

**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.P.8 (the “Act”);

**AND IN THE MATTER OF** a Proposal of the Superintendent of Financial Services to Make an Order under section 87 of the Act respecting a request by Mr. Jan Szarycz relating to the **Canadian Commercial Workers Industrial Pension Plan**, Registration Number 0580431 (the “Plan”);

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

**B E T W E E N:**

**JAN SZARYCZ**

**Applicant**

**- and -**

**SUPERINTENDENT OF FINANCIAL SERVICES**

**Respondent**

**BEFORE:**

Mr. John Solursh  
Chair of the Tribunal and of the Panel

Mr. Shiraz Bharmal  
Member of the Tribunal and of the Panel

Mr. Martin Brown  
Member of the Tribunal and of the Panel

**APPEARANCES:**

For the Applicant  
Mr. Jan Szarycz [Self Represented]

For the Superintendent of Financial Services  
Ms. Deborah McPhail

**HEARING DATE:**

October 26, 2007

## **REASONS FOR DECISION**

### **NATURE OF THE APPLICATION**

The Applicant seeks an Order that:

- (a) the Respondent Superintendent of Financial Services (the “Superintendent”) set aside the Notice of Proposal dated April 18, 2007 to refuse to make an Order in respect of the Canadian Commercial Workers Industrial Pension Plan (the “Plan”) requiring the administrator of the Plan to transfer the commuted value of the Applicant’s pension benefit to a Lock-In Retirement Account (a “LIRA”), a Life Income Fund (“LIF”) or a Lock-In Retirement Income Fund (“LRIF”) or requiring the administrator of the Plan to provide payment to the Applicant of the commuted value of his pension benefits, pursuant to Sections 42, 50, 67 and 87 of the *Pension Benefits Act*, Ontario (the “Act”); and,
- (b) this Tribunal make such an Order equivalent to the order he requested of the Superintendent.

### **FACTS**

The Applicant and the Superintendent appeared before the Tribunal and filed written submissions, together with an Agreed Statement of Facts (Confidential), an Agreed Book of Documents and a Confidential Agreed Book of Documents. The Agreed Statement of Facts was marked Confidential on consent of the Applicant and Superintendent because it referred to the names of two other former members of the Plan and their pension entitlements. Both parties agreed that it was appropriate to preserve the confidentiality of that information and we have reflected that agreement in the summary below the circumstances of those other individuals. The hearing proceeded on the basis of the Agreed Statement of Facts and the Agreed Books of Documents. The stated relevant facts are as follows:

## **I. Background Facts**

1. The Plan is a multi-employer defined benefit pension plan that is registered under the Act.
2. The Applicant is a former member of the Plan who was employed by a participating employer called Group 4 Falck (Canada) Ltd.
3. Group 4 Falck (Canada) Ltd. ceased to be a participating employer in the Plan effective September 30, 2004, and the Applicant's membership in the Plan ceased at that time.
4. The Applicant was at least 50 years old on the date his membership in the Plan ceased.

## **II. Plan Provisions/Applicant's Pension**

5. Section 12.01 of the Plan provides that the "Trustees" (as defined under the Plan) shall be responsible for all matters relating to the administration of the Plan. It provides further that the Trustees shall decide conclusively all matters relating to the operation, interpretation and application of the Plan. It also states that the Trustees "may, in their own sole discretion, delegate any or all of their duties and responsibilities as administrator of the Plan to one or more committees or other persons, as deemed appropriate from time to time." We will refer to the Trustees below as the "Trustees" or the "Plan Administrator".
6. Notice of this hearing was given by the Registrar of the Tribunal to the Administrator. The Administrator did not appear at or participate in the hearing.
7. Section 8.05 of the Plan provides for payment of an immediate monthly pension if the member is 50 or older. This Section of the Plan states that a former member who is entitled to receive a deferred pension may elect to commence receiving that pension on or after the first day of any month following the attainment of age 50, and that the amount of the pension shall be determined in accordance with sections 6.02 and 6.03 of the Plan.
8. Sections 7.08 and 8.07(a) of the Plan state that where a member's annual pension payable on his Normal Retirement Date is less than 2% of the Year's Maximum Pensionable Earnings as

defined under the Canada Pension Plan (the “YMPE”), the member shall receive a lump sum payment equal to the Commuted Value of such pension, instead of a monthly pension payment.

