Rules of Practice and Procedure* sets out a procedure permitting the Tribunal to review and amend its orders. Because of the strong public interest in the finality of orders, however, a review is by no means a routine matter.

5. In dealing with Requests for Review, the Tribunal follows a two-step decision-making process. Once it receives such a request, the Tribunal considers whether or not, as a threshold matter, the applicant has established a sufficient basis for conducting a review. If the Tribunal determines that such a basis has been established, it then conducts the review. According to the Rules, both the decision as to whether or not a review is warranted, and a decision on the review itself, if granted, are made by the panel or member who made the initial order. Requests for Review are decided on the basis of the supporting materials filed with the Request. If a review is granted, it will normally be dealt with based on those same supporting materials, supplemented where appropriate by the original record.

6. As part of the Part XI process, Rule 50.01 provides for matters that may be taken into account in determining whether or not to review a Tribunal order:

In deciding whether it is advisable to review all or part of its order, the panel or member may consider any relevant circumstances, including:

- (a) whether there is a material error of law or fact such that the panel or member would likely have reached a different decision but for that error;
- (b) the extent to which any party or any other person has relied on the order;
- (c) whether the order is under appeal or is the subject of a judicial review application; and
- (d) whether the public interest in finality of orders is outweighed by the prejudice to the requester.

7. The Tribunal has recently had occasion to address the standards that should be applied in deciding whether or not a Request for Review should be granted. In *Susan McGrath v. Superintendent of Financial Services, OMERS Administration Corporation and OMERS Sponsors Corporation*, FST Decision No. P0335-2008-3 (May 7, 2010), the Tribunal made the following observations:

A Request for Review of a Tribunal order is not an opportunity to reargue the case. There is a strong public interest in the finality of orders. Accordingly, most Tribunals whose rules provide for review or reconsideration offer such an opportunity only on very narrow grounds. For example, the Ontario Labour Relations Board, which has a general statutory power of reconsideration, has issued an Information Bulletin (No.19) in which it provides the following general guideline to parties seeking review:

Generally, the Board will not reconsider its decision unless the requesting party has new evidence that would be practically conclusive of the case and that it could not have reasonably obtained earlier, or the party has new objections or argument that it had no opportunity to raise earlier. Because of the need for finality in labour relations matters, the Board does not treat its reconsideration power as either a tool for the party to repair the deficiency of its case nor as an opportunity to reargue it...If the requesting party relies on matters that could reasonably have been raised at the original hearing, the Board will normally not reconsider its decision.

The Tribunal noted:

There is a similar need for finality in pension matters. In our view, the Tribunal should take a similarly narrow approach to determining whether or not Requests for Review cross the threshold and warrant a review of a Tribunal order.

8. Accordingly, to meet the ‘threshold test’ required to establish grounds for a review, an applicant must put forward either *new* evidence, or *new* objections or arguments. In either case,

the new evidence or arguments must not have been reasonably available at the time of the original hearing. If the applicant relies on new evidence, that evidence must be so cogent that it “would be practically conclusive of the case” in favour of the result sought by the party making the Request for Review.

The “Cooper Cuts”

9. The Tribunal’s decision on this issue was based primarily on an analysis of the documentary record surrounding the settlement of the class action, and the relationship of that settlement to the settlement of the Tribunal proceeding as reflected in the Original Order. The Tribunal determined that the impact of the Cooper cuts on the Applicants’ pensions had been squarely raised as an issue in the class action proceeding, and had been settled in that proceeding against the position of the Applicants. Accordingly, it could not be reopened in the Claims Bar Procedure. The submissions in support of the Request for Review on this issue were primarily made by Member D on behalf of all the Applicants. Member D argues that the matter of the Cooper cuts was *not* settled. His Request for Review does not directly address the Tribunal’s analysis of the documentary record. Instead, he bases his argument on facts and events peripheral to the settlement documents themselves. He argues, in effect, that notwithstanding the language of the Approval Order and related documents, the Tribunal should have found that the issue of the Cooper cuts was exempted from the scope of the settlement.

