

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;

AND IN THE MATTER OF the Spar Aerospace Limited Pension Plan for Employees Represented by CAW Local 112, Registration No. 0549501 and the Spar Aerospace Limited Pension Plan for Employees Represented by CAW Local 673, Registration No. 0549519;

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

B E T W E E N:

CAW-CANADA AND ITS LOCALS 112 AND 673

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

-and-

SPAR AEROSPACE LIMITED

Respondents

DECISION ON TWO PRELIMINARY ISSUES

BEFORE:

Elizabeth Shilton
Member of the Tribunal and Chair of the Panel

Colin McNairn
Chair of the Tribunal and Member of the Panel

Shiraz Bharmal
Member of the Tribunal and of the Panel

APPEARANCES:

For the Applicant:
Lewis N. Gottheil

For the Superintendent:
Mark Bailey

For Spar Aerospace Limited:
Markus F. Kremer and Morgana Kellythorne

HEARING DATE:
December 11, 2006

A. THE BACKGROUND

On February 6, 2006, the CAW and its Locals 112 and 673 (the "CAW") filed a request that the Superintendent of Financial Services of Ontario (the "Superintendent") order a partial wind up under s.69 of the *Pension Benefits Act* (the "*PBA*") of two pension plans (the "Plans") for employees represented by the CAW who work at the facilities of Spar Aerospace Limited ("Spar") in Mississauga, Ontario. The request was based on the assertion that a significant number of layoffs had taken place at the plant since March 2004. On April 26, 2006 Anna Vani, Pension Officer with the Financial Services Commission of Ontario ("FSCO"), wrote to the CAW advising that the members of the Plans were "subject to the requirements of the Pension Benefits Standards Act (PBSA) therefore section 69 of the Act would not be applicable to the members affected by downsizing." On May 16, 2006, the CAW filed a Notice of Appeal and an accompanying letter requesting a hearing under s. 89 of the *PBA* (together the "Request for Hearing") with the Tribunal. The relief sought is that the Superintendent be ordered to direct a partial wind up of the Plans as originally requested by the CAW. Both the Superintendent and Spar oppose that order.

On the merits, the issue is whether or not the Plans should be subject to a partial wind up order. Before reaching the merits, however, three preliminary jurisdictional objections have been asserted, as follows:

- (1) Both the Superintendent and Spar assert that the rights of all the members of the pension plans in question are governed by the federal statute, the *Pension Benefits Standards Act, 1985*, R.S. 1985, c.32 (2nd Suppl.) (the "*PBSA*") and not the provincial statute, the *PBA*, and this Tribunal therefore has no jurisdiction to order the Superintendent to direct a partial wind up of the Plans (the "constitutional issue").
- (2) Both Spar and the Superintendent also assert that this Tribunal has no jurisdiction to embark on a hearing to consider the issue of what legislation applies; that issue, they argue, has already been dealt with by the federal regulator, the Office of the Superintendent of Financial Institutions ("OSFI") and cannot now be dealt with by the Tribunal (the "OSFI decision as a bar issue").
- (3) In addition, Spar asserts that the Tribunal lacks jurisdiction to embark on a hearing because the *PBA* does not entitle the CAW to a hearing in a case in

which the Superintendent has decided he does not have jurisdiction over the pension plans in question (the “*PBA* hearing rights issue”).

If the Tribunal were to decide that it has no jurisdiction to embark on a hearing, there would be no need to deal with the constitutional issue, or to address the merits of a partial wind up order. Accordingly, at a pre-hearing conference held on October 11, 2006, it was agreed that the Tribunal should consider issues (2) and (3) before proceeding further with the CAW’s Request for Hearing. This jurisdictional hearing, characterized as a hearing on a motion by the Superintendent and Spar that the Tribunal must or should decline to decide the constitutional issue, was convened to deal with these two issues.

The issues were originally stated by the parties as follows:

- (a) Does the Tribunal lack jurisdiction to determine whether the Plans are subject to provincial regulatory authority either because:
 - (i) OSFI has already decided the issue of regulatory authority; or
 - (ii) The *PBA* does not entitle the Applicant [the CAW] to a hearing because the Superintendent has decided that he does not have jurisdiction over the Plans?
- (b) Assuming the Tribunal decides that it has jurisdiction to make this determination, nevertheless does the Tribunal have a residual discretion to decline to hear the matter because OSFI has decided the matter of regulatory authority and, if so, should it exercise that discretion?

At the hearing, the argument proceeded on the basis that question (b) need not be dealt with as a separate question but was essentially subsumed under question (a)(i).

We have concluded that, in the circumstances we have before us, the *PBA* entitles the CAW to a hearing, and nothing that OSFI has already decided is a bar to this Tribunal proceeding to hear the CAW’s case.

Our reasons are set out below.

B. THE STATUTORY CONTEXT

In order to understand the jurisdictional issues before us, it is important to understand the general statutory framework governing pensions in Canada. Pursuant to the division of powers under the *Constitution Act, 1867*, the regulation of occupational pensions may fall under either provincial or federal jurisdiction, depending on whether the employment of the plan members is subject to provincial or federal legislative authority.

The federal pension statute of general application is the *PBSA*, which sets out the scope of its coverage as follows:

- 4. 1) This Act applies in respect of pension plans.