9. Section 8.07(c) of the Plan provides, that notwithstanding Section 8.07(a) where the Act (defined in the Plan as the provincial pension benefits legislation that applies to a member) so requires, a Member shall be given the option to elect to receive a lump sum equal to the Commuted Value of the pension which has been credited to him instead of a monthly pension payment, if the annual pension payable on his Normal Retirement Date or the Commuted Value of such pension is less than the amount specified in the Act.

10. The Plan provides pension benefits for members in all 10 provinces. The Act in Ontario applies to the Applicant.

11. The Applicant’s Annual Statement from the Plan as of December 31, 2004 states that his total monthly pension at his Normal Retirement Date is \$72.27.

**The Canadian Commercial Workers Industry Pension Plan, Annual Statement for Jan Szarycz as of December 31, 2004; Agreed Book of Documents, Tab 2**

12. The YMPE for 2006 was \$42,100.00; 2% of that amount is \$842.00 annually, or \$70.17 monthly. The Superintendent’s counsel noted at the hearing that the amount for prior years was lower; however, in order to maximize the relevant amount for purposes of the Superintendent’s decision and potentially assist the Applicant’s position, the Superintendent has proceeded on the basis that YMPE for 2006 was applicable.

**Historical OAS & CPP; Agreed Book of Documents, Tab 3**

**III. Applicant’s Personal Circumstances**

13. The Applicant suffers from numerous medical complaints identified in the Agreed Statement of Facts (Confidential). These conditions have caused the Applicant to incur various expenses.

14. On June 11, 2002, the Applicant was ordered by the Ontario Superior Court of Justice to pay interim monthly child support and interim monthly spousal support.

**Order dated June 11, 2002, Ontario Superior Court of Justice, Court File No. 00-FP-262893 FIS; Agreed Book of Documents, Tab 5**

15. The Applicant received a Notice of Rent Increase from Fleetwood Realty Management Co. advising that the rent on his residence would be increased as at June 1, 2006.

**Notice of Rent Increase as at June 1, 2006; Agreed Book of Documents, Tab 6**

16. As at May 31, 2007, the Applicant had an overdraft with TD Canada Trust. As at May 31, 2007, the Applicant had an outstanding balance under a line of credit with TD Canada Trust.

17. The Applicant has produced a pay stub showing his net pay for the two-week period ended March 25, 2007.

18. The Applicant asserts that other members or former members of the Plan have been permitted to transfer their pension entitlements or to be paid lump sums in circumstances similar to those of the Applicant.

**IV. Personal Circumstances of Other Members**

19. The Applicant has received a letter from the Plan to Mr. X dated May 13, 2005. This letter states that under the terms of the Plan, a member's credited pension is paid in a lump sum if the amount of that pension is less than \$68.50 per month. The letter states that the monthly pension amount credited to Mr. X is \$67.17 and the value of the pension is estimated to be \$10,655.74. However, pursuant to regulations under the Act, only 61% can be paid immediately to Mr. X and the balance must be held back for 5 years. The letter requests Mr. X to complete a "Method of Payment" form.

**Letter from Plan Administrator to Mr. X, dated May 13, 2005; Confidential Agreed Book of Documents, Tab 1**

20. The Applicant has also received the following materials from another member of the Plan, Mr. Y:

- a) a statement signed by Mr. Y dated July 16, 2007, which states that in the same place, same position, and with the same hourly payment as the Applicant, that he was in the

same Plan as the Applicant, that he was informed by the Plan administrator in 2005 that his pension was \$66.10 monthly, and that he has been receiving his full pension since 2005;

- b) a letter from the Plan administrator to Mr. Y stating that he would receive a monthly pension of \$63.50, which was an estimated amount;
- c) a Pension Plan Options Quotation form from the Plan with various options; the option of a monthly pension for a life pension with a joint and survivor pension 50% is checked off.

