

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 Proposal of the Superintendent of Financial Services to Make an Order under section 87(2)(a) of the *Act* in respect of the Ontario Power Generation Pension Plan, Registration Number 1059120;

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

B E T W E E N:

HENRY KERNIUS and ONTARIO POWER GENERATION INC.

Applicants

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

-and-

LENORE EDMUNDS

Added Party

**DECISION ON THE REQUEST FOR AN ORDER UNDER RULE 18.08
(Written Submissions filed July 10, 2008)**

Counsel:

Ari Kaplan for Henry Kernius
Lisa La Horey for Ontario Power Generation
Deborah McPhail for the Superintendent of Financial Services
Bryan Smith for Lenore Edmunds

A. Background

On January 8, 2008, the Superintendent of Financial Services (the “Superintendent”) issued a Notice of Proposal (“NOP”) to make the following order pursuant to section 87(2)(a) of the *Pension Benefits Act* (“PBA”):

....that the Ontario Power Generation Inc. (the “OPG”) commence payment of the pension of Mr. Henry Kernius (“Mr. Kernius”) together with all interest on outstanding payments from the date such payments were due to the date of payment.

Based on the reasons which accompanied the Notice of Proposal, it would appear that the real issue between the parties was not the entitlement of Mr. Kernius to a pension, which entitlement was never contested. The disagreement centred on certain matters arising from the divorce judgment between Mr. Kernius and his former spouse, Lenore Edmunds, which entitled her to a share of Mr. Kernius’ pension. Mr. Kernius took issue with the options and entitlements OPG, his former employer, was proposing to offer Ms Edmunds based on its interpretation of her rights under the judgment. The Superintendent’s proposed order did not resolve those issues. Accordingly, both Mr. Kernius and OPG filed Requests for Hearing before the Tribunal, seeking to have the issue of the respective entitlements of Mr. Kernius and Ms Edmunds resolved. At a pre-hearing conference on May 9, 2008, Ms Edmunds was granted party status.

Pursuant to the Tribunal’s Rules of Practice and Procedure (the “Rules”), a Settlement Conference was convened on July 4, 2008, with a member of the Tribunal presiding. A settlement was reached on that day, and signed off by all parties. The parties have now requested that the Tribunal issue an order pursuant to Rule 18.08. In support of that request, they have chosen, with leave of the Panel Chair given at a Pre-Hearing teleconference held on July 8, 2008, to make written submissions in lieu of an oral hearing. The written submissions were filed on July 10, 2008 in the form of a joint submission signed by counsel for all parties. These submissions included a draft order which the parties are requesting that the Tribunal issue.

The order as drafted raises a number of concerns about the relationship between Rule 18.08 and the Tribunal’s statutory jurisdiction to issue orders. As discussed below, we have not been persuaded that Rule 18.08 contemplates an order of this type. Accordingly, we decline to issue the order.

B. The Tribunal’s Power to Issue Orders: Statutory and Regulatory Basis

Before dealing with the specifics of the requested order, we propose to review the statutory and regulatory framework within which the Tribunal makes its orders. The power of the Tribunal to make orders is entirely statutory. The *Financial Services Commission of Ontario Act*, S.O. 1997, c.28. (“*FSCO Act*”), the act which establishes the Tribunal, addresses the Tribunal’s general power to make orders as follows:

21. (1) The Tribunal shall determine matters before it by order.
- (2) The Tribunal may make an order subject to the conditions that are set out in the order.

(3) The Tribunal may make interim orders before making the final order in a matter before it.

(4) An order of the Tribunal is final and conclusive for all purposes unless the Act under which the Tribunal made it provides for an appeal.

...

24. (1) The Tribunal may order that a party to a proceeding before it pay the costs of another party or the Tribunal's costs of the proceeding.

...

In addition, s.25.0.1 of the *Statutory Powers Procedures Act*, R.S.O. 1990, c.32 (“*SPPA*”) provides that a Tribunal has the power to “determine its own procedures and practices and may for that purpose... (a) make orders with respect to the procedures and practices that apply in any particular proceeding”.

