

**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 Approve a Partial Wind-up Report under section 70(2) of the *Act* relating to the **Pension Plan for Executives of Shoppers Drug Mart, Registration Number 1066083;**

**AND IN THE MATTER OF** a Hearing in accordance with subsection 80(8) of the *Act*.

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

**MICHAEL DEL GRANDE, GERRY GROSKOPF, DIANE HINDMAN,  
HOWARD KOPSTICK, MICHAEL HOENMANS, WILLIAM  
DINGWALL, EDDIE MAINIERO, MORRIE COHEN, GREG  
HARMESON and BEN SHIKAZE**

**Applicants**

**- and -**

**SHOPPERS DRUG MART INC. and SUPERINTENDENT OF  
FINANCIAL SERVICES**

**Respondents**

**BEFORE:**

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

Mr. Jeffrey Richardson  
Member of the Tribunal and of the Panel

Mr. David Short  
Member of the Tribunal and of the Panel

**APPEARANCES:**

For the Applicants:

Mr. Michael Del Grande, representing himself  
Mr. Gerry Groskopf, representing himself and as representative for Mr. Howard Kopstick and Mr. Morrie Cohen

Mr. Robin Boys, representative for Ms Diane Hindman  
Mr. Brian Jenkins, representative for Mr. Ben Shikaze, Mr. Greg Harmeson,  
Mr. Michael Hoenmans and Mr. Eddie Mainiero

For the Respondent Shoppers Drug Mart Inc.:

Mr. Alan B. Merskey

For the Respondent Superintendent of Financial Services:

Ms Deborah McPhail

**HEARD:**

April 24 and April 27, 2009

**OVERVIEW**

The hearing on April 24 and 27, 2009 was the first stage (“Stage One”) of a two stage hearing in response to applications to this Tribunal filed by certain of the Applicants with respect to the Notice of Proposal of the Superintendent referred to below. An additional hearing date (“Stage Two”) relating to that Notice of Proposal was held in late June, 2009 with respect to issues raised by Howard Kopstick and Diane Hindman. These reasons relate only to Stage One.

**REASONS FOR DECISION – STAGE ONE**

**A. Background and Relevant Facts**

The following summary of facts is based on an Agreed Statement of Facts filed by the parties and the sworn testimony given and documents presented at the hearing by various of the Applicants in the context of issues relating specifically to them:

1. The Pension Plan for Executives of Shoppers Drug Mart Inc. (the “Plan”), which is registered in Ontario, was established as a single employer, defined benefit pension plan as at February 4, 2000. The Plan was established as a successor pension plan to the Imperial Tobacco Corporate Pension Plan (the “Imasco Corporation Pension Plan”) which is a plan registered in Quebec.
2. Shoppers Drug Mart Inc. (“Shoppers”) was established as a new corporation on or about February 4, 2000 to facilitate the effective acquisition by institutional investors, through

ownership of Shoppers, of the Shoppers Drug Mart business previously carried on by Imasco Ltd. or one of its controlled affiliates (collectively referred to in these Reasons as “Imasco”). The shares of Shoppers were sold to those investors by Imasco.

3. Coverage for any qualifying pensionable service to Imasco prior to the date of the sale of the business by employees of that business who became employees of Shoppers pursuant to the business sale generally remains a responsibility of the Imasco Corporate Pension Plan. The Plan includes some provisions which refer to the Imasco Corporate Pension Plan and another plan of Imasco (Imperial Tobacco). Consideration of how those provisions operate and the impact of the business sale on the Imasco Corporate Pension Plan appropriately was not the subject of submissions by the parties for consideration by this Tribunal and was not an issue before this Tribunal.<sup>1</sup>

4. The Plan accepted as members any qualified person still employed and who was a member of the Imasco Corporate Pension Plan at the time of closing.

5. When the Plan was established, there were 81 active members in the Plan. By January 15, 2003, 53 of these members had ceased to be employed by Shoppers. As of December 31, 2007, there were 57 active employees in the Plan. The turnover in Plan membership reflected actions taken by Shoppers following a re-examination of the performance of all senior management seeking to eliminate redundancy, duplication and individuals who Shoppers concluded were underperformers or did not have the skills to implement its business strategy.

6. Turnover in active Plan membership was also reflective of the age of the membership. At least 17 individuals were 55 years of age or older at the time their employment ceased. Of those, 8 were 60 years of age or older.

7. Some of the terminations were structured as early retirements while others were simply employment terminations. In any event, the Applicants as departing employees received a benefit package apparently intended by Shoppers to address what it perceived to be their anticipated common law entitlements and they signed releases.<sup>2</sup>

8. The Superintendent of Financial Services (the “Superintendent”) issued a Notice of Proposal on June 8, 2005 (the “2005 Notice of Proposal”), proposing to order a partial wind up of the Plan under clause 69(1)(d) of the Act with respect to all members of the Plan who ceased to be employed as a result of an alleged reorganization of Shoppers business before January 15, 2003.

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<sup>1</sup> Some of the Applicants testified that there may be submissions made to the pension regulator in Quebec regarding any potential rights of the Applicants to enhance benefits under the Imasco Corporate Pension Plan apparently based in part on an argument that there should have been a partial wind up of that plan with respect to individuals employed in Ontario in the Shoppers Drug Mart business at or shortly prior to the business sale.