**Statement signed by Mr. Y, dated July 16, 2007; Confidential Agreed Book of Documents, Tab 2**

**Letter from Plan Administrator, to Mr. Y, dated September 19, 2005; Confidential Agreed Book of Documents, Tab 2**

**Canadian Commercial Workers Industry Pension Plan, Pension Plan Options Quotation – Ontario Member with Eligible Spouse, for Mr. Y, undated; Confidential Agreed Book of Documents, Tab 2**

- 21. It is the Applicant's position that he should receive similar treatment from the Plan as the treatment received by Mr. X and Mr. Y.

## **V. Notice of Proposal**

- 22. On April 18, 2007, the Superintendent issued a Notice of Proposal proposing to refuse to order the Plan Administrator to transfer the commuted value of the Applicant's pension benefit, and proposing to refuse to order the Plan Administrator to provide payment to the Applicant of the commuted value of his pension benefit.

- 23. The Notice of Proposal relies upon three essential reasons:

- a) under the terms of the Plan, the Applicant was eligible for an immediate pension when his membership was terminated and the Plan did not permit any transfer options in such

circumstances. Therefore, pursuant to subsection 42(3) of the Act, the transfer options set out in section 42 do not apply to the Applicant;

- b) subsection 50(1) of the Act allows a pension plan to provide for payment of the commuted value of a pension benefit to a former member if the annual pension benefit payable is not more than 2 per cent of the Year's Maximum Pensionable Earnings in the year employment was terminated. However, the Applicant's annual pension benefit exceeds this amount;
- c) the Applicant's pension benefits cannot be commuted under the "financial hardship" provisions of the Act because the funds are in a registered pension plan, which is not a fund prescribed for transfer under Regulation 909, R.R.O. 1990 (the "Regulation").

## **VI. Issues and the Law**

24. As agreed between the parties, the issues to be resolved by the Tribunal in this matter are:

- a) Is the Applicant entitled to transfer some or all of his pension benefits in the Plan under the Act?
- b) If the answer to issue one is yes, what form should the transfer take and what amount should be transferred?

### **Issue A – Is the Applicant entitled to transfer some or all of his pension benefits in the Plan under the Act?**

#### **i) Section 42 of the Act**

25. Section 42 of the Act gives a former member of a pension plan the right (commonly known as a "portability right") to require the Administrator of the Plan to transfer pension benefits only in limited circumstances in lieu of entitlement to a locked-in deferred pension under subsection (1) of that section. It reads as follows:

"42(1) A former member of a pension plan who, on or after the 1<sup>st</sup> day of January, 1988, terminates employment or ceases to be a member of the pension

plan and who is entitled to a deferred pension is entitled to require the administrator to pay an amount equal to the commuted value of the deferred pension,

(a) to the pension fund related to another pension plan, if the administrator of the other pension plan agrees to accept the payment;

(b) into a prescribed retirement savings arrangement; or

(c) for the purchase for the former member of a life annuity that will not commence before the earliest date on which the former member would have been entitled to receive payment of pension benefits under the pension plan.

(2) The entitlement under subsection (1) is subject to the prescribed limitations in respect of the transfer of funds from pension funds.

(3) Subsection (1) does not apply to a former member whose employment is terminated and who is entitled to immediate payment of a pension benefit under the pension plan or under section 41, unless the pension plan provides such an entitlement.” (emphasis added)

26. Section 8.05 of the Plan provides for payment of an immediate monthly pension if the member is 50 years of age or older, and that a former member who is entitled to receive a deferred pension may elect to commence receiving that pension on or after the first day of any month following the attainment of age 50. The Applicant was at least 50 years old when his membership in the Plan was terminated.

27. The Plan does not provide a member who is entitled to an immediate pension on the date employment or membership is terminated with an automatic right to transfer his or her pension benefits from the Plan. However, Section 7.07 of the Plan gives the Trustees, subject to the terms of that section, the discretionary power to allow a member to transfer his or her pension entitlements from the Plan subject to any conditions or limitations imposed by the Act or the *Income Tax Act of Canada* (the “*Tax Act*”).

