

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 subsection 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 89(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 Shoppers Drug Mart Inc.:

Mr. Alan B. Merskey

For the Superintendent of Financial Services:

Ms. Deborah McPhail

HEARD:

June 22 and June 23, 2009

OVERVIEW

The hearing on June 22 and 23, 2009 was the second stage (“Stage Two”) 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. Stage Two of the hearing relating to that Notice of Proposal was limited to issues raised by Howard Kopstick and Diane Hindman. These reasons relate only to Stage Two except that our orders set out at the conclusion of these reasons are applicable to both Stage One and Stage Two of the proceeding relating to the Notice of Proposal. Our reasons for our decision in Stage One were dated August 4, 2009.

REASONS FOR DECISION – STAGE TWO

A. Background and Relevant Facts

Ms. Hindman and Mr. Kopstick (the “Stage Two Applicants”), the Superintendent and Shoppers Drug Mart Inc. filed written submissions together with an Agreed Statement of Facts and Agreed Book of Documents. They confirmed at the hearing that the documents, including those in the Agreed Book of Documents, filed at Stage One were evidence on the record for purposes of Stage Two. In addition, the parties presented at the hearing additional documents and testimony was given by some witnesses. The Tribunal has fully reviewed the documents presented to us as well as the sworn testimony of the witnesses. Based on the Agreed Statement of Facts and the sworn testimony given at the hearing, the salient factual background can be summarized as follows:

1. Facts Related to the Plan and the Partial Wind Up

1.1 The partial wind up of the Pension Plan for Executives of Shoppers Drug Mart (the “Plan”) is the result of Minutes of Resolution setting out a settlement that was reached in a previous Financial Services Tribunal proceeding (the “previous proceeding”).

1.2 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.

1.3 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.

1.4 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.

1.5 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.

1.6 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.

1.7 Shoppers requested a hearing in 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.

1.8 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.

1.9 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.

1.10 The form of the Minutes of Resolution was settled in July 2007. 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.

1.11 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.

1.12 Ms. Hindman and Mr. Kopstick were excluded from the partial wind up because Shoppers and the Superintendent took the position that these two individuals ceased to be employed by Shoppers for reasons unrelated to the reorganization of Shoppers’ business between January 1, 2000 and January 2003. Diane Hindman and Howard Kopstick argued during Stage Two of this proceeding 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 subsection 74 (1) of the Act. It was agreed during the pre-hearing conference in this proceeding that submissions made with respect to any grow-in entitlement of Diane Hindman or Howard Kopstick would be dealt with at Stage Two of the hearing before this Tribunal. Accordingly, while their representatives were present at Stage One and participated in settling the Agreed Statement of Facts, their claims, which are the subject of Stage Two, were not addressed in the reasons issued by the Tribunal with respect to the other applicants related to Stage One.

1.13 The Minutes of Resolution set out the agreement of the parties in the previous proceeding that the “Applicant will declare a partial wind up effective April 22, 2005” and that it was to be “in respect of all members and former members who ceased to be employed between January 1, 2000 and April 25, 2003 as a result of the reorganization of the Applicant’s business.” That agreement was reflected in the partial wind up report as of April 22, 2005 (defined in the report as the “Partial Wind Up Date”) filed by Shoppers. That report stated “the Company declared the partial wind up with respect to those members and former members” and that the Company had given notice to the Superintendent “of its intentions to partially wind up the Plan...” The report also stated that the Notice of Proposal of its partial wind up “as required under Section 68 of the *Pension Benefits Act (Ontario)*” would be transmitted to those members and former members, as agreed by the Superintendent and the Company, after approval of the report from the Superintendent. However, the description of member entitlements in the partial wind up report indicates that the date for determination of “55 points” (i.e. potential entitlement to grow-in benefits under Section 69 of the Act) was for purposes of the report, the date as of which the member’s pensionable service ceased.

1.14 The term “Member” is defined in Section 2.31 of the Plan as “an individual who remains contingently or absolutely entitled to a retirement income under the Plan”.

1.15 The Minutes of Resolution state that the Superintendent consented to and supported the Minutes of Resolution as an appropriate and reasonable exercise of the Superintendent’s

discretion, based on the facts disclosed by Shoppers to the Superintendent as at September 24, 2007.