<sup>2</sup> The contents and appropriateness of those compensation packages and the legal effectiveness of those releases was the subject of comment during testimony by some of the Applicants. However, as noted in the reasons below, any dispute in the context of this application as to whether the packages were legally adequate and the releases were legally binding is appropriately a subject for the courts and in any event is beyond the scope of the Tribunal’s jurisdiction.

9. Shoppers requested a hearing (the “previous proceeding”) by the Financial Services Tribunal (the “Tribunal”) with respect to the 2005 Notice of Proposal. The Applicant Eddie Mainiero (“Mr. Mainiero”) requested and obtained party status in that proceeding.
10. The previous proceeding was settled by way of Minutes of Resolution, which were signed by Shoppers, the Superintendent, and Mr. Mainiero on September 24, 2007. All parties in the previous proceeding were represented by counsel and took part in the resolution discussions. Mr. Mainiero and the Superintendent each advanced positions or information during these discussions with respect to some of the former members of the Plan who were not parties to the previous hearing. The Minutes of Resolution were filed in this new proceeding (“this proceeding”) as a confidential document under the Tribunal’s Rules of Practice and Procedure for Proceedings Before the Financial Services Tribunal.
11. The Minutes of Resolution state that the Superintendent agrees that if there is a hearing request as a result of the Notice of Proposal to approve a Partial Wind-up Report, the Superintendent will not support the position of any member or former member who disagrees with the Notice of Proposal unless the member or former member presents evidence in the hearing that is substantially different from the facts relating to any reorganization that Shoppers has communicated to the Superintendent respecting such member or former member.
12. The form of the Minutes was settled in July 2007. Mr. Mainiero through his counsel subsequently requested payment of legal and actuarial fees in the amount of \$80,000. This request was refused by Shoppers. The Minutes were then entered into in their current form.
13. Pursuant to the Minutes of Resolution, Shoppers filed a partial wind-up report dated August 2007 (the “Partial Wind-up Report”); and also pursuant to the Minutes of Resolution, the Superintendent issued a Notice of Proposal proposing to approve the Partial Wind-up Report on August 22, 2008. That Notice of Proposal gave rise to the hearing requests in this proceeding.
14. The Partial Wind-up Report includes 42 former members of the Plan who ceased to be employed by Shoppers during the partial wind up period. The Partial Wind-up Report excludes 24 former members of the Plan who ceased to be employed by Shoppers during the partial wind up period.
15. The Applicants in this proceeding who are included in the Partial Wind-up Report are: William Dingwall (who did not appear at the hearing); Gerry Groskopf; and Eddie Mainiero.
16. The Applicants in this proceeding who are not included in the Partial Wind-up Report are: Michael Del Grande; Diane Hindman; Howard Kopstick; Michael Hoenmans; Morrie Cohen; Gregory Harmeson; and Ben Shikaze.
17. The Applicants, Mr. Del Grande and Mr. Cohen were excluded from the Partial Wind-up Report because Shoppers and the Superintendent took the position that those two individuals were never members of the Plan. They argued at the hearing that they should be members of the Plan and that they should therefore be included in the partial wind up and entitled to “grow-in” benefits under the Act.

18. Mr. Del Grande ceased to be employed by Shoppers predecessor, Imasco, on January 3, 2000. At that date he was 45 years old. Mr. Del Grande testified about the circumstances of his termination of employment by Imasco. Those circumstances arguably may be relevant to any claim he commenced or may choose to pursue in the courts with respect to Imasco. However coverage under the Imasco Corporate Pension Plan was not in issue before this Tribunal and Imasco was not a party to this matter. No evidence was presented that Mr. Del Grande was employed in any capacity by Shoppers.

19. Mr. Cohen's employment by Imasco was terminated on January 20, 2000. He had been informed of his termination on January 11, 2000 when he was told about various options relating to the Plan and the proposed termination arrangement including severance pay and certain other benefits. He was not given an option of continuous remuneration during the severance period but was offered a lump sum amount which did not specifically include any amount for or in lieu of accrual of pensionable service after termination. Later that day he was offered a "contract position" with the Shoppers Drug Mart business in a different and lower paying employment role as "Director of Store Developments". He was given nine days to consider the severance proposal. Prior to the end of January 2000, he decided to accept the termination arrangement and accepted his new contract position. Thus prior to the end of January 2000 he became employed by Shoppers in a new capacity upon the closing of the business sale. Mr. Cohen acknowledged under cross-examination that he was provided with severance arrangements on termination of his previous employment by Imasco. He eventually resigned his new position in April 2002. He also acknowledged under cross-examination that he did not ask for or receive at the time of his previous termination of employment any salary continuance and that his new employment with Imasco and subsequently Shoppers as Director of Store Developments resulted in his inclusion as a member of a separate non-executive pension plan of Shoppers Drug Mart.