28. Specifically, Section 7.07 reads as follows: “The Trustees may, where permitted, and shall, where required under the Act, allow a member to elect to receive any other optional form of pension payment or to receive any other permitted transfer of the Commuted Value of his pension, subject to any conditions or limitation imposed by the Act or the *Tax Act*.” Section 7.11 of the Plan clarifies that “All the provisions of this Section 7 shall apply to Deferred Vested Pensioners ...” and therefore Section 7.07 would apply to the Applicant since he is a Deferred Vested Pensioner under the Plan.

29. As noted in the summary of facts above, the relevant provincial legislation with respect to the Applicant for purposes of the Plan is the *Pension Benefits Act* of Ontario.

30. The Tribunal members asked the parties at the hearing for their submissions as to whether Section 7.07 of the Plan constituted a provision of a plan entitling a member to require a transfer to a prescribed retirement savings arrangement as set out in subsection 42(3) of the Act. It was the Superintendent’s submission that Section 7.07 of the Plan does not meet the standard set out in subsection 42(3) and accordingly the Plan does not “provide” an entitlement to transfer pension benefits under subsection 42(1). Specifically, the Superintendent’s counsel argued that subsection 42(3), contemplated specific entitlement to the Plan member to transfer pension benefits under a pension plan rather than a provision such as Section 7.07 which gives the Trustees discretion to permit a transfer.

31. We find that:

- a) Section 7.07 of the Plan gives the Trustees as Plan Administrator discretion to entitle the Applicant to require them to pay an amount equal to the commuted value of his deferred pension into a prescribed retirement savings arrangement or to take advantage of the other alternatives set out in subsection 42(3) of the Act;
- b) that discretion constitutes provision for such entitlement in the Plan for purposes of the Act including under subsection 42(3); and
- c) accordingly if and when the Trustees exercise that discretion in favour of the Applicant they will be required to make the transfer requested by the Applicant pursuant to the Plan

and the Act will permit him to transfer the Commuted Value of his pension entitlement under the Plan to a prescribed retirement savings arrangement.

32. The key question we were required to address in reaching our conclusions is whether the discretion of the Trustees under Section 7.07 of the Plan is a transfer “permitted under the Act” or whether subsection 42(3) of Act contemplates only a right to transfer which is fully vested in and exercisable by a Plan member without the need for a discretionary approval of a Plan Administrator.

33. In answering that question it is appropriate, in the absence of a definition of “permits” as used in Section 7.07 of the Plan, to consider in the context of Section 7.07 the grammatical and ordinary meaning of “permit”. Accordingly we reviewed some dictionary definitions provided by Superintendent’s counsel which indicate it has a broad meaning that ordinarily would include the exercise of a discretion.

34. The word “permit” is broadly defined as follows in Black’s Law Dictionary Eighth Edition:

- “(1) to consent formally (permit the inspection to be carried out).
- (2) to give opportunity for ...
- (3) to allow or admit (if the law so permits).”

35. Similarly, the word “permit”, when used as a verb, is broadly defined in the Concise Oxford Dictionary of Current English Eighth Edition as follows:

- “(1) give permission or consent to; authorize (permit me to say).
- (2) a. allow; give an opportunity to (permit the traffic to flow again).  
b. give an opportunity (circumstances permitting).
- (3) (foll. by it) admit, allow for.”

36. The context in which “permits” as used in Section 7.07 of the Plan does not limit the broad general definition of that word. Rather, we have concluded that a narrow reading of that section and of subsection 42(3) of the Act as suggested by the Superintendent would yield a peculiar result which seems to be contrary to the general policy of the Act. That general policy

is to permit portability into a prescribed retirement savings arrangement support to which the lock-in provisions of the Act would apply while reserving to the Superintendent the discretion under the financial hardship provisions to consent in appropriate circumstances to the commutation of an individual's pension entitlement within the prescribed retirement savings arrangement.