- 2) In this Act, “pension plan” means a superannuation or other plan organized and administered to provide pension benefits to employees employed in included employment (and former employees) and to which the employer is required under or in accordance with the plan to contribute, whether or not provision is also made for other benefits or for benefits to other persons, and includes a supplemental pension plan, whether or not the employer is required to make contributions under or in accordance with the supplemental pension plan, but does not include
- a) an employees’ profit sharing plan or a deferred profit sharing plan as defined in sections 144 and 147, respectively, of the *Income Tax Act*;
 - b) an arrangement to provide a “retiring allowance” as defined in subsection 248(1) of the *Income Tax Act*; or
 - c) any other prescribed arrangement.
- . . .
- 4) In this Act, “included employment” means employment, other than excepted employment, on or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including, without restricting the generality of the foregoing,
- a) any work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of a ship and transportation by ship anywhere in Canada;
 - b) any railway, canal, telegraph or other work or undertaking connecting a province with another province or extending beyond the limits of a province;
 - c) any line of steam or other ships connecting a province with another province or extending beyond the limits of a province;
 - d) any ferry between a province and another province or between a province and a country other than Canada;
 - e) any aerodrome, aircraft or line of air transportation;
 - f) any radio broadcasting station;
 - g) any bank or authorized foreign bank within the meaning of section 2 of the *Bank Act*;
 - h) any work, undertaking or business that, although wholly situated within a province, is before or after its execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more provinces; and
 - i) any work, undertaking or business outside the exclusive legislative authority of provincial legislatures, and any work, undertaking or business of a local or private nature in Yukon, the Northwest Territories or Nunavut.

While it takes many words to say so, the essence of this provision is that employees whose employment is on or in connection with an undertaking under federal legislative authority, and who are not otherwise exempted, are covered by the *PBSA*. In general, their pension plans should be registered under that Act. The administrative agency responsible for this statute is the federal regulator, OSFI. Among other things, OSFI is responsible for registering pension plans under the *PBSA*. Applications for the wind up of plans which are federally regulated are made to the Superintendent of Financial Institutions, the administrative head of OSFI.

Ontario has a similar pension regulation system for employees whose employment falls under provincial jurisdiction. The relevant statute is the *PBA*, administered by the Financial Services Commission of Ontario (“FSCO”). Section 3 of the *PBA* provides that:

This Act applies to every pension plan that is provided for persons employed in Ontario

While the Act does not spell this out, s.3 makes the *PBA* applicable only where the employment in question is both located in Ontario and subject to provincial legislative authority; as a matter of constitutional law, where the employment in question is subject to federal legislative authority, the *PBA* does not apply. Applications for the wind up of plans which are regulated by FSCO are made to the Superintendent of Financial Services, the administrative head of FSCO.

Given this bifurcation of jurisdiction, it is possible that a single pension plan may provide benefits to employees in both federal and provincial jurisdictions. In that case, *prima facie* the plan would have to be registered in both jurisdictions. In order to avoid subjecting plan administrators to the necessity of registering and meeting the regulatory compliance requirements of more than one regulatory regime, the federal and Ontario governments, pursuant to statutory authority, have entered into a Memorandum of Agreement dated August 29, 1968 and subsequently renewed. Under this Memorandum, the parties have agreed that where the majority of the members of a pension plan are “employed in included employment” within the meaning of the *PSBA*, FSCO delegates its authority to OSFI in relation to “registration, audit and inspection”. Reciprocally, the federal regulator delegates its authority to FSCO where the majority of members are in employment which is provincially regulated. In essence, this means that if a majority of the members of a plan are federally regulated, the plan will be registered only with OSFI, even though it may have some members whose substantive rights are governed by the *PBA*. Such reciprocal memoranda of agreement between regulatory authorities have been recognized and respected by Canadian courts: see *Boucher v. Stelco Inc.*, [2005] SCC 64. The Memorandum in this case does not address the question of who decides whether a majority of members of any given pension plan are provincially or federally regulated.

C. THE FACTS

The facts relevant to a determination of the preliminary issues before us were generally not in controversy, and were placed in evidence by way of an agreed statement of facts and two books of documents. In addition to these agreed facts, the CAW filed an additional book of documents, accepted as evidence by all parties, and a statement of evidence of Jeff Wareham, a CAW National Representative responsible for pensions and benefits, who has been personally involved with collective bargaining and pension issues for the relevant Spar bargaining units for a number of years. Mr. Wareham was cross-examined on his statement by counsel for the Superintendent. The parties agreed that Mr. Wareham’s evidence was properly before us for purposes of this motion.

The CAW and Spar have had a collective bargaining relationship going back some 40 years. This bargaining relationship has always been provincially regulated. The pension plans at issue in this case, which cover the hourly rated and the salaried employees at the Mississauga work site are incorporated by reference into the terms of the relevant

collective agreements. These Plans were registered with FSCO under the *PBA* from their inception in 1968 until, at the request of Spar, they were registered by OSFI in August of 2006. In 1993, when a significant number of employees were laid off as a result of the sale of one of Spar's divisions, the Plans were subject to a partial wind up order under the *PBA*.