2. Facts Related to Shoppers' Operations and Reorganization

2.1 Subject to very limited exceptions, Shoppers retail stores (including the stores at which Diane Hindman worked before being employed by Shoppers in August 1994) are not owned or operated directly by Shoppers. Rather, each store is owned and operated by a separate corporation established by an "Associate", who enters into an agreement with Shoppers with respect to the operation of the store. With a few exceptions that are not applicable to Ms. Hindman's situation, Associates are licensed pharmacists and are required to work at least 20 hours per week in the store, in addition to their store management responsibilities.

2.2 Associates are not required or permitted to put equity into the corporation which owns their store. Rather, equity is provided by Shoppers, which also assumes responsibility for any losses incurred by the store corporation (evidence was given that it is usual for new Shoppers stores to incur losses during the first few years of operation). Associates may in some circumstances accrue equity in the store corporation derived from its operating profits.

2.3 Shoppers guarantees Associates a specified minimum level of compensation, financed if necessary by funds paid by Shoppers to the store corporation. If a store is profitable (after the payment of the guaranteed minimum compensation to the Associate), the profit is shared between Shoppers and the Associate, with Shoppers receiving the bulk of the profit.

2.4 Associates and store employees are not remunerated directly by Shoppers. Rather, they receive their remuneration from the store corporation.

2.5 Shoppers administers a basic corporate pension plan (the "Employee Plan") for its employees who are not eligible for membership in the Plan addressed in this proceeding which essentially covers Shoppers executives. The definition of "Employee" in the Employee Plan excludes persons employed in store locations. An employee of Shoppers who becomes eligible for membership in its Executive Pension Plan receives credit (as pensionable service) for any credited service that the employee had in another registered pension plan sponsored by Shoppers, including the Employee Plan, but not for service as an Associate or as a store employee.

2.6 Mr. Robin Boys, a former Senior Vice-President, Operations Planning of Shoppers, gave evidence regarding the changes in Shoppers operations in the late 1990s and early 2000s. He testified that in the mid-1990s, Shoppers realized that its ordering and shipping processes were inefficient, as each store carried out these functions independently. A large investment was made in centralized purchasing and distribution facilities and systems, and in a centralized accounting system. This process was completed in the late 1990s, and it was recognized that the skill set of Shoppers corporate staff needed to be changed in the new environment.

2.7 Mr. Boys also testified that in reviewing its management, Shoppers bench-marked its staffing levels against some large drugstore chains in the United States, and concluded that its corporate operations were over-staffed, with approximately 1.5 head office staff per store, as compared to 1 person per store in a major U.S. chain. Shoppers recognized a lack of efficiency,

with too many staff calling on stores and too many layers of management. Shoppers senior management concluded that it needed to reduce its head office staff by about 330 people, including some staff who had been added during the centralization project who were no longer needed.

2.8 Mr. Boys also testified that in the years preceding the reorganization of Shoppers business, the number of Shoppers employees with the title of Vice-President or above had increased substantially. Prior to the reorganization there were about 40 employees with the title of Vice President and about 30 employees with the title of Senior Vice-President or above.

2.9 Testimony was given that the number of employees in senior positions was substantially reduced during the reorganization. In particular, Mr. Todd Small (currently Vice President, Operations) testified that the employment of four of the eight employees with the title “Vice-President Operations” in the Ontario Region of Shoppers was terminated during the reorganization, and that there are currently only six employees with that title across Canada.

3. Facts Related to Ms. Hindman’s Employment

3.1 Ms. Hindman’s employment within the Shoppers organization commenced in October 1991, as a part-time pharmacist at a store in Bowmanville, Ontario. She worked full time in the Bowmanville store from March or April 1992 until August 1992, when she became the Associate in the Whitby store.

3.2 Ms. Hindman left the Whitby store in August 1994, when she became an employee of Shoppers in the position of a Professional Services Co-ordinator.

3.3 Ms. Hindman subsequently was appointed Director of Healthcare Facilities. In 2000 she was given the new title of “Vice-President of Healthcare Facilities” and at or around that time became a member of the Plan.

3.4 In the positions of Director and subsequently Vice-President of Healthcare Facilities, Ms. Hindman had responsibility for the management of services provided by Shoppers to residents of Long-Term Care (“LTC”) facilities. These services included the supply of prescription medications to residents of LTC facilities by approximately 50 Shoppers stores. In this capacity, Ms. Hindman supervised a group of up to 9 employees.