37. The Applicant essentially was seeking from the Superintendent a decision which would enable him to commute the value of his pension entitlement either directly or through a transfer of that entitlement into a LIRA or other prescribed retirement savings arrangement. Following such a transfer he then would be able to apply under the "financial hardship" provision of subsection 67(5) of the Act for the Superintendent's consent to the commutation or surrender of such a prescribed retirement savings arrangement. As noted below, Superintendent's counsel indicated at the hearing that if the "financial hardship" provision was applicable to a pension plan under the Act and was not limited to a prescribed retirement savings arrangement the Superintendent likely would grant consent to the commutation or surrender of the Applicant's pension entitlement.

38. The submissions of the parties and the documentary record available at the hearing do not include whether the Trustees were asked to exercise their discretion. We expect that if they had adopted the same view of subsection 42(3) as the Superintendent they assumed they could not exercise that discretion to agree to the transfer to a prescribed retirement savings arrangement as ultimately is being sought by the Applicant.

39. In view of the Superintendent's position on the interpretation of subsection 42(3) of the Act it seems clear that the Superintendent did not consider, prior to issuing the Proposal, whether he should require the Trustees to first determine whether in their discretion the Applicant should be allowed to transfer the Commuted Value of his pension into a prescribed retirement savings arrangement.

40. We have concluded that the appropriate course of action would have been for the Superintendent to ascertain from the Trustees whether they had addressed the Applicant's request and determined in the exercise of their discretion whether to grant him the transfer option set out in Section 7.07 of the Plan.

41. We expect that if the facts were drawn to the attention of the Trustees, they understood the transfer being sought by the Applicant, they applied the interpretation of the Act set out above, and they (like the Superintendent) recognized the severe financial hardship faced by the Applicant as set out in the Agreed Statement of Facts, the Trustees may well have agreed to exercise their discretion under 7.07 to permit such a transfer. A transfer of such a relatively small amount in those exceptional circumstances likely would be regarded by the Trustees as not resulting in any undue financial exposure to the Plan while being sensitive to the unusual circumstances faced by the Applicant. We would reiterate that the Superintendent through his counsel stated in his Submissions to the Tribunal and orally at the hearing that he is sympathetic to the Applicant's position while expressing the conclusion that the criteria in the Act for the transfer or unlocking of pension benefits do not apply to the Applicant's circumstances and "there is no discretion under the Act to permit a transfer or unlocking of funds if these criteria are not met."

42. In conclusion, this matter is referred back to the Superintendent on the basis that the Trustees should be asked whether in the applicable circumstances they are prepared to allow the Applicant to elect to receive a transfer of the Commuted Value of his pension into a prescribed retirement savings arrangement subject to any limitations imposed by the *Tax Act*. If the Trustees agree to permit such a transfer we find that it would comply with Section 42 of the Act.

**ii) Subsection 50(1) of the Act**

43. Subsection 50(1) of the Act states,

"A pension plan may provide for payment to a former member of the commuted value of a benefit if the annual benefit payable at the normal retirement date is not more than 2 per cent of the Years' Maximum Pensionable Earnings in the year that the former member terminated employment."

44. Sections 7.08(a) and 8.07(a) of the Plan provide that where a member's annual pension payable on his Normal Retirement Date is less than 2% of the YMPE, the member shall receive a lump sum payment equal to the commuted value of the pension.

45. The Applicant's Annual Statement from the Plan as of December 31, 2004 states that his total monthly pension at his Normal Retirement Date is \$72.27. The YMPE for 2006 was \$42,100.00; 2% of that amount is \$842.09 annually, or \$70.17 monthly.

**Agreed Statement of Facts, paragraph 10, Tab "A"**

**Historical OAS & CPP; Agreed Book of Documents, Tab 3**

46. We agree with the Superintendent that the Applicant does not meet the criteria in subsection 50(1) of the Act of section 7.08(a) of the Plan, as his monthly pension at his normal retirement date exceeds 2% of the monthly YMPE for 2006.

**iii) Subsection 67(5) of the Act: Financial Hardship Rule**

47. Subsection 67(5) of the Act provides a "financial hardship" rule under which the Superintendent can consent to commutation of an amount transferred from a pension plan into a locked-in prescribed retirement arrangement. It states that despite the general rule in the Act that pension funds may not be commuted or surrendered during the person's life, the Superintendent may consent to the commutation or surrender, in whole or in part, of a "prescribed retirement savings arrangement of a type that is prescribed for the purposes of this subsection if the Superintendent is satisfied as to the existence of such circumstances of financial hardship as may be prescribed".