Much of the documentation filed before us relates to the dealings between Spar, OSFI, FSCO and the CAW from January of 2003, when Spar first requested that the Plans be federally registered, until August 2006 when the Certificates of Registration under the *PSBA* were actually issued. The sequence of events revealed by these documents was helpfully summarized for us in the parties' written submissions, and we have drawn on those summaries for the following outline of the relevant sequence of events:

- a) On January 16, 2003, Paul Wong of Spar, the employer sponsor for the Plans, wrote to the Ontario Superintendent and OSFI requesting that the registration of the Plans be transferred, effective January 1, 2003, from FSCO to OSFI (Exhibit A1).
- b) In a letter dated June 24, 2003, addressed to both FSCO and OSFI, counsel for the CAW requested that any decision issued in response to Spar's January 16, 2003 request be delayed to permit time for the CAW to provide written submissions (Exhibit A2). Although neither regulator acknowledged this letter at this time, the CAW did file written submissions via correspondence dated July 21, 2003, addressed to both FSCO and OSFI (Exhibit A3).
- c) In a letter dated September 17, 2003 to OSFI, Pauline Stephens of FSCO indicated that FSCO was awaiting OSFI's "determination regarding the 'included employment' status of the members of [the Plans]." The September 17, 2003 letter specifically referenced Spar's request of January 16, 2003 and the CAW's submissions filed in respect of this request filed on July 21, 2003. Counsel for the CAW was copied on the September 17, 2003 letter (Exhibit A4).
- d) In an e-mail dated January 12, 2004, Nancy Begg-Durkee, an employee of OSFI, responded to Spar's January 16, 2003 request that its pension plans be re-registered under the *PBSA*. Her email, addressed to Mr. Paul Wong of Spar and copied to FSCO, states: "I am confirming that the activities of Spar in respect of the maintenance, repair, design and manufacturing of aircraft falls [sic] within federal jurisdiction" and advises that the Plans should be federally registered (Exhibit A5).
- e) The CAW wrote to OSFI again on August 13, 2004 seeking information and disclosure with respect to the status of Spar's application to register the plans (Exhibit A8).
- f) No reply was forthcoming at that time. Follow-up telephone contacts from the CAW to OSFI and a letter of January 24, 2005 (Exhibit A9) produced a response from OSFI by letter on February 17, 2005 indicating that OSFI was "looking into the concerns" expressed by the CAW (Exhibit A10). This was followed by a letter from OSFI on March 17, 2005 in which the CAW was advised that the Plans had not been registered by OSFI and in fact no registration application had been received as of that date (Exhibit A11).

- g) When Spar did apply for registration on July 6, 2005, (Exhibits A12 & A13), neither Spar nor OSFI notified the union of the application.
- h) The CAW wrote again to OSFI on August 23, 2005, expressing its concern that OSFI had a “duty to hear from all concerned” and that it was inappropriate for OSFI to be dealing with Spar on this registration matter without notice to the CAW (Exhibit A14).
- i) OSFI replied to the CAW by letter dated September 21, 2005, advising of OSFI’s position that “determining whether employment is included employment (under the PBSA, 1985) is not a discretionary power given to OSFI”. The letter stated that “[b]ased on the request from Spar Aerospace Limited to register the Spar Aerospace Limited Plans under the PBSA, the members of these plans fall under the definition of “included employment” pursuant to section 4(4) of the PBSA” (Exhibit A15).
- j) In a letter dated January 11, 2006 to Mr. Wong of Spar, Ms. Vani of FSCO confirmed FSCO’s understanding that OSFI had registered the Plans federally effective January 1, 2003 (Exhibit A16). In fact, this was not the case at that time.
- k) The CAW wrote to the Superintendent on February 6, 2006 requesting that the Superintendent order partial wind ups of the Plans on the basis that a significant number of members of the Plans had ceased employment due to Spar’s loss of a number of contracts with key customers between March 2004 and the date of the request (Exhibit A18).
- l) FSCO staff responded to this letter on February 16, 2006 advising that the registration of the Plans had been transferred to OSFI and that FSCO staff had written to OSFI (see Exhibit A20, dated February 15, 2006) to request confirmation that all members of the Plans were employed in “included employment” as defined in the *PBSA* (Exhibit A19).
- m) In February 28, 2006 CAW representatives attended at the office of OSFI in Ottawa to discuss with OSFI staff the matter of Spar’s efforts to register its CAW-Canada Plans under the authority of the *PBSA*.
- n) At that meeting, the CAW was informed of OSFI’s position that:
- OSFI was not obliged to notify the CAW or the employees the CAW represents of any request to register a pension plan under the *PBSA*;
 - OSFI’s registration of a pension plan does not determine regulatory authority or jurisdiction over a pension plan;
 - OSFI had no obligation to (and would not) disclose to the union any application or submission made by Spar pertaining to the registration of the two Plans;
 - OSFI relies upon information and advice provided by the company/sponsor of a pension plan regarding the registration of a

pension plan and need not and does not conduct a hearing of any kind involving the union with respect to that issue;

- the registration of a pension plan is an “administrative” matter and not a matter requiring “adjudication” or consultation with a collective bargaining agent.
- o) In a letter dated March 2, 2006 to FSCO, the CAW indicated its disagreement with the transfer of the Plans’ registration to OSFI and reiterated its view that partial wind ups of the Plans should be ordered under the *PBA* (Exhibit A21).
- p) In a letter also dated March 2, 2006, counsel for the CAW wrote to Mr. Wong of Spar requesting that Spar provide copies of the applications to register the Plans (along with associated documents and information) filed by Spar with OSFI (Exhibit A22).
- q) FSCO staff responded to the CAW’s March 2, 2006 letter to FSCO in a letter dated March 10, 2006 indicating that FSCO was still awaiting confirmation from OSFI that all members of the Plans were employed in “included employment” (Exhibit A24).
- r) On March 14, 2006, Gordon Mosher of OSFI sent an email to Ms. Vani of FSCO, indicating that OSFI was “reviewing the registration issue and anticipate[d] having a response...in the near future” (Exhibit A25). That email also responded to Ms. Vani’s earlier request that OSFI confirm whether all employees were in “included employment” as follows: “please note that the administrator confirmed in an email dated February 27, 2006 that all members of the Local 112 and Local 673 are subject to the PBSA”. (The February 27, 2005 email was filed as Exhibit B6.)
- s) Also on March 14, 2006, Mr. Wong of Spar responded to the CAW’s request for copies of the application for registration of the Plans and related documents filed with OSFI by providing the documents (Exhibit A26).
- t) In an email to Ms. Vani of FSCO, dated April 24, 2006, Evelyne Borkowski-Parent of OSFI confirmed OSFI’s understanding, “after concurring [sic] with the plan administrator”, that “all employees of the 5 Spar plans are employed in ‘included employment’ and none of them falls under Ontario’s jurisdiction” (Exhibit A27).
- u) In a letter dated April 26, 2006 to the CAW (Exhibit A28), Ms Vani of FSCO, wrote to the CAW as follows:

“Further to our letter dated March 10, 2006, we have received a response from the Office of the Superintendent of Financial Institutions (OSFI), indicating that all employees of the five SPAR plans fall under ‘included employment’ and that none of the employees fall under the Pension Benefits Act (PBA).

As such, the members under the above plans are subject to the requirements of the Pension Benefits Standards Act (PBSA) therefore

section 69 of the [Ontario] Act would not be applicable to the members affected by downsizing.

Further enquiries with respect to the SPAR plans should be directed to OSFI.”

This letter was copied to the Deputy Superintendent of Pensions at FSCO, as well as to Spar and two officials at OSFI.

- v) The CAW filed its Request for Hearing on May 16, 2006, initiating this proceeding. The CAW cited sections 69, 87(2) and 89(6) of the *PBA* in its Request for Hearing. The impugned decision or order was described as: “The Superintendent has refused to issue a notice or an order with a view to effecting the partial wind up of the two Pension Plans collectively bargained by the applicant [the CAW] under review. The Superintendent has refused to take jurisdiction over this matter. The Superintendent decided that federal law applies to these Plans” (Exhibit A29).
- w) OSFI issued Certificates of Registration for the Plans dated August 3, 2006 (for the Local 112 Plan) and August 14, 2006 (for the Local 673 Plan) (Exhibit A30).
- x) On October 6, 2006, the CAW commenced an Application for Judicial Review of OSFI’s decision to register the Plans before the Federal Court (Exhibit A31). Spar, OSFI and the Superintendent have all filed Notices of Appearance with respect to the JR Application (Exhibits A32, A33 & A34). The application was initially based on the submission that OSFI had erred in finding that the Plans in question were governed by federal legislation. It was subsequently amended to allege as well that the exclusion of the CAW from the OSFI decision-making process resulted in a denial of natural justice (Exhibit A35).

It is clear from the evidence that despite diligent efforts to insert itself, the CAW was effectively excluded from OSFI’s decision-making process. Based on the evidence before us, it appears that OSFI took the view that it was making an administrative decision based on information supplied by Spar, and that no consultation with other affected parties was required or appropriate. We make no finding as to whether or not OSFI was correct in that view; that is an issue that will presumably be considered by the Federal Court in addressing the CAW’s application for judicial review of OSFI’s registration decision.

It is also clear from the evidence that in February of 2006 when the CAW filed its request that the Superintendent make a partial wind up order, and indeed until August of 2006, the Plans at issue in this case were provincially registered, as indeed they had been for some 38 years. It is true that by February 2006 there had been considerable communication between the provincial and federal regulators on the issue. OSFI had expressed the view that the plans should be federally registered (Exhibit A5), and that employees covered by these Plans were in “included employment” within the meaning of the *PSBA* (Exhibit A15). All parties were aware of that fact. Between the February 6, 2006 filing of the request and the letter from FSCO to the CAW on April 26, 2006 advising that the Plans were under federal jurisdiction, it appears that OSFI concluded that not only some employees, but in fact *all* employees were in “included employment” in the sense of the *PBSA* (Exhibits A25 and A27). But the registration of the Plans did not change until the Certificates of Registration were issued in August 2006, and accordingly in February of 2006 when the CAW requested the Superintendent to issue a

wind up order, and again in May of 2006 when the CAW requested a hearing before this Tribunal, the Plans were registered under the *PBA*.

D. THE LEGAL ARGUMENTS

(a) The PBA Hearing Rights Issue

In its written submissions, Spar argues that “under the *PBA*, the [Tribunal] is not empowered to hold a hearing when the Superintendent has deferred to OSFI’s jurisdiction and therefore has not made a final decision as to whether to order, or to refuse to order, a partial wind up of the [Plans].” On the facts in this case, Spar argues, “the Superintendent has neither proposed to order a partial wind up of the Plans nor decided that the criteria for ordering a partial wind up have not been met. Instead, the Superintendent has declined to render a final decision with respect to whether a partial wind up should be ordered, because OSFI has taken jurisdiction over the Plans”. Spar describes what occurred here as a “deferral to OSFI”, rather than a decision to refuse to order a partial wind up. Spar supports its argument by reference to the Tribunal’s decision in *David Horgan and Superintendent of Financial Services*, FST Decision No. P0063-1999-1, March 27, 2000, *Pension Bulletin*, 10/3, p,151, in which the Tribunal declined to proceed with a hearing in the absence of a decision from the Superintendent.