3.5 While Ms. Hindman was in the position of Vice-President of Healthcare Facilities, Shoppers conducted a review of its LTC operations, including consideration of the possibility of expanding this operation by creating centralized LTC operations (rather than distributing medications only through Shoppers retail stores). Ms. Hindman participated in this review. In 2001 Shoppers senior management concluded that, while there was some opportunity to expand Shoppers’ LTC business, the economics of doing so were not attractive in view of the high cost of establishing centralized operations. Accordingly it was decided that Shoppers would continue to service LTC facilities through its retail stores. In her evidence, Ms. Hindman testified that she was disappointed by this decision in light of her strong interest and expertise in servicing LTC facilities, but that she recognized the validity of the decision on business grounds.

3.6 In light of the decision not to proceed with centralized LTC operations, Ms. Hindman's title was changed in October 2001 to Vice-President, Prescription Operations and Healthcare Facilities.

3.7 Ms. Hindman was asked to meet with her supervisor, Mr. Stephen Gill, and with Mr. Donald Casey (Shoppers Vice-President, Human Resources) on December 6, 2001. At that meeting, Ms. Hindman was advised that her employment with Shoppers would terminate immediately. She was given a termination letter which provided her with two options - either to become an Associate in a Shoppers retail store or to accept a severance package. After obtaining legal advice, she was able to negotiate an improved severance package which extended her salary and benefits for a severance period ending on December 5, 2002.

3.8 We accept Ms. Hindman's testimony that she was unwilling to return to the position of an Associate, as she had previously been in that position and had since become keenly interested in the provision of health care to seniors, which she recognized to be a growing market, and accordingly she declined that option.

3.9 There was no dispute that at the time of Ms. Hindman's termination from Shoppers she was 46 years of age, had continuous service of 8.3 years and had credited service in the Plan of 7.7 years, assuming the calculation of those figures commenced from August 22, 1994 when she was employed directly by Shoppers and excluding any service as an Associate at stores within the Shoppers' organization prior to August 22, 1994. Issues as to the appropriate dates for commencement and termination of her potential entitlement to grow-in under subsection 74(1) of the Act are addressed below.

3.10 We accept Ms. Hindman's testimony that she was told at the December 6, 2001 meeting that her termination was the result of the restructuring of Shoppers' business. She was subsequently provided with a reference letter, signed by Mr. Gill, stating that Ms. Hindman left Shoppers "as the result of a restructuring and a refocus of our internal processes". We also accept her testimony that her termination came as a complete shock, as her performance reviews had been positive and she had received no negative comments regarding her performance.

3.11 In his evidence, Mr. Casey testified that following Shoppers' decision not to pursue centralized LTC operations, Ms. Hindman had become argumentative and difficult to deal with, in her dealings with her peers outside her immediate department, which constituted deterioration in her performance. Mr. Casey acknowledged that performance concerns were not mentioned at the December 6, 2001 meeting, due to the sensitive nature of that meeting, and that he had not previously communicated with Ms. Hindman regarding performance concerns. Mr. Casey also testified that Ms. Hindman's termination was a stand-alone event, and was not related to the numerous other head office terminations that occurred in 2000 and 2001.

3.12 Following notification of her termination of employment, Ms. Hindman submitted an application dated December 31, 2001 to the University of Colorado for admission to its Non-traditional Doctor of Pharmacy program, and was accepted to that program. Ms. Hindman testified that, following the termination of her employment with Shoppers, she recognized that her employment opportunities in her field of interest would be very limited in the absence of a

Doctor of Pharmacy Degree. She also testified that she had no intention of leaving Shoppers to pursue such a designation before her employment was terminated by Shoppers.

3.13 Following her termination of employment, Ms. Hindman was provided with a “Termination Statement and Option Form” related to her entitlement under the Plan. This statement provided her with the options of either (a) receiving a monthly deferred pension from the Plan commencing at age 65; or (b) transferring the lump sum (commuted) value of her pension entitlement to a locked-in RRSP, to the registered pension plan of a new employer or to an insurance company for the purchase of a life annuity. Ms Hindman elected the deferred pension option.