48. As Superintendent's counsel mentioned at the hearing, it is unclear why a similar financial hardship rule was not included in the Act with respect to amounts in a pension plan. It is possible the Ontario Expert Commission on Pensions, which is currently reviewing the Act and related regulations, may want to recommend an amendment to the Act to address what may well be an oversight. As the Superintendent's counsel noted, there is no obvious policy reason for not providing a financial hardship rule directly in a pension plan and instead requiring a transfer first be made to a prescribed retirement arrangement before an application to the Superintendent can be made under the hardship rule.

***Pension Benefits Act, supra, s. 67(5), Tab "A"***

49. Section 84 of the Regulation states,

84. The following prescribed retirement savings arrangements are prescribed for the purposes of subsection 67(5) of the Act:

1. A life income fund.
2. A locked-in retirement account.
3. A locked-in retirement income fund.

50. The Applicant's pension funds are in a registered pension plan, and not in any of the three types of retirement savings arrangements that are prescribed. Therefore, we agree with the position of the Superintendent that even if the Applicant is able to demonstrate that he would otherwise meet the criteria for the unlocking of funds for financial hardship circumstances, no jurisdiction is granted under the Act for the Superintendent or this Tribunal to order the funds unlocked while they are in the Plan.

51. The Applicant has argued that his circumstances are no different from the circumstances of other former members who received their pension benefits by way of a lump sum. However, we agree with the position of the Superintendent that those other former members appear to meet the criteria in subsection 50(1) of the Act and in Sections 7.08(a) and 8.07(a) of the Plan.

52. We also agree with the position of the Superintendent that neither the Superintendent nor this Tribunal has jurisdiction to make an Order based on equity or fairness in the circumstances of this Application if the Order is outside the specific requirements of the criteria of the Act and the Regulation. We adopt the view in paragraph 12 of this Tribunal's decision in *Thomas Kaster v. Superintendent of Financial Services and Ontario Teachers' Pension Plan Board*, February 9, 2000, FST Decision No. P0086-199-1, page 7 which concluded, in response to an invitation by counsel for the Applicant in that matter to consider the fairness of the process in that case that the Tribunal does not have equitable jurisdiction by virtue of the parties right of appeal under Section 91 of the PBA and Section 98 of the *Courts of Justice Act*. The Tribunal's jurisdiction relating to pension plans as an administrative body established by statute is fully set out under the Act and *Financial Services Commission of Ontario Act*.

**Issue B – If the answer to issue one is yes, what form should the transfer take and what amount should be transferred?**

53. Given our finding under Issue A that this matter should be referred back to the Superintendent regarding the Trustees' discretion under Section 7.07 of the Plan, we do not need to address Issue B.

**CONCLUSION**

We find that it was premature for the Superintendent to make a determination that the Applicant was not entitled to transfer some or all of his pension benefits in the Plan under the Act until the Superintendent has ascertained whether the Trustees as Plan Administrator have considered, and decided not to exercise their discretion under Section 7.07 of the Plan after taking into account the financial hardship faced by the Applicant, so as to permit a transfer of the Commuted Value of his pension entitlement into a Prescribed Retirement Arrangement. Accordingly, the Superintendent is ordered to refrain from carrying out the proposal set out in the Notice of Proposal and render his decision only after obtaining and considering the determination of the Trustees under Section 7.07. If the Trustees in the proper exercise of their discretion refuse to permit the requested transfer the Superintendent is ordered to proceed with the Notice of Proposal to refuse to make an Order dated April 18, 2007.

Dated at the City of Toronto, this 29th day of January, 2008.

“John Solursh”

John Solursh  
Chair of the Tribunal and of the Panel

“Shiraz Bharmal”

Shiraz Bharmal  
Member of the Tribunal and of the Panel

“Martin Brown”

Martin Brown  
Member of the Tribunal and of the Panel