In *Horgan*, as in this case, the application was filed in response to a letter from a pension officer rather than a notice of proposal, decision or other communication from the Superintendent. There, however, the similarity ends. The substantive content of the two letters is very different. In *Horgan*, the letter advised the applicant that the pension officer found no basis on the information provided up to that point on which to conclude that the applicant had a case for the relief he was requesting, but indicated a willingness to review any additional information or documents the applicant might choose to provide. In other words, the matter was still open so far as FSCO was concerned. On those facts, the Tribunal held that the pension officer’s letter was not a decision of the Superintendent within the meaning of the *PBA*, and therefore could not provide the basis for a hearing before the Tribunal. By comparison, the Vani letter of April 26, 2006 expresses FSCO’s unequivocal position on the issue, making it quite clear that FSCO would not be dealing with the matter any further and referring the CAW to OSFI.

While the FSCO letter that formed the basis for the Request for Hearing in this case was signed by a pension officer, no party took issue with her authority to convey the position of the Superintendent on the CAW’s request for partial wind up orders. Spar’s argument was that the Vani letter does not reflect a decision *per se*. On the contrary, it simply provides information that the Superintendent was deferring to the decision already made by OSFI. Spar argues that the Superintendent has not refused to make an order winding up the Plans, but has simply deferred to OSFI’s decision that the Plans are under federal jurisdiction.

In our view, this argument places form before substance. In his oral submissions, counsel for the Superintendent took issue with Spar’s characterization of Ms Vani’s letter as “informational only”. He argued that the letter “can be accurately characterized as a refusal to order a partial wind up on the grounds that the *PBA* does not apply.” We agree. Indeed, it would be difficult to characterize it in any other way. The Superintendent did not order a partial wind up. Instead, through Ms. Vani, he conveyed his decision that because OSFI “had indicated” that the employees at issue were under

federal jurisdiction, the *PBA* was not applicable to them. The Superintendent was thus choosing to rely on the OSFI conclusion regarding the nature of employment of the affected members without further enquiry and hence disposing of the partial wind-up matter. The inescapable inference from this letter is that the Superintendent was refusing to make an order, and we so find.

On its face, s. 89(5) appears to contemplate a hearing in respect of a proposal by the Superintendent relating to the potential wind up of a pension plan only when the proposal is to make an order requiring a wind up of the plan. However, the Ontario Divisional Court has held that this provision should be read as also requiring a hearing, at the instance of an aggrieved party, when the Superintendent proposes to *refuse* to make an order winding up a pension plan; see *Maynard v. Ontario (Superintendent of Pensions)* (2000), 23 C.C.P.B. 145, [2000] O.J. No. 881 (Div. Ct.); see also *CUPE v. Ontario Hospital Association* (1992) 91 D.L.R. (4th) 436 (Div. Ct.); *Baxter v. Ontario (Superintendent of Financial Services)* (2004), 43 C.C.P.B. 1, [2004] O.J. No. 4909 (Div. Ct.). It is now clearly established in this province that the Superintendent's refusal to make a wind up order entitles the aggrieved party to apply to the Tribunal for a hearing. We have found that the Vani letter of April 26, 2006 constitutes a refusal by the Superintendent to make a partial wind up order, and accordingly, we dismiss Spar's objection on this ground.

(b) The 'OSFI Decision as a Bar' Issue

The Superintendent and Spar both take the position that OSFI has already decided the issue of jurisdiction in favour of federal jurisdiction, and this decision operates as an absolute bar to any inquiry by this Tribunal into the CAW's request. In support of this argument, they rely on the legal doctrines of (i) issue estoppel; (ii) abuse of process; and (iii) the rule against collateral attack. In addition, Spar argues that the CAW's outstanding application before the Federal Court for judicial review of OSFI's decision to register the Plans operates as a bar to these proceedings; for this argument, Spar relies on the doctrine of *lis pendens alibi*.

These arguments all belong generally to the category of judicial "techniques developed to prevent abuse of the decision-making process": *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, at para. 20, p.474. These techniques are designed to avoid costly duplication of legal proceedings, and provide for stability, consistency and finality in legal proceedings.

The application of these doctrines normally calls for a close comparison of the parties, issues and circumstances surrounding the decision which is said to erect a barrier to further litigation, and the parties, issues and circumstances in the subsequent proceeding. In this case, our task in making this comparison is complicated by the fact that the parties are not in agreement about what "decision" of OSFI we should be looking at in analyzing their arguments. As we understand it, the Superintendent and Spar seek to ground their submissions on the following documents:

- Exhibit A5, a January 12, 2004 email from an OSFI employee to Spar, responding to Spar's January 16, 2003 request that its pension plans, currently registered under the *PBA*, be re-registered under the *PBSA*. The email states: "I am confirming that the activities of Spar in respect of the maintenance, repair,

design and manufacturing of aircraft falls [sic] within federal jurisdiction” and advises that the Plans should be federally registered.

- Exhibit A25, a March 14, 2006 email from OSFI staff to FSCO staff, advising FSCO that the administrator of the Plans has confirmed that “all members of Local 112 and Local 673 are subject to the *PBSA*.”
- Exhibit A27, an April 24, 2006 email from OSFI staff to FSCO staff advising that “after concurring with the plan administrator, it is our understanding that all employees of the ...Spar plans are in ‘included employment’ and none of them falls under Ontario jurisdiction.”

They argue that the key decision made by OSFI is the decision that Spar’s activities were under federal jurisdiction; that decision was made in January 2004, more than two years prior to CAW’s February 2006 request for a partial wind up order. Exhibits A25 and A27, they argue, support that initial decision by confirming OSFI’s decision that *all* employees covered by these Plans are in “included employment” and subject to the *PBA*; while these emails do not pre-date the request for a partial wind up, they do pre-date the request to this Tribunal for a hearing. They characterize the Certificates of Registration (Exhibit A30) as simply administrative confirmation of these earlier decisions made by OSFI; the registrations themselves are not the foundation of the estoppel.