20. The applicants Mr. Hoenmans, Mr. Harmeson and Mr. Shikaze were excluded from the partial wind up because Shoppers and the Superintendent took the position that they were not "in Ontario" within the meaning of Section 74 of the Act and therefore would not stand to benefit from a partial wind up in that they would not qualify to "grow into" enhanced pension benefits under Section 74 (commonly known in the pension plan area as "grow-in" benefits).

21. Mr. Hoenmans was employed by Shoppers in Alberta. He was 40 years old on the date he ceased to be employed.

22. Mr. Harmeson was employed by Shoppers in British Columbia. He was fifty-six years old on the date he ceased to be employed and had 33.4 years of continuous service for purposes of the Plan.

23. Mr. Shikaze was employed by Shoppers in British Columbia. He was fifty-five years old on the date he ceased to be employed and had 21.8 years of continuous service under the Plan.

24. The Partial Wind-up Report states:  
As agreed to by the Company and the Superintendent, where a Partial Wind Up Member previously elected to transfer the lump sum value out of the Plan, the only settlement

option for any additional benefits owing as a result of this partial wind up is the lump sum transfer.

Where a Partial Wind Up Member previously elected a deferred or immediate pension option, a lump sum value transfer and the deferred or immediate pension option will be offered. If the deferred or immediate pension is elected, a pension annuity will be purchased from an insurance company licensed to contract business in Canada.

25. The Partial Wind-up Report also states that grow-in benefits will not be provided to Partial Wind Up Members who were not in Ontario.

26. It was not clear from Mr. Mainiero's written submissions prior to the hearing in this proceeding whether he was claiming any additional rights or benefits on partial wind up. He was asking this Tribunal for an order reimbursing him for his legal costs in the previous Tribunal proceeding, in this proceeding and in generally dealing with Shoppers. Mr. Mainiero and his representative clarified during the hearing that in applying for this hearing he had been seeking additional information which would enable him to determine whether he had any entitlement to additional rights or benefits on the partial wind up. He confirmed at the hearing that based on information provided recently by Shoppers, and subject to confirmation of the correctness of that information by Shoppers, he was no longer claiming any additional rights or benefits on the partial wind up. Mr. Mainiero did not provide any evidence or make any submissions to the effect that the information provided by Shoppers was not correct.

27. Mr. Groskopf, in his capacity as an Applicant, initially claimed the right to re-elect the manner in which he was taking his pension benefits from the Plan and an order reimbursing him for his legal costs in this proceeding and in generally dealing with Shoppers. Shortly before the hearing he amended his claim to limit it to a right of a re-election only with respect to any additional "grow-in" amounts he became entitled to under the Plan as a result of the partial wind up.

28. The Applicant William Dingwall has not filed any materials and so the nature of his claim, if any, is unknown.

29. The Plan did not have a surplus as at the partial wind up date.

30. Diane Hindman and Howard Kopstick were excluded from the partial wind up because Shoppers and the Superintendent take the position that they ceased to be employed by Shoppers for reasons unrelated to the reorganization of Shoppers' business between January 2000 and January 2003. Diane Hindman and Howard Kopstick have indicated that they intend to argue that they ceased to be employed by Shoppers as a result of the reorganization, and that they should therefore be included in the partial wind up and entitled to "grow-in" benefits under the Act. It was agreed during the pre-hearing conference in this proceeding that the submissions on behalf and in respect of Diane Hindman and Howard Kopstick would be dealt with at Stage Two of the hearing before this Tribunal scheduled for late June 2009. Accordingly, while their representatives were present at Stage One and participated in settling the Agreed Statement of

Facts, their claims are not addressed in the following portion of these reasons which are limited to the other Applicants.

**B. Preliminary Motion Relating to Production of Certain Documents**

1. At the commencement of the Hearing the Tribunal heard submissions on behalf of Mr. Mainiero supported by some of the other Applicants and opposed by Shoppers and the Superintendent, that the Tribunal direct Shoppers to produce the following materials:

- (a) an organization chart of Shoppers as of the latest date prior to the end of the year 2000 that provides, as much as is available, the corporate and regional office structure showing employee positions, reporting structures and job titles; and
- (b) an organization chart of Shoppers after, and as near to January 15, 2003 as possible that provides, as much as is available, the corporate and regional office structure showing employee positions, reporting structures and job titles.

The Tribunal, after a brief adjournment and consideration of the request, advised the parties that it had decided not to grant the requested order for reasons to be set out in more detail when written reasons relating to Stage One were issued. The reasons for that decision are as follows:

- (a) The information was not relevant to the issues before the Tribunal and this Application. The only potential exception (although highly doubtful in the view of the Tribunal) was that the documentation might be of some limited assistance to Ms. Hindman's presentation. However, Ms. Hindman could seek to establish any facts relevant to her partial termination of employment through the testimony of witnesses at Stage Two due to be held in late June.
- (b) The requested documents were potentially relevant to the question in the previous proceeding as to whether a partial wind up of the Plan should be ordered. That question was addressed and resolved in the previous proceeding. The existence of a corporate reorganization as a requirement for a partial plan wind up also was resolved.
- (c) In the course of that previous proceeding - which led to the Minutes of Resolution signed by Shoppers, the Superintendent and Mr. Mainiero - when the same documents were requested, Shoppers had replied that those documents could not be located. Mr. Merskey on behalf of Shoppers advised the Tribunal at this hearing that Shoppers, consistent with its disclosure obligations, had undertaken the necessary review of its files and still had not been able to locate those documents. Shoppers did not disagree with the possibility that such documents may have existed at one time.