In cases arising under the *PBA*, the jurisdiction of the Tribunal is normally engaged only after the Superintendent has dealt with an issue under that Act, and has either proposed to make an order, or refused to make an order. In such cases, while the Tribunal may draw upon the general order-making powers with which it is endowed by the *FSCO Act* and the *SPPA*, its primary substantive order-making power stems from s.89(9) of the *PBA*, which provides as follows:

At or after a hearing, the Tribunal by order may direct the Superintendent to carry out or to refrain from carrying out the proposal and to take such action as the Tribunal considers the Superintendent ought to take in accordance with this Act and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent.

In addition to the above statutory provisions, Rule 18.08 of the Tribunals’ *Rules of Practice and Procedure*¹ (“the Rules”) provides as follows:

The parties to an agreement to settle any or all of the issues in a proceeding may request that any terms of the agreement be included in an order of the Tribunal, to the extent permitted by law.

Such an order is clearly discretionary.

C. The Order Sought

In the case before us, the parties have sought a broad order under Rule 18.08 reflecting the nature of the settlement they have negotiated. Because of the parties’ expressed concerns for confidentiality, we have not set out in full the terms of the order sought. In summary, however, the parties seek the following:

- an order approving the Minutes of Settlement
- an order that the Minutes of Settlement bind the parties

¹ Rule 18.08 is made pursuant to the Tribunal’s rule-making authority as set out in the *SPPA* and the *FSCO Act*.

- an order that the Minutes of Settlement are to be treated as a confidential document pursuant to the Tribunal’s rules
- orders directed to OPG with respect to the precise division of pension entitlements between Mr. Kernius and Ms Edmunds, as set out in the Minutes of Settlement.
- an order granting leave to Mr. Kernius and OPG to withdraw their Requests for Hearing (to be followed by the Superintendent withdrawing the Notice of Proposal)
- an order that there shall be no costs
- an order that the Tribunal shall remain seized “with respect to any issues that arise in the implementation of the settlement”

In their written submissions, the parties advise us that “[T]his is not a case that turns on the interpretation of the Pension Benefits Act (“PBA”) or the terms of the pension plan. Rather, it turns on the interpretation of a provision in the divorce judgment dealing with the provision in the divorce judgment dealing with the division of pension credits.” They submit that since the Superintendent’s NOP simply ordered that OPG make pension payments to Mr. Kernius and did not take a position on how the pension credits were to be split between the parties, the settlement in fact complies with the NOP. They also submit that the settlement does not transgress the *PBA* rules with respect to pension-splitting. Accordingly, the parties submit that we need not inquire further on the issue of whether or not the order sought is “permitted by law” as required by Rule 18.08.

D. Decision

For the following reasons, we are not persuaded by these submissions.

Neither the *PBA* nor the *Rules* require that a settlement reached by the parties must be reflected in an order of the Tribunal in order to be binding. Many matters which are the subject of a request for hearing before the Tribunal may be settled between the parties without requiring any intervention from the Tribunal. Rule 18.08 is not intended to encourage parties who can reach and implement their own settlements to seek Tribunal orders. For parties who may need or want a Tribunal order to give full effect to their agreement, however, Rule 18.08 plays an important role in facilitating settlements. For such parties, the Rule clarifies that parties who have brought issues before the Tribunal need not fully litigate these issues in order to gain recourse to the Tribunal’s order-making powers. They may settle their differences by agreement, and still seek the aid of the Tribunal to give effect to their agreement.

Notwithstanding its very general language, however, there are important limitations on the Tribunal’s powers under Rule 18.08 to reflect settlements in Tribunal orders. Rule 18.08 empowers the Tribunal to make only those orders otherwise “permitted by law”. Simply because the parties have chosen to incorporate certain terms in their Minutes of Settlement does not endow the Tribunal with the power to make orders with respect to those terms. A party seeking a Tribunal order under Rule 18.08 must point to some statutory or regulatory authority for the making of a Tribunal order in the terms sought before such an order can be made. In their submissions, the parties have relied on s.89(9) of the *PBA* and Rule 18.08 itself as the basis for our authority to issue this order. In our view, neither of these provides a sound basis for the order sought.