The CAW, on the other hand, argues that OSFI did not make any decision until it actually registered the Plans, a decision reflected in the Certificates of Registration issued in August of 2006. According to the CAW, it is this registration decision that must be analysed to determine whether it meets the legal tests for an estoppel.

In view of our ultimate disposition of the arguments, it is not necessary to make a choice between these two positions. Regardless of which OSFI decision we focus on for purposes of analysis, we are not persuaded that there is any bar to these proceedings.

We now consider these arguments in sequence.

(i) Issue Estoppel

Issue estoppel is the doctrine that a legal issue already decided in a prior proceeding should not be decided again. For a prior decision to establish an estoppel on a particular issue, it must meet three pre-conditions:

- It must be a decision on the same issue;
- It must be a final judicial decision; and
- It must be a decision between the same parties.

Even where these three pre-conditions have been met, however, the courts have also said that issue estoppel is an equitable doctrine, and should not be applied if to do so would work an injustice in all the circumstances of the case. As Binnie J. noted in *Danyluk v. Ainsworth Technologies Inc.*, *supra*: “[a] judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice” (para. 1, p.465). The policy interests of the judicial system must always be weighed against the rights of the litigants to have their causes heard: *Brosseau v. Superintendent of Financial*

Services, FST Decision No. PO183-2002-1, *Pension Bulletin* 13/1, at p.141; see also see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, para 53, p.100.; *Danyluk v. Ainsworth Technologies Inc.*, *supra*, para. 33, p.481; para. 67, p.484.

The courts have made it clear that, like the decisions of courts, the decisions of administrative bodies may operate as a bar to further litigation. At least for purposes of the application of issue estoppel, however, they have made it equally clear that not all administrative decisions attract the operation of the doctrine. Unlike courts, administrative bodies have a range of functions: it is only when exercising their *adjudicative* functions that the decisions of administrative tribunals can be invoked against a party seeking to adjudicate rights in another forum. This is a threshold requirement; if a decision is not adjudicative, the doctrine simply does not apply and there is no need to determine whether the more detailed legal elements of the tests for application have been met.

This threshold requirement is explained in *Danyluk v. Ainsworth Technologies Inc.*, *supra*, by Binnie J., speaking for the court:

A common element of the preconditions to issue estoppel...is the fundamental requirement that the decision in the prior proceeding be a judicial decision. According to the authorities..., there are three elements that may be taken into account. First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, was the decision made in a judicial manner? These are distinct requirements:

It is of no avail to prove that the alleged *res judicata* was a decision, or that it was pronounced according to judicial principles, unless it emanated from such a tribunal in the exercise of its adjudicative functions; nor is it sufficient that it was pronounced by such a tribunal unless it was a judicial decision on the merits..... (para. 35, p. 481-482)

It is difficult to characterize any of the correspondence prior to the registration of the Plans as evidencing an adjudicative decision in this sense. Even the decision to register the Plans, which clearly involves the exercise of a statutory power and may entail natural justice requirements (an issue we leave to the Federal Court) may not be an adjudicative decision in the sense required for the application of issue estoppel. Certainly it would appear that OSFI itself did not see its role as adjudicative in any sense of the word in making that decision (see. Part C, para. n, above).

We do not, however, have to decide that issue. Our analysis of the issue estoppel argument is equally applicable to any and all the decision(s) of OSFI as they are reflected in the documents up to and including the registration of the Plans.

In our view, it is clear that that the parties to the OSFI decision were not the same as the parties to the matter before us. Here the CAW is the applicant. As noted above, OSFI did not recognize the CAW as a party at any stage of its proceedings. OSFI advised the CAW at its meeting on February 28, 2006 that the union had no legal right to participate. The CAW was not even notified by OSFI when the Plans were registered. The Superintendent and Spar both acknowledge that the CAW was not a party before OSFI.

The Superintendent and Spar argue nonetheless that issue estoppel should be applied in this case. They submit that since the CAW has applied to the Federal Court for relief from any denial of natural justice that took place before OSFI, its exclusion from the OSFI process can be remedied in that forum, and OSFI's decision should still bind the CAW for purposes of proceedings before this Tribunal. We are not persuaded by that argument. We are dealing here with a deliberate and considered refusal to recognize that the CAW was a party to the process. To suggest that a litigant in that situation should still be considered a party for purposes of issue estoppel because a court on judicial review might say that it *should have been* treated as a party would be to render meaningless the third pre-condition for the establishment of issue estoppel.

Under all the circumstances, we find that the applicant before us was not a party before OSFI, and accordingly, the third pre-condition for the application of issue estoppel has not been met in this case.

For issue estoppel to apply, all three pre-conditions must be met. Our decision that the third pre-condition has not been met is therefore sufficient to dispose of this argument. Despite the full and able submissions we heard on those issues, we express no opinion on whether OSFI dealt with the same issue as is before us, or whether any relevant decision of OSFI meets the test of being a “final judicial decision”.

Even where all three pre-conditions for the application of issue estoppel have been met, however, there is discretion to refuse to apply the doctrine if to do so would work an injustice. This discretion is broader when the estopping decision is a decision of an administrative body than it would be if a court decision is involved, “...because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers” : *Danyluk v. Ainsworth Technologies Inc.*, *supra*, at para. 62, p. 491 . If we had found that the three pre-conditions for issue estoppel had been met, we would nevertheless, in the exercise of our discretion, have come to the conclusion that this matter should proceed before us.