3.14 In its initial communications with the Superintendent, Shoppers took the position that Ms. Hindman was excluded from the partial wind up report on the basis that her employment ceased due to her resignation to pursue post-graduate studies, which was unrelated to the reorganization of Shoppers’ business. Shoppers acknowledged in its reply submission that Ms. Hindman’s termination was not in fact due to her resignation to pursue post-graduate studies, but Shoppers continued to take the position that her termination was unrelated to the reorganization of Shoppers’ business.

4. Facts Related to Mr. Kopstick’s Employment

4.1 Mr. Kopstick was a long time Shoppers employee, with approximately 33 years of service within the organization. He testified that he was a store manager at the Centrepoint Mall store from 1975 to 1980, and was transferred to the corporate office in 1980 as a District Co-Coordinator. The chronology of Mr. Kopstick’s early employment set out in Shoppers’ written submissions is somewhat different, but the differences are of no consequence to the matters at issue.

4.2 Mr. Kopstick was subsequently appointed to the position of Director Operations, which he held for about 8 years prior to being appointed as a Vice-President Operations in 1992. As Vice-President Operations he was responsible for the profitability of the region under his supervision, and for the supervision of 5-6 District Directors within that region. His district included approximately 100 stores and Associates.

4.3 In 1999 Mr. Kopstick was advised that his position was to be changed from Vice-President Operations to Vice-President, New Store Concepts, a position which had not previously existed. In his new position, he would be responsible for the management of a new Shoppers retail store in the Bayview Village Shopping Centre in Toronto. That store had not yet opened, and did not have an Associate as its owner/operator.

4.4 Mr. Kopstick testified that he was initially “set back” when advised of this change in his position. However he discussed the situation with Mr. David Bloom, the CEO of Shoppers, and was persuaded that the Bayview Village store, which was expected to become a “flagship store” in a prestigious location, represented a great opportunity with the potential for his becoming a “Co-Associate” at a future date. The Bayview Village store was testing certain new concepts such as self-service cosmetics and an in-store customer adviser with respect to vitamins. The store initially did not have a pharmacy, due to lease restrictions resulting from the presence of

another pharmacy within Bayview Village, but it was expected that a pharmacy would be added at a future date.

4.5 Soon after Mr. Kopstick assumed his responsibilities at the Bayview Village store, Shoppers reported receiving a considerable number of complaints regarding Mr. Kopstick from the store employees under his supervision. These complaints included concerns regarding Mr. Kopstick's allegedly intimidating management style, unrealistic working time expectations, lack of compassion and inappropriate comments and actions, all of which were contributing to very low staff morale.

4.6 Mr. Kopstick attended a meeting on September 15, 2000 with Mr. Russell Cohen, Mr. Kopstick's immediate superior, and Mr. Todd Small. At that meeting Mr. Kopstick was informed of the concerns that had been expressed about his management of the Bayview Village store. In his evidence, Mr. Kopstick testified that, while he did not believe that all the concerns expressed were valid, he recognized that some of the concerns were valid and he agreed to an action plan to improve the atmosphere in the store. He also agreed to meet with a counsellor who would assist him to make behavioural changes.

4.7 Mr. Kopstick attended a further meeting with Mr. Cohen and Mr. Fred Van Laare (Senior Vice-President, Operations) on January 3, 2000. A memorandum from Mr. Cohen to Mr. Van Laare sent following that meeting indicates that there were further discussions at that meeting regarding Mr. Kopstick's human resource issues, and that Mr. Kopstick was advised that his performance was at question based on these concerns.

4.8 Mr. Kopstick was asked to attend a further meeting with Mr. Cohen and Mr. Van Laare on January 26, 2000. At that meeting, Mr. Kopstick was informed that his employment with Shoppers would be terminated effective February 11, 2000. Mr. Kopstick was offered a severance package including 24 months' salary and benefits continuation, which he subsequently accepted by the deadline of February 3, 2000 specified by Shoppers. We accept Mr. Kopstick's testimony that, at the termination meeting, he was told that his position as Vice-President, New Store Concepts was being eliminated, as Shoppers needed to reduce costs in connection with its major investment in new technology, and that Shoppers had tried to find another suitable position for him within Shoppers but had not been able to do so. Mr. Kopstick testified that he was given no indication that his termination was for performance-related reasons.