In view of the foregoing the Tribunal did not have to consider the further submissions of Shoppers that the motion, which was only filed with the Tribunal on April 14, 2008, was late and contrary to the stipulation by the Tribunal in the pre-hearing conference memorandum that no

further documentary production was required with respect to the issues being considered at the hearing.<sup>3</sup>

### **C. Issues and the Law**

The issues at Stage One of the hearing were as follows:

1. Are the three non-residents of Ontario, Mr. Hoenmans, Mr. Harmeson, and Mr. Shikaze, entitled to grow-in benefits under the Plan provisions and applicable provincial laws?
2. Were the Applicants, Mr. Cohen and Mr. Del Grande, members of the Plan? If not, what consequences should follow?
3. What remedies or relief are Mr. Dingwall, Mr. Mainiero, and Mr. Groskopf entitled to in this proceeding?

In addition, submissions were made on the issue of cost.

#### **1. Issue (1): Are the three non-Ontario Applicants, Mr. Hoenmans, Mr. Harmeson and Mr. Shikaze, entitled to grow-in benefits under the Plan provisions and applicable provincial laws?**

It is clear and undisputed under the Agreed Statement of Facts and the argument presented on behalf of Mr. Hoenmans, Mr. Harmeson and Mr. Shikaze (collectively, the “non-Ontario Applicants”) that during any relevant period for purposes of the Plan they were neither resident nor employed in Ontario, where the Plan was registered and the plurality of the Plan membership was located. They acknowledged that the pension benefits legislation of British Columbia and Alberta, where they were resident and we understand reported for work with the Shoppers Drug Mart business, did not require grow-in benefits. Accordingly, the issue is whether the Plan text, rather than the Ontario Act, required grow-in benefits for those extra-provincial employees where Ontario members are statutorily entitled to a grow-in benefit.

In substance the argument made on behalf of Mr. Hoenmans, Mr. Harmeson and Mr. Shikaze (collectively, the “non-Ontario Applicants”) is that they are entitled to grow-in benefits because:

- (a) the Plan states that the Act applies to the Plan. Specifically Section 2.03 of the Plan states that it “shall be construed in accordance with the laws of the Province of Ontario”;
- (b) the pension statutes of British Columbia and Alberta require the administrator to administer the Plan according to its terms, and also provide that greater benefits than those in the legislation in British Columbia and Alberta may be provided;

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<sup>3</sup> At a second prehearing conference of the Tribunal relating to this matter held on March 4, 2009 the Tribunal again canvassed the possibility of a request for further disclosure and no such request was made.

- (c) grow-in benefits as set out in Section 74 of the Act therefore apply to all members of the Plan.

The relevant provisions in the Plan state:

2.03 The Plan shall be construed in accordance with the laws of the Province of Ontario.

2.11 “Applicable Pension Laws” means the *Pension Benefits Act* (Ontario) and any regulations pursuant thereto and any amendments or substitutes therefore as well as any similar statute applicable in a particular circumstance and any regulation pursuant thereto adopted by the federal or any provincial or territorial government.

Paragraph 19.01(d) of the Plan identifies the law under which the Plan shall be “administered” as follows:

The Plan shall be administered ... in accordance with laws of the Province of Ontario except insofar as Applicable Pension Laws or other legislation of another jurisdiction in respect of Members employed in or resident in that jurisdiction applies by operation of law.

Appendix B to the Plan also contains reference to specific provisions for each of the provinces in which members resided, including Ontario. These provisions deal with the differing provincial definitions applicable to, among other things, the determinations of spousal status, and part time eligibility.

The Plan contains no express agreement to provide grow-in benefits.

We do not accept the argument of the Applicants as ably presented by Mr. Jenkins. To the extent that the Plan provides that the Act applies to confer entitlements on Plan members that are not otherwise specifically provided for under the Plan, it seems clear to us that any restrictions or exceptions in the Act also apply. In that respect, Section 74 of the Act, which provides for grow-in benefits, states in its opening words:

74(1) **A member in Ontario** of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive ... (emphasis added)

The non-Ontario applicants argued that if Shoppers had intended the grow-in provisions of the Act to apply only to members of Ontario, it would have stated as such in the Plan. Such wording in our view would have been superfluous, however, because section 74(1) of the Act clearly states that with respect to grow-in benefits the Act only applies to members in Ontario.