In *Danyluk v. Ainsworth Technologies Inc.*, *supra*, the Supreme Court of Canada set out a list of factors which may be relevant with respect to a court or tribunal's exercise of its discretion. The court made it clear, however, that the list of discretionary factors is “open”, the unifying objective being “to ensure that the operation of issue estoppel promotes the orderly administration of justice, but not at the cost of real injustice in the particular case” (para. 67, p. 494). We do not, therefore, propose to perform the mechanical exercise of testing the facts in this case against the list of factors set out in *Danyluk v. Ainsworth Technologies Inc.*, *supra*. We will, however, set out the factors that we have found relevant to the exercise of our discretion to proceed in this case.

- The CAW, was effectively excluded from meaningful participation in the prior proceeding;
- The registration process is a summary process designed to permit cheap and easy registration of pension plans; the application for partial wind up, by contrast, may expose pension plan sponsors to significant financial liability and involves significant benefits for employees. Such issues require a fuller opportunity for the CAW to lead evidence and make out its case than was available in the registration process;

- The CAW does not have a right of reconsideration of the OSFI decision under the *PBSA* although Spar would have such a right if OSFI has refused to register the Plan (see the *PBSA*, s. 32(1));
- The CAW does not have a right of appeal to the Federal Court from any decision made by OSFI in the course of the registration process, but must make its case to that court within the restrictions imposed by the administrative law rules applicable to judicial review, and has little or no recourse on findings of fact;
- The Plans had been registered provincially for almost 40 years, and were still provincially registered at the time the CAW applied for the partial wind up orders, and for this hearing;
- The Tribunal provides the best forum for the constitutional issues to be fully thrashed out; unlike OSFI, it is able to hear witnesses, review evidence and make findings of fact using adjudicative-type procedures and unlike the Federal Court, it is not bound by the record before OSFI.

We are not unmindful of the spectre raised by the Superintendent and Spar of conflicting decisions between two regulatory authorities, and a potential regulatory hiatus for Spar if the issue of registering jurisdiction is in limbo for any period of time. We believe these concerns are exaggerated, however, in view of the fact that the statutes contemplate that pension plans may indeed overlap jurisdictions, and regulatory authorities have a long history of cooperation in dealing with these overlap issues. Furthermore, as the CAW pointed out in its argument, the partial wind up application focuses on the status of a particular group of Spar employees within a specific time frame throughout which the Plans were provincially registered. A decision in respect of a period of time prior to August 2006 need not create any conflict with federal registration effective August 2006, and certainly would not automatically void any such registration. In any event, the Tribunal would not be making any finding with respect to registration but only with respect to the wind-up matter involving the affected members.

(ii) The Rule Against Collateral Attack

The Superintendent and Spar rely also on the rule against collateral attack, a doctrine that applies to prevent a party from seeking, through a second proceeding, to overturn or render unenforceable a judicial decision made in a prior proceeding, without going through the process of appealing or reviewing the first decision directly. They submit that if the CAW request for a partial wind up order under the PBA were successful, this would necessarily require that the OSFI decision be disregarded, overruled or invalidated. Consequently, they argue that the CAW's hearing request in this case is an impermissible collateral attack on the OSFI decision. In support of this proposition they rely on the decision of the Supreme Court of Canada in *Boucher v. Stelco Inc.*, 2005 SCC 64.

In our view, the rule against collateral attack is not helpful in this case. It would appear to have direct application only where the result of success in the second proceeding would be to essentially nullify or render meaningless the result of the first proceeding. This is clearly not the case here, where a partial wind up order would not operate to nullify the federal registration. In *Boucher*, Lebel J. essentially treated the rule against collateral attack as a species of *res judicata* or issue estoppel (*supra*, para. 35). Likewise in *Toronto (City) v. C.U.P.E., Local 79*, *supra*, Arbour J. rejected the collateral attack

doctrine in favour of an 'abuse of process' analysis. In that case, an employee and his union sought to challenge his criminal conviction in the course of an arbitration proceeding involving his dismissal from employment. They were not seeking to have the conviction itself overturned; they were implicitly attacking its correctness, but not its legal force: para. 34. In such a case, she took the view that the issues were better analysed by resort to the doctrine of abuse of process, rather than by attempting to invoke the rule against collateral attack. That reasoning seems apposite here, where the CAW disputes the correctness of an OSFI decision and will no doubt ask this Tribunal not to follow it as it pertains to the affected members, but is not asking that it be quashed or set aside in this forum.

(iii) Abuse of Process

Accordingly, we turn now to the arguments of the Superintendent and Spar based on the doctrine of abuse of process. As the Supreme Court of Canada noted in *Toronto (City) v. C.U.P.E., Local 79*, *supra* at para. 37:

Canadian courts have applied the doctrine of abuse of process to preclude relitigation where the strict requirements of issue estoppel (typically the privity/mutuality requirement) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of the justice.

In other words, the abuse of process doctrine gives the courts discretion to relieve against unfair and oppressive re-litigation in circumstances where the interests of justice dictate that result, despite the fact that the strict conditions for issue estoppel have not been established. In *Toronto (City) v. C.U.P.E., Local 79* itself, issue estoppel could not be established because the criminal conviction did not involve the same parties as the arbitration between the employer and the union. The court nevertheless held that it would be an abuse of process to allow the issue of the employee's guilt or innocence to be re-litigated, citing policy concerns such as "the integrity of the criminal process and the increased authority of a criminal verdict" [para. 32, 43].