4.9 Evidence was introduced (and not disputed) that Mr. Kopstick had received numerous performance reviews up to and including 1997, all of which were favourable (although the 1997 review was somewhat less positive than the earlier reviews). Mr. Kopstick was not given any performance reviews subsequent to 1997, even though Shoppers policies called for performance reviews to be conducted at least annually. In its submissions, Shoppers noted that for several years prior to 1997, Mr. Kopstick's performance reviews had been conducted by his cousin, Mr. Marvin Kopstick.

4.10 Mr. Todd Small (currently Vice President, Operations) gave evidence regarding Mr. Kopstick's conduct since Mr. Small was hired by Shoppers as a District Co-ordinator in 1997, working under Mr. Kopstick's supervision. He testified that he and his fellow District Co-

ordinators had serious concerns regarding Mr. Kopstick's management style and alleged micro-management, which were communicated to Mr. Russell Cohen (Mr. Kopstick's immediate superior).

4.11 Mr. Small also testified that, in his view, Shoppers preserved Mr. Kopstick's title of Vice President when he was transferred to the Bayview Village store only out of concern for Mr. Kopstick's pride, rather than on the basis of Mr. Kopstick's new duties. He perceived the change in position represented a "last chance" given by Shoppers for Mr. Kopstick to demonstrate his value.

4.12 Mr. Small also testified that the two senior staff members in the Bayview Village Store, which was under his supervision as District Co-ordinator, had expressed concerns to him regarding Mr. Kopstick's management of the store including inappropriate comments to and regarding staff members and customers.

4.13 Mr. Small also testified regarding a "staff survey analysis" conducted of the Bayview Village store staff, which he believes was conducted in January 2000 and which reported generally unfavourable responses regarding Mr. Kopstick's supervision.

4.14 Mr. Donald Casey (Shoppers Vice-President, Human Resources) testified regarding Mr. Kopstick's 1997 performance review. His own assessment was that Mr. Cohen (who conducted the review) was "trying to turn Howard around". His own view was that Mr. Kopstick was perceived to be a bully, and that he was a Vice President who "didn't look or behave like a Vice President".

4.15 Regarding the absence of performance reviews after 1997, Mr. Casey testified that it was not unusual during that period for performance reviews to be omitted. He also stated that, in his view, Mr. Cohen was reluctant to make difficult decisions related to performance issues. His assessment was that the needs for improvement in certain areas identified in Mr. Kopstick's 1997 performance review (which was generally favourable) reflected Mr. Kopstick's difficulty with Shoppers' transition from a very entrepreneurial organization to a more tightly managed one.

4.16 Mr. Kopstick's position of Vice-President, New Store Concepts was not filled following his termination - the position was eliminated.

B. Issues and the Law

The issues at Stage Two of the hearing, as agreed at a May 5, 2009 pre-hearing conference of the parties, were as follows:

1. Did either of the Applicants, Diane Hindman or Howard Kopstick cease to be employed as a result of the reorganization of Shoppers business?
2. If the answer to issue 1 is "yes", are there any discretionary reasons not to require Shoppers to include either of the Applicants listed in issue 1 in this partial wind up?

3. If the answer to issue 1 is “yes” and the answer to issue 2 is “no”, to what benefits or rights are such Applicants entitled as a result of the partial wind up?
4. What are the dates of the partial wind up?

We have slightly restated issue 2 below and addressed issues 3 and 4 in our reasons relating to issue 2.

1. Issue (1): Did either of the Applicants, Diane Hindman or Howard Kopstick cease to be employed as a result of the reorganization of Shoppers business?

The Law

All parties agreed that this proceeding arises from the Minutes of Resolution entered into between Shoppers and the Superintendent and the partial wind up report that flows from it. The Minutes of Resolution, which settle the previous proceeding, provided that Shoppers was to declare a partial wind up effective April 22, 2005 with respect to all members and former members of the Plan who ceased to be employed between January 1, 2000 and April 25, 2003 “as a result of the reorganization of the Applicants’ business.” The partial wind up report confirms that that approach was reflected in a declaration by Shoppers (the “Company”) relating to the partial wind up of the Plan. The Minutes of Resolution also provided that the Superintendent would approve the partial wind up report if it is consistent with the Minutes of Resolution “assuming that the partial wind up report otherwise complies with the Act and Regulations and the terms of the Plan.”