The Plan provisions are a reflection of the inter-provincial framework that exists for the regulation of multi-jurisdictional pension plans. As described by the Supreme Court of Canada:

To avoid subjecting inter-provincial plans ... to multiple administrative controls, the provincial governments of Canada agreed on the importance of reciprocity in overseeing them. In substance, their memorandums of reciprocal agreement recognized as a majority “administrator” the regulatory authority of the province in which the majority of the employees participating in a supplemental pension plan work. A memorandum of reciprocal agreement entrusts the oversight of the plan, and decisions on the management and wind-up of the plan, to this regulatory authority.<sup>4</sup>

This practice is also described in the policy statements of the Superintendent, as cited by the Divisional Court:

... the pension benefits legislation of a particular province or territory of Canada applies to members employed in that province or territory. Plans which have employees in various provinces must therefore apply the laws of more than one jurisdiction to the same plan. The existing Reciprocal Agreement among pension regulators signed in 1968, requires pension regulators to administer the pension laws of other jurisdictions in relation to those plan members employed in such other jurisdictions.

Sponsors of multi-jurisdictional plans face the administrative burden and added expense of applying a patchwork of differing (and sometimes contradictory) legislative requirements to various members of the same plan. As a result, a practice has been established whereby the rules of the jurisdiction of a member’s employment are applied to benefit entitlement issues, (e.g. vesting) but the jurisdiction of registration of the plan are applied to administrative issues (such as the payment of fees, filing, disclosure, accounting and auditing etc.).<sup>5</sup>

The Regulations to the Act specifically designate Alberta and British Columbia as “provinces or territories in which there is in force legislation substantially similar to the Act”.<sup>6</sup>

The Plan, like any other contract, must be interpreted contextually, within the regulatory framework in which it exists.<sup>7</sup> The Plan provisions stipulating the province of administration, and variance for Applicable Pension Law, exist to recognize and adhere to the regulatory framework.

The Plan provides no more than it shall be administered in accordance with the law of Ontario and where applicable other personal provincial laws.<sup>8</sup> Ontario law requires the provision of grow-in benefits to Ontario residents. As acknowledged by the Applicants, there is no statutory requirement to extend grow-in benefits to extra-provincial residents.

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<sup>4</sup> *Boucher v. Stelco Inc.*, [2005] 3 S.C.R. 279, at para. 5.

<sup>5</sup> *Regie des rentes du Quebec v. Pension Commission of Ontario*, [2000] O.J. No. 2845 (Div. Ct.) at para. 58.

<sup>6</sup> Regulations, s. 23(1).

<sup>7</sup> *Otis Canada Inc. v. Ontario Superintendent of Pensions*, [1991] O.J. No. 251 at p. 12 *Hemosol Corp (Re.)*, [2006] O.J. No. 4018 (S.C.J.) at para. 18-19.

<sup>8</sup> Plan, Article 19(d).

Our conclusion is consistent with the position taken by the Superintendent and endorsed by the Quebec Court of Appeal, and the Quebec Superior Court, in *Boucher*. The Plan in *Boucher* provided not only that it would be interpreted in accordance with Ontario law, but that any wind up would be carried out in accordance with the provisions of the Act. Nevertheless, Mr. Justice Morin of the Quebec Court of Appeal specifically rejected the same contention that is being made here to the effect that similar wording could give rise to a contractually agreed grow-in for extra-provincial employees:

... the respondent's pension plan ... merely states that the plan shall be interpreted in accordance with the laws of Ontario. This subsection does not state that a non-resident of Ontario is entitled to the benefits conferred by the Ontario Act.

**... subsection 21(b) of the respondent's pension plan specifies that the windup of the plan must be carried out in accordance with the Ontario Act. It does not, however, state that a non-resident of Ontario is entitled to the benefits of this Act. (emphasis added)**

The Supreme Court's decision in *Boucher* is based on jurisdictional grounds (that the issue had already been effectively decided by the Ontario Superintendent of Pensions in approving Stelco's Partial Wind-up Report that provided grow-in benefits only to Ontario members). However, the decision acknowledges that the Québec Court of Appeal majority held that "the Ontario legislation limited early retirement benefits to plan members employed in Ontario."<sup>9</sup>

Accordingly, the non-Ontario applicants are not entitled to grow-in benefits under Section 74 of the Ontario Act or the Plan.

**2. Issue (2): Were the Applicants, Mr. Cohen and Mr. Del Grande, members of the Plan? If not, what consequences should follow?**

We have concluded that, based on the facts set out above, neither Mr. Cohen nor Mr. Del Grande became a member of the Plan and that neither the Superintendent nor this Tribunal have any jurisdiction to require that they be included as members of the Plan.

As noted above, each of Mr. Cohen and Mr. Del Grande accepted severance arrangements with Imasco prior to the establishment of the Plan.

It follows from the facts outlined above regarding the termination of Mr. Del Grande's employment by Imasco prior to the time of closing that Mr. Del Grande was no longer an employee of Imasco, and did not on closing become an employee of Shoppers and a member of the Plan. As Mr. Del Grande acknowledged, his employment ceased on January 3, 2000. Specifically, he was never employed by Shoppers in a capacity under which he qualified for membership in the Plan.

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<sup>9</sup> *Boucher, ibid*, at p. 6; Superintendent of Financial Services' Book of Authorities, Tab 4.

Mr. Cohen's previous employment by Imasco had been terminated before the time of closing. He subsequently agreed to re-employment by Imasco by the time of closing in a lower paying and lower characterized capacity pursuant to which he eventually qualified for membership in a different non-executive pension plan maintained by Shoppers. Specifically, he became an employee of Shoppers in his reduced role of Director of Store Development pursuant to which he became a member of that non-executive pension plan but did not fall within the senior categories of employment qualifying for membership in the Plan which is the subject to his Application to this Tribunal.