10. That argument was made and rejected in the original Claims Bar appeal hearing (see pp. 25-26 May 13th decision). In that hearing, Member D relied primarily on the comments made by Justice Cullity in the course of the Approval Hearing, to the effect that he [Member D] could take up his issue in the Claims Bar Procedure. In support of his Request for Review, however, he filed additional material on this issue consisting of:

(1) An email from class counsel to Member D dated April 7, 2008 (prior to the Approval Hearing). The email sets out counsel’s opinion that Member D could raise the matter of the amount of his pension as part of the Claims Bar Procedure (although counsel made it clear that there was no guarantee of success).

(2) A portion of an affidavit of Ari Kaplan (a member of the firm acting as class counsel) filed in support of the Application for Approval of the Settlement and dated April 10, 2008. The Kaplan affidavit contained a paragraph (para. 75) directly addressing Member D’s claim. In that paragraph, Mr. Kaplan affirmed that Member D’s circumstances were unique, because his pension had been reduced twice. He expressed the hope “that these unique situations may be appropriately addressed through the claims bar procedure described in the FST Order”; and

(3) Justice Cullity’s Reasons for Judgment, released on May 29, 2008 after the Approval Order was issued. Paragraph 29 of those Reasons address Member D’s situation directly, as follows:

Despite the extensive notice given to the members, only one formal objection was received. This objection arose out of an attempt by the trustees to make deductions from the objector’s pension benefits to compensate for a previous

overpayment made as a result of a miscalculation by the Plan's former actuary who is now deceased and is no longer a party to this proceeding. The proposed deductions amount to approximately \$60,000. At the hearing, I agreed with the submission of class counsel that this question was not an issue in the litigation. It may possibly be addressed in the future administration of the Plan by the administrator, or, if necessary, by the Financial Services Tribunal.

All three of these documents were available at the time of the original hearing in this matter. Member D submits that they were not filed because the Applicants were not aware that jurisdiction would be an issue.

11. In addition to these three documents, a fourth document has subsequently emerged which was clearly not available at the time of the hearing. In preparing his Request for Review, Member D consulted class counsel seeking permission to file with the Tribunal documents prepared by that law firm. In response to this request, class counsel advised that he was not in a position to represent the Applicants in this matter; he undertook, however, to approach Justice Cullity for clarification on the issue of the impact of the settlement on Member D's rights under the Claims Bar Procedure. A motion hearing was held on July 20, 2010. On July 21, 2010, following the motion hearing, Justice Cullity issued the following Endorsement, which I have set out in full:

Further to the meeting on July 20, 2010, I confirm that in paragraph 29 of the Reasons for Decision released on May 29, 2008, I addressed only [Member D's] claim with respect to the clawback of alleged overpayments of pension benefits. The wider question of the level of benefits he was entitled to receive thereafter was not addressed separately from the question of the overall merits of the settlement referred to in paragraph 30 and in earlier paragraphs of the Reasons for Decision. Despite the contents of the pleadings, I understood from Mr. Kaplan's affidavit that [Member D's] claims with respect to the clawback were unique to his situation.

When preparing the Reasons for Decision some six weeks after the Judgment had been signed, I overlooked the fact that, by consenting to paragraph 16 of the Judgment, the parties had disposed of the issue addressed in paragraph 29 of the Reasons. I regret any confusion this has caused.

The above clarification is made pursuant to paragraph 18 of the Judgment to deal with an issue that has arisen in implementing the settlement.

This endorsement was filed with the Tribunal.

12. In dealing with this Request for Review, I must first deal with whether or not the Applicants have met the threshold test for obtaining review of a Tribunal order. With respect to the first three documents filed as new evidence, the responding parties submit that the Applicants cannot rely on them to meet the threshold test for review because they were available at the time of the hearing. They argue that the Applicants were or should have been well aware that jurisdiction was an issue, since it was put squarely in issue in the parties' written submissions filed prior to the hearing, and Member D filed and relied on evidence going to the same issue in

the original hearing. In my view, the responding parties are clearly correct. This evidence was available; if the Applicants had wished to rely on it, they could and should have filed it at that time. In addition, this evidence cannot meet the threshold test for a more substantive reason; it does not add materially to the record that was originally before me on this issue. The first two documents appear to demonstrate only that class counsel was of the opinion that the question of the “Cooper cuts” was still open as a matter of law, despite the settlement. The legal arguments which might support such an opinion are not apparent, and even if they were, it is obvious that those legal arguments could have been raised in the original proceeding. The third document, Justice Cullity’s Reasons for Decision, does not address the issue of the amount of the Applicant’s pension entitlement; the Reasons address the separate issue of the attempt by the trustees to claw back an alleged overpayment. All three of these documents barely meet the test of relevance, and certainly do not meet the high threshold requirement that they be practically dispositive of the point at issue.