A number of the terms of the order requested are almost certainly unnecessary in order to implement the terms of a settlement in this case. In particular:

- we note that the Rules do not require leave for a party to withdraw a Request for Hearing prior to the commencement of a hearing (see Rule 41);
- we understand that the parties have agreed to seek no costs, and accordingly at this stage of the proceeding it is not necessary to obtain an order from the Tribunal that there will be no costs;
- we have already indicated that there is no statutory or regulatory requirement for a Tribunal order to bind the parties to the settlement to which they have all agreed. If the parties are all legally competent to contract, as we understand they are here, they are capable of binding themselves by entering into a settlement agreement, as they have done in this case.

Terms which address issues such as these might well be included to add certainty in an otherwise proper order, but in our view, parties at the pre-hearing stage of a Tribunal proceeding need not seek an order from the Tribunal simply to deal with these matters.

Other terms requested raise more substantive concerns.

First, we are asked to “approve” the settlement. The purpose of this request is not clear. While we acknowledge that panels of the Tribunal (including members of the present panel) have from time to time issued consent orders in the past which have included this term, we have not been directed to any authority, statutory or otherwise, that would permit us to approve settlements, and we are aware of none.

Second, we are asked to make an order directed to OPG with respect to the specific division of pension credits between Mr. Kernius and Ms. Edmunds. As discussed above, under the *PBA* the Tribunal deals primarily with NOPs issued by the Superintendent. Section 89(9) contemplates that in the normal course, the Tribunal’s substantive orders will be directed toward the Superintendent. In this case, no order directed to the Superintendent, either to withdraw the NOP or to substitute a new one, has been requested. Instead we have been asked to direct our order to OPG.

The parties do not address in their submissions why the draft order has been constructed in this way, or how an order directed towards OPG is authorized by s.89(9) in the circumstances of this case. They have advised us, however, that the settlement they have reached is compatible with the existing NOP. In other words, it need not be set aside to implement the settlement. If the outstanding NOP does not pose an obstacle to the settlement, it is difficult to see why the intervention of the Tribunal is required or sought to implement the settlement. It may be that in a proper case, a substantive order under s.89(9) directed against a party other than the Superintendent may be appropriate. In this case, however, we have been provided with no basis on which to make such an order.

As noted above, the parties have been quite explicit in their submissions that the operative provisions of the settlement do not turn on the interpretation of the *PBA* or the pension plan, but on the divorce judgment between Mr. Kernius and Ms Edmunds. Accordingly, what we are being asked to do is issue an order directing OPG to implement an interpretation of the divorce judgment which has been agreed upon by Mr. Kernius and Ms Edmunds. We have great difficulty locating in s.89(9) any authority for us to make an order directing an employer to implement a divorce judgment, and the parties have given us no assistance in this regard. Our central role within the statutory pension scheme clearly relates to the *PBA*, and to the pension plans governed by that statute. That role may, of course, require us from time to time to interpret other documents such as divorce judgments in the course of carrying out our statutory mandate. Standing outside the context of a case requiring interpretation or application of the *PBA* and the pension plan, however, such an order would appear to take us somewhat beyond our jurisdiction. The fact that OPG has consented to be subject to such an order cannot expand that jurisdiction.

Third, we are concerned about the parties' request for an order that the terms of the Minutes of Settlement remain confidential. This is clearly the type of order we have authority to make in proper cases. On the material before us, however, we are not persuaded that this is a proper case.

In the ordinary course, Minutes of Settlement arrived at in the course of a Tribunal Settlement Conference are confidential documents from the Tribunal's perspective. Once the parties choose to place those Minutes in evidence before the Tribunal in a formal hearing outside the confines of a settlement conference, however, the matter is governed by Rule 11 (Confidential Documents), or in some cases Rule 28 (Hearings in the Absence of the Public). In this case, the parties have chosen to ground their request for confidentiality on Rule 28.02. As we understand it, they are seeking, in essence, that this written hearing, or part of it, be held in camera. The parties have supported that request with the bare submission that the Minutes should remain confidential because:

[They] address intimate financial or personal matters, the disclosure of which would cause harm that outweighs the public interest. There is no public interest in the amounts or the details of payment as set out in the Minutes of Settlement, because this is a unique case based on its own facts. Disclosure of the Minutes of Settlement would serve no public interest.