Mr. Del Grande and to some extent also Mr. Cohen and some of the other Applicants testified as to why they were dissatisfied with the process by which they were advised of their termination of employment by Imasco and argued that events had been manipulated to avoid their inclusion in the Plan. Each of them in good faith and in light of his termination of service by Imasco after many years of service regarded their terminations, whether characterized as a resignation or termination, as a traumatic event. However, it would be inappropriate and beyond the scope of this Tribunal's jurisdiction to address the termination packages provided. Imasco was not a party to the hearing. In any event any allegation of improper manipulation to avoid inclusion in the Plan relate to Imasco and not to Shoppers, occurred prior to the sale of the business and does not provide any basis on which this Tribunal or the Superintendent could require their inclusion as members of the Plan.

The Superintendent and Tribunal are statutory bodies. They can only exercise the powers granted to them under the Act and any other applicable legislation.<sup>10</sup> The power to include former employees such as Mr. Del Grande or Mr. Cohen in a specific pension plan is not a power granted to the Tribunal or the Superintendent under the Act or any other applicable legislation.

The Superintendent does have power through a combination of Section 31(1) of the Act and Section 33 of the Act to require the inclusion in plan membership of an employee of an employer who falls within a "class of employees for whom a pension plan has been established" as follows:

- (i) Section 31(1) of the Act provides:
  - Eligibility for membership – every employee of a class of employees for whom a pension plan is established is eligible to be a member of the pension plan.
- (ii) Sections 31(2) and 31(3) go on to establish the criteria for full time or part time membership.
- (iii) Section 33 entitles the Superintendent to determine whether a person belongs to such a class:
  - (1) Where there is a dispute as to whether or not an employee is a member of a class of employee for whom a pension plan is established or maintained, the

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<sup>10</sup> Baxter v. Ontario (Superintendent of Pensions) (2002), 33 C.C.P.B. 43 (F.S.T.) at para. 8.

Superintendent, subject to section 89, by order may require the administrator to accept the employee as a member.

(2) The Superintendent may make the order if the Superintendent is of the opinion that, on the basis of the nature of the employment or terms of employment of the employee, the employee is a member of a class.

The Plan sets out the class of employee for which it is established in Section 2.23 as one which:

- (a) ... is in a position evaluated at salary grade 10 or above under the job evaluation system of the Company and has attained the title of Vice President or above; or
- (b) who is invited by the Company in its sole discretion to join the Plan.

Section 3.01 of the Plan also provides that:

... each person who is an Employee on the Effective Date and who was a member of the Imasco Plan immediately prior to the Effective Date shall become a Member on the Effective Date.

Section 2.22 of the Plan defines the Effective Date to be February 4, 2000.

In summary, the class of employees are:

- (a) those of a certain position level or higher; and
- (b) were employees on or after February 4, 2000, in those positions.

Neither the Superintendent nor the Tribunal have jurisdiction to order that an employment relationship be created. Mr. Del Grande never became an employee of Shoppers. Mr. Cohen, did become an employee of Shopper's, but not as an employee of a class of employees for whom the Plan was established. Accordingly, section 33 of the Act does not provide the Superintendent, and therefore the Tribunal, with any power to grant the relief they requested.

The Superintendent and the Tribunal have the jurisdiction to order that a pension plan member be included in a partial wind up, even if the partial wind up is a voluntary one under section 68 of the Act. However, such an order can only be made with respect to someone who is in an employment relationship with the employer under the pension plan<sup>11</sup> and who is a member of that plan.

### **3. Issue (3): What remedies or relief are Mr. Mainiero and Mr. Groskopf entitled to in this proceeding?**

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<sup>11</sup> *Marshall Steel Limited and Associated Companies v. Superintendent of Financial Services and Jeffrey G. Marshall*, November 29, 2002, FST Decision No. P0150-2001-1; Superintendent of Financial Services' Book of Authorities, Tab 2.

(a) Mr. Mainiero

Mr. Mainiero and Mr. Groskopf are both included in the partial wind up.

Mr. Mainiero's written submissions filed prior to the hearing questioned whether his rights were adequately recognized in the Partial Plan Wind-up Report. As noted above, at the hearing his representative advised the Tribunal that as a result of information provided to them shortly before the hearing it appeared to them that, subject to confirmation of the correctness of that information by Shoppers, Mr. Mainiero's rights and the entitlements in the wind up of the Plan were adequately recognized in the Partial Wind-up Report. Accordingly his submissions focussed primarily on what he argued was the alleged delay in providing the information as a factor, together with other factors relating to the previous proceeding, that should be taken into consideration in his request for costs addressed below.

In view of the lack of any evidence by Mr. Mainiero that his benefits or entitlements on the partial plan wind up were not correctly reflected in the Partial Wind Up Report, Mr. Mainiero is not entitled to any relief or remedy in this proceeding relating to his benefits or entitlements on the partial plan wind up. The Tribunal anticipates that if Mr. Mainiero at a future date can satisfy Shoppers, based on the additional information it agreed to provide, that the calculation of his benefits or entitlements was not correct, Shoppers as Plan administrator and acting in good faith will take appropriate corrective steps.