We are not prepared to find that the CAW's February 2006 application for a partial wind up order can be characterized as an abuse of process. On that date, the Plans at issue were provincially rather than federally registered. The CAW had made diligent efforts over many months to ascertain the status of Spar's application to register, and had been effectively ignored by OSFI. In those circumstances, it was logical, rather than abusive, oppressive or manifestly unfair, for the CAW to approach the Superintendent for a partial wind up order. Even in May 2006 when the CAW filed its request for hearing, the Plans were still provincially registered. By that time the CAW had been notified by FSCO, in response to its initial request for a wind up order, that OFSI had made a determination that the employees governed by the plans were under federal jurisdiction. But OSFI had still not registered the Plans. Whether the CAW is right or wrong about its position that the affected members are within provincial jurisdiction, it cannot be said to be acting improperly or misusing the processes under the *PBA* by seeking to have that issue determined under those processes.

Furthermore, we are not persuaded that the integrity of the justice system is at stake here. *Toronto (City) v. C.U.P.E., Local 79* involved a prior decision by a criminal court on a matter of guilt or innocence, decided after according a defendant the full panoply of judicial procedural rights. Here the prior decision was made by an administrative

authority of coordinate jurisdiction, in the course of what can be described at best as a summary process. There is nothing about this particular decision, or the process according to which it was made, that suggests that the credibility of the judicial process will be undermined if we allow this matter to proceed.

If we are wrong in this, we note that the discretionary factors available in issue estoppel cases are equally available in determining whether there has been an abuse of process: *Toronto (City) v. C.U.P.E., Local 79, supra* at para. 53. p. 110. We would apply those factors, as discussed above, to find that in the interests of justice and fairness this matter can proceed.

(iv) *Lis Pendens Alibi* and the Federal Court Judicial Review Proceeding

The arguments considered above address the relationship between any decision that OSFI made on its authority to register the Plans or its actual registration of the Plans, and this proceeding before the Tribunal. We have found that any such OSFI decision does not operate as a bar to our hearing this case. The *lis pendens alibi* argument advanced by Spar, by contrast, focuses on the relationship between this proceeding and the outstanding application before the Federal Court for judicial review of the OSFI decision. The *lis pendens alibi* principle serves some of the same 'judicial economy' functions as the doctrines of issue estoppel, the rule against collateral attack and abuse of process. The principle, succinctly stated, is that a court or tribunal should decline jurisdiction when there is a "*lis pendens alibi*": a parallel proceeding pending in another court or tribunal: *Rocois Construction Inc. v. Québec Ready Mix Inc.*, [1990] 2 S.C.R. 440.

To succeed in this argument, Spar must first establish that the matter before this Tribunal is indeed a parallel proceeding with the application for judicial review before the Federal Court. We do not believe it has crossed this threshold. This matter is an application to partially wind up the Plans. The matter before the Federal Court is an application for judicial review of the OSFI decision to register the Plans: in other words, an application seeking to quash the OSFI registration certificates. It is true that there may be overlap of issues in the two cases: specifically, the constitutional issue. But the Federal Court may well decide to dispose of the judicial review application on administrative law grounds that do not directly implicate the constitutional issues. And even if the Court does deal with the constitutional issue, it is far from inevitable that it will do so on a basis that directly disposes of the issue before us. As noted above, the CAW application focuses on the status of a particular group of Spar employees within a specific time frame prior to August 2006. A decision by the Federal Court on the issue of whether the Plans should or should not have been registered federally in August 2006 may not address the question of whether the employees at issue in this application were entitled to rights conferred by the *PBA* at the relevant time. Furthermore, Spar did not put before us any case law to the effect that the overlap of a single issue attracts the application of the *lis pendens alibi* doctrine. The legal test recognized by the Supreme Court of Canada in *Rocois Construction Inc. v. Québec Ready Mix Inc.*, *supra*, clearly requires much more: substantial similarity, if not identity, not just of some issues, but of parties, cause and object.

Spar argued that practicality and judicial economy dictate that the Federal Court should decide the constitutional issue, relying heavily on the fact that only the Federal Court has

both regulators before it, and only the Federal Court can make an order that binds all parties including OSFI. While that argument has some attraction, in the absence of a finding that the Federal Court proceeding is a *lis pendens alibi*, we are unable to give it any effect. If the Federal Court does directly address the same constitutional issue in the application for judicial review, and if this proceeding is still ongoing at that time, we will no doubt have to deal with the question of whether the Federal Court's decision gives rise to an issue estoppel. In doing so, we will have to address the arguments that were put before us with respect to *forum conveniens*, and the more limited scope provided to parties by a judicial review application to contest the facts. Meanwhile, however, we find that the Federal Court application is not a *lis pendens alibi*, as the courts have applied that concept, and accordingly we are not prepared to stay or quash this proceeding because that application is outstanding.

We note that OSFI was given notice of this hearing, and while it did not appear for purposes of these threshold arguments, it may do so further down the road. Likewise, both provincial and federal governments will be given Notice of Constitutional Question at the next stage of the proceedings, ensuring the opportunity for all interests to be fully advanced and protected in the argument before this Tribunal on the constitutional issue.

D. DISPOSITION

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

The Registrar will contact the parties to set up a continuation of the pre-hearing conference to address the scheduling of the hearing on the constitutional issue.

DATED at Toronto, Ontario, this 19th day of January, 2007

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

"Colin McNairn"
Colin McNairn, Chair of the Tribunal and
Member of the Panel

"S. Bharmal"
Shiraz Bharmal, Member of the Tribunal
and of the Panel