They have not identified the precise nature of the "intimate financial or personal matters" except to indicate that the matter arises out of a divorce judgment (although by inference the reference appears to be to the precise amounts involved and the details of the transfer). They have not indicated the nature of the harm that would or might be caused by disclosure of the Minutes of Settlement. Their submission amounts to little more than an argument that this case affects only these parties, and therefore there is no public interest in dealing with it in a public forum.

We recognize that this is a joint submission; no party opposes a confidentiality order. This is by no means the end of the matter, however. The Tribunal is a statutory tribunal, administering a public statute. It has public responsibilities to the administration of justice that cannot be abrogated by agreement of the parties. The Supreme Court of Canada has on numerous occasions

emphasized the strong public interest in the openness and transparency of legal proceedings. Recently in *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, Fish J., speaking for the court, enunciated this principle as follows:

- 1 In any constitutional climate, the administration of justice thrives on exposure to light -- and withers under a cloud of secrecy.
- 2 That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(b) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.
- 3 The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.
- 4 Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration*. [emphasis in the original]

(See also *Hollinger Inc. et al v. The Ravelston Corporation Limited et al* (2008), 89 O.R. (3d) 721 (C.A.), per Juriansz J.A.)

The public policy in favour of openness in adjudicative proceedings is a very strong one, reflected in Tribunal Rule 28 which contemplates that in the normal course, all hearings will be open to the public. With respect to a written hearing, Rule 28.01(c) specifically provides that such a hearing will be “open to the public in the sense that the public are entitled to reasonable access to the documentary evidence and submissions filed in the written hearing.”

Rule 28.02 also, of course, gives the Tribunal the discretion to order that a hearing, or part of a hearing be closed:

- ...if it is of the opinion that:
- a. matters involving public security may be disclosed; or
 - b. intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature that, having regard to the circumstances, the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.

This is a discretion that the Tribunal must exercise judicially, however, on the basis of the evidence before it and with due regard to the public policy in favour of public hearings. If the matter arises under the *PBA*, a public statute, by definition it engages the public interest. Parties who seek the benefit of Rule 28.02 must persuade the Tribunal that the case is an exceptional one

that should fall outside the general presumption that all aspects of a hearing should be public. In our view, it is not sufficient simply to recite the terms of Rule 28.02 and submit that they apply in this case. Even less is it sufficient to submit that “because this is a unique case based on its own facts”, there is no public interest in the matter. We have not been provided with a sufficient evidentiary basis for an order pursuant to Rule 28.02.

In conclusion, we have serious doubts about our authority to issue significant parts of the order requested. In the exercise of our discretion, therefore, we have determined not to make the order. Since the order sought is in effect a consent order drafted to reflect the parties’ comprehensive settlement agreement, we do not believe it appropriate to issue a partial order, or to attempt to craft an alternative order. Under the circumstance, we dismiss this request without prejudice to the right of the parties to reapply under Rule 18.08 within a reasonable time, should they see fit, for an order drafted to take into account these reasons.

With respect to the current status of the Minutes of Settlement, we note that while it was sent to the panel members, it was never formally filed as an Exhibit, and forms no part of these reasons. In view of our disposition of the parties’ request, the Minutes of Settlement will be restored to the Settlement Conference file.

E. Disposition

We order that the request for an order under Rule 18.08 be dismissed, without prejudice to the right of the parties to submit a new request within a reasonable time, should they see fit to do so.

DATED at Toronto, Ontario, this 14th day of August, 2008

“Elizabeth Shilton”
Elizabeth Shilton, Member of the
Tribunal and Chair of the Panel

“Ralph Scane”
Ralph Scane, Member of the Tribunal and
of the Panel

“Shiraz Bharmal”
Shiraz Bharmal, Member of the Tribunal
and of the Panel