(b) Mr. Groskopf

Mr. Groskopf was included in the partial plan wind up.

He elected to receive a lump sum payment of his benefits under the Plan on March 22, 2006. The amount of his additional entitlement under the Plan, based substantially if not exclusively on his "grow-in" entitlement as a result of the partial plan wind up (his "Additional Benefit"), was subsequently determined when the Partial Plan Wind-up Report was prepared.

He testified that the options he was provided at the time of his election did not mention a partial plan wind up or the possibility of having an annuity purchased. His original written submissions to the Tribunal prior to the hearing indicated that he wanted to receive the same options that would be provided to other members affected by the partial plan wind up with respect to both the entitlement previously paid to him and with respect to the Additional Benefit. He subsequently amended his submission several days prior to the hearing to request that the options he was seeking, including the possibility of having an annuity purchased, apply only to the Additional Benefit.

The Act provides transfer options to members who are terminated from their employment in lieu of any entitlement to a deferred pension. Section 42 of the Act is the transfer provision and it states in part:

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.

The same options are available to members affected by a partial plan wind up pursuant to subsection 73(2) of the Act. The only additional transfer option given to members affected by a partial wind up is the ability to transfer pension funds if the member is entitled to an immediate pension from the Plan (see subsections 42(3) and 73(2) of the Act). The Superintendent and Shoppers argued that this additional option would not have applied to Mr. Groskopf in any event with respect to the original benefit paid to him because he was able to transfer his funds on the basis that he did not qualify for an immediate pension on his termination date.

The Superintendent's counsel argued that Mr. Groskopf had to know there was a partial plan wind up in the works when he made his election. The notice of proposal with respect to the proposed partial plan wind up was issued in April, 2005. Mr. Groskopf acknowledged that he knew there was a dispute, to which he was not a party, regarding the possibility of a partial plan wind up. However, the Tribunal accepts Mr. Groskopf's testimony that as a lay person, he did not fully appreciate any additional benefit he was entitled to receive as a result of a partial plan wind up would be the subject of the election he made at the time on the same basis as the benefit to which he was entitled in the absence of a partial plan wind up.

The Superintendent acknowledged that members are entitled to receive a statement as to their options on the partial plan wind up but went on to submit that the practical difficulties associated with the election in circumstances such as Mr. Groskopf's effectively means that the election is not possible in some instances. That is why it was agreed, as part of the resolution in the previous proceeding, that the Partial Wind-up Report should provide for annuity purchases for any eligible members affected by the partial wind up who had not elected to have a lump sum commuted value paid out of the plan. Mr. Groskopf was not a party to the Minutes of Resolution.

We have concluded that Mr. Groskopf did not intend to make his election to receive a lump sum with respect to the Additional Benefit. Nevertheless, as counsel to the Superintendent and counsel for Shoppers have observed, if Mr. Groskopf's request were granted unconditionally, it could lead to practical difficulties. In particular, it would enable him to make a different election with respect to the Additional Benefit that he made with respect to his prior benefit (before the increase as a result of the partial plan wind up). That result might be viewed as unacceptable by the Canada Revenue Agency under the *Income Tax Act* (the "ITA"). Such an action by the Canada Revenue Agency could in theory, although the practical risks may be low, result in

disqualification of the Plan under the ITA and thereby the loss of related favourable tax treatment for Canadian income tax purposes to Mr. Groskopf and other terminated and continuing Plan members. Mr. Groskopf agreed the tax qualification of the Plan was integral to the Plan and to his position in seeking an additional transfer option.

Accordingly, we order that Mr. Groskopf be given the same options with respect to his Additional Benefit as were granted to him with respect to the previous lump sum payment provided that Canada Revenue Agency grants its approval to that effect. It is the responsibility of the Plan administrator to make reasonable efforts to seek that approval from the Canada Revenue Agency.

#### **D. Claim for Costs in Stage One**

A number of the Applicants involved in Stage One of this proceeding, including Mr. Groskopf and Mr. Mainiero, claimed that they should be reimbursed by Shoppers for their legal expenses in advancing their various claims, including expenses relating to the previous proceeding.

The previous proceeding resulted when the Superintendent issued the 2005 Notice of Proposal proposing to order a partial wind up of the Plan with respect to all members of the Plan who ceased to be employed as a result of that alleged reorganization of Shoppers business before January 15, 2003. In reply to that 2005 Notice of Proposal Shoppers requested the previous hearing before the Tribunal and Mr. Mainiero requested and obtained party status in that proceeding. The previous hearing ultimately was settled by way of Minutes of Resolution, which were signed by Shoppers, the Superintendent and Mr. Mainiero on September 24, 2007.

All parties in the previous proceeding were represented by counsel and took part in the resolution discussions. The negotiations included a request submitted by Mr. Mainiero through his counsel for \$80,000 towards his costs. Shoppers rejected that request and no provision for costs was included in the Minutes of Settlement.