13. With respect to the fourth piece of ‘new evidence’, Justice Cullity’s July 21, 2010 Endorsement, I invited written submissions from the parties on its implications for this Request for Review. I received submissions from all parties who had originally filed submissions on the Request for Review; in addition I received a brief submission from Bruce Chambers. While I have carefully reviewed these submissions, I do not propose to discuss them here in detail. Suffice it to say that there is serious disagreement between the Applicants and the responding parties as to the meaning of Justice Cullity’s Endorsement, and its implications for this Request for Review. The Superintendent, supported by the other responding parties, submits that “the Endorsement clarifies and confirms the view of the Tribunal concerning the effect of the settlement on the Cooper/Turnbull issue as set out in the Decision”. The Applicants draw the opposite conclusion. They argue that “Justice Cullity’s Endorsement states that this issue [i.e. the impact of the Cooper cuts on the amount of pension] was not resolved in the settlement, and therefore is open to be resolved in the Claims Bar Procedure as referenced in Mr. Kaplan’s April 10th, 2008 affidavit”.

14. In my view, the Superintendent has correctly interpreted the Endorsement. It will be recalled that the “Cooper cuts” raised two separate problems for the affected members; their pension entitlements were reduced, and the plan sought to claw back alleged overpayments for pensions paid according to the prior actuary’s methodology. The class action settlement contained language specifically barring the plan from pursuing its claim for the alleged overpayments. In the July 21 endorsement, Justice Cullity explains, in effect, that any “exemption” he may have appeared to grant on the “Cooper cuts” issue related only to the clawback, which had already been separately addressed in the Approval Order. He makes it clear that the other aspect of the issue, which he describes as the “wider question of the level of benefits [Member D] was entitled to receive” was not intended to be the subject of any special exemption; to use Justice Cullity’s words, it “was not addressed separately from the question of the overall merits of the settlement referred to in paragraph 30 and in earlier paragraphs of the Reasons for Decision.” Accordingly, the July 21 endorsement does exactly what the Superintendent argues that it does; it expresses Justice Cullity’s view (and presumably his intention) that the matter of Member D’s on-going entitlement (and by implication, that of other members affected by the “Cooper cuts”) would be governed by the overall settlement as set out in the Approval Order. This is precisely the approach the Tribunal took in its original decision of May 13, 2010. Accordingly, this ‘new evidence’ does not meet the threshold requirement for

review: the requirement that it be practically dispositive of the matter in favour of the Applicants' position. Indeed, to the extent that it is relevant, it simply confirms the correctness of the Tribunal's approach in the May 13th decision.

15. I find therefore that the Applicants have not met the threshold test for the granting of a review, and I dismiss the Requests for Review on this ground.

The Pension Entitlements of the Active Successor Members

16. The submissions on this ground were made primarily by Member B, on behalf of himself and Member C, the other Active Successor Member. No new evidence was filed in support of this Request for Review. I have carefully reviewed Member B's submissions, and have determined that they raise the same issues and arguments that were raised before the Tribunal at the original hearing. Their only novelty, as noted in the Superintendent's response, is that in some cases they have been "recast in terms of arguments interpreting the Decision". These issues and arguments were fully disposed of in the May 13th decision, and the Request for Review does not raise any new grounds or matters which would meet the threshold test for reviewing a decision.

17. Accordingly, I dismiss the Requests for Review on this ground as well.

Order

18. The Applicants' Requests for Review are dismissed.

DATED at Toronto, Ontario, this 29th day of July, 2010

 "Elizabeth Shilton"

Elizabeth Shilton, Chair of the Panel
And Member of the Tribunal