Shoppers filed a Partial Wind-up Report dated August, 2007 pursuant to the Minutes of Resolution. In accordance with those Minutes of Resolution, the Superintendent ultimately issued a Notice of Proposal to approve the Partial Wind-up Report on August 22, 2008 which gave rise to the hearing requests in this proceeding.

Mr. Mainiero spent considerable personal time and incurred significant fees with respect to the prior proceeding to advance the interests of others as well as himself resulting in a partial plan wind up. Mr. Groskopf and the other Applicants did not participate in the prior proceeding. It is clear that Mr. Mainiero is quite upset and anxious about the process leading to his termination of employment and the subsequent opposition by Shoppers to initially agree to a partial plan wind up which resulted in the prior proceeding.

Mr. Mainiero's objectives in pursuing the previous proceeding in support of the Superintendent's proposal for a partial plan wind up were understandable and were appreciated by the other Applicants and presumably by any members of the Plan affected by the partial plan wind up. However, we agree with the submissions of Shoppers and the Superintendent that insofar as any

Applicant seeks costs of the previous proceeding, the Tribunal does not have jurisdiction to grant costs relating to the previous proceeding in the context of this proceeding. The *Financial Services Commission of Ontario Act, 1997* provides only that:

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**.<sup>12</sup> (emphasis added)

Mr. Mainiero declined, after consultation with counsel, to attempt to enforce in the previous proceeding his costs, relating to that proceeding. He is not entitled to reconsider that choice in this proceeding.

With respect to the claim for costs with respect to this proceeding we would note that the criteria for an award of costs by the Tribunal are set out in the Tribunal's Rules of Practice and Procedure. Rule 45.01 sets out the criteria upon which the Applicants appear to be basing their claims:

45.01 In determining whether a party is liable to pay the costs of a party, the Tribunal shall consider:

- (a) whether the party engaged in conduct which is clearly unreasonable, frivolous, or vexatious;
- (b) whether the party's conduct unreasonably delayed or prolonged the proceeding, including any failure to comply with undertakings or orders ...

It is apparent from the criteria under Rule 45 that a claim for costs must be based upon conduct related to the proceeding. Furthermore, the examples set out in the Tribunal's Practice Direction on Cost Awards, as revised effective August 1, 2004, assist in identifying the limited circumstances in which costs will be awarded as follows:

- a. Some examples of conduct or a course of conduct which the Tribunal is likely to find clearly unreasonable, frivolous or vexatious are:
  - i. when a party has advanced a position which was frivolous, vexatious, or manifestly unfounded; or
  - ii. acting or failing to act in a way which results in prejudice to any of the other parties or an unnecessary or unreasonable delay in the proceeding;
  - iii. failing either to attend a hearing or to send a representative to a hearing after having been properly served with a notice of the hearing;
  - iv. changing a position taken in a preliminary proceeding, introducing new issues which have not previously been identified, giving evidence on issues which are

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<sup>12</sup> S.O. 1997, c. 28, s. 24.

not in dispute or not giving evidence on an issue which had specifically been raised by that party previously;

v. failure to cooperate with other parties during preliminary proceedings or at the hearing; and

vi. failure to comply with an undertaking, or a procedural order or direction of the Tribunal which has resulted in prejudice to another party ...

Mr. Mainiero in particular alleged undue delay and lack of timely responsiveness to requests for information with respect to this proceeding as well as the previous proceeding. The Tribunal agrees with the submissions of Shoppers and the Superintendent that putting aside any consideration regarding the previous proceeding for the reasons set out above<sup>13</sup> only a relatively short and quite reasonable period of time passed between the signing of the Minutes of Resolution and the filing of the Partial Plan Wind-up Report recognizing the technical and fact sensitive nature of a Partial Wind-up Report and the need for adequate time to enable the Plan administrator to fulfill its fiduciary duties with respect to all parties to the Plan, including both terminated and continuing members including identifying and appropriately addressing individual circumstances. We therefore have concluded in regard to the current proceeding that:

- (i) Shoppers was not, as argued by Mr. Mainiero, engaged in conduct which is clearly unreasonable, frivolous or vexatious; and
- (ii) Shoppers conduct did not unreasonably delay or prolong the proceeding.

The Tribunal's criteria for an award of costs by the Tribunal against Shoppers as set out in the Tribunal's Rules of Practice and Procedure have not been met with respect to the Applicants whose interests have been the subject of Stage One of this current proceeding. Accordingly, the Tribunal has decided no costs shall be awarded with respect to this stage of the proceeding.

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<sup>13</sup> Our comments should not be taken as implying the initial opposition by Shoppers to the previous Notice of Proposal leading to the Minutes of Resolution to partially wind up the Plan was unreasonable.

**E. Order**

This proceeding with respect to the Notice of Proposal is being held in two stages. Our order with respect of this proceeding which will relate to the Notice of Proposal and accordingly to both stages, will be issued after completion of Stage Two.

**DATED** at the City of Toronto, this 4<sup>th</sup> day of August 2009.

“John Solursh”

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

“Jeffrey Richardsom”

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Jeffrey Richardson  
Member of the Tribunal and of the Panel

“David Short”

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David Short  
Member of the Tribunal and of the Panel