The partial wind up proceeded on the basis of the action of the employer, Shoppers under Section 68 of the Act. The Superintendent did not proceed with his proposal to order a partial wind up under subsection 69(1) of the Act.¹ However, it is clear from the submissions of the parties and the facts, including the circumstances leading to the Minutes of Settlement and the partial wind up report, that the requirement for determination as to whether Diane Hindman or Howard Kopstick ceased to be employed “as a result of the reorganization of Shoppers’ business” was intended to reflect the discretion the Superintendent otherwise had proposed to exercise so as to order a partial wind up under clause 69(1)(d) of the Act.² That clause gives the Superintendent power to require the wind up of a pension plan in whole or in part if a significant number of members of a pension plan cease to be employed by the employer “*as a result of the reorganization of the business of the employer*”. (emphasis added).

The Minutes of Resolution also provided that if a hearing was requested as a result of the Notice of Proposal approving the partial wind up report, the Superintendent would not support the position of any member or former member who disagreed with the proposal approval unless that individual presented evidence in the hearing that was substantially different from the facts disclosed by Shoppers in the previous hearing.

¹ This distinction is addressed in more detail with respect to Issue 2 below.

² *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended, Section 69.

The Superintendent took the position at the beginning of Stage Two of this hearing that with respect to Mr. Kopstick and Ms. Hindman, the evidence had not yet been presented and it was therefore, premature for the Superintendent to present the final position. At the conclusion of the factual presentation portion of the hearing, the Superintendent took the position that:

- (i) with respect to Ms. Hindman, her employment was terminated by Shoppers “as a result of” Shoppers’ reorganization but she failed as at the date of her termination of employment to meet the “55” points test required to qualify for enhanced “grow-in” entitlement under subsection 74(1) of the Act; and
- (ii) with respect to Mr. Kopstick, his employment was not terminated “as a result” of the reorganization of Shoppers’ business and accordingly, while he would meet the “55” points test (combination of age plus years of continuous employment or membership in the pension plan) “at the effective date of the wind up of the pension plan in whole or in part” under subsection 74(1) of the Act he did not qualify for the enhanced “grow-in” rights under that subsection.

There was no surplus in the Plan at the time of the partial wind up. Portability options were granted to Ms. Hindman and Mr. Kopstick. Accordingly, entitlement to portability rights or surplus upon the partial wind up of the Plan are not in issue. The issue for purposes of the hearing was the entitlement of Ms. Hindman and Mr. Kopstick to enhanced grow-in rights under subsection 74(1) of the Act.

The former Pension Commission of Ontario dealt with the causation criteria in clause 69(1)(d) of the Act in a partial wind up case called *Imperial Oil*³ in 1996:

The purpose of clause 69(1)(d) is to protect plan members in situations where a significant number of terminations occur as a result of a reorganization of the business. The reason that prompts the reorganization may be cost cutting, bench marking or cyclical employment patterns due to price fluctuations but whatever the underlying cause, it is the fact of the reorganization that is of legal significance.

Did the workforce reduction result from these activities? Again, we answer “yes”. Are we inclined to force the Superintendent to consider each termination over the 3 year period to ensure that the driving force was the reorganization? No. The amount of resources to do that would be enormous and it is not clear that accurate information could even be obtained. For example, if a lower performing employee is let go when the restructuring takes place, is the termination deemed to be a result of performance or the restructuring? If the employer and employee differed in their views as to what was the dominant reason, how would the dispute be resolved? This simple example illustrates the futility of such an approach. If it were to be done for literally thousands of employees, the task might never be completed. The information given by Imperial Oil itself shows that the

³ Imperial Oil Limited Retirement Plan (1988), May 27, 1996, XDEC-34 (PCO), at pp. 7-8.

terminations took place contemporaneous with the reorganization and were related to the activities we have found amount to a reorganization. There is no need to go behind that information.

The Pension Commission also held in *Imperial Oil* that a former member of the Imperial Oil plan, Mr. Newton, was not entitled to be in the partial wind up because his termination was not contemporaneous with the events that constituted the reorganization. The Commission held that it is not a question of whether the reorganization led to termination but rather whether the termination occurred during the wind up period; for the termination to be part of the partial wind up, “it must be part of the event of reorganization and not some type of “spin off” consequence”.⁴

The *Imperial Oil* case involved a notice of proposal of the Superintendent to order a wind up, focussing in particular on issues as to the number of employment terminations and whether they were a result of a reorganization of the business. Determination as to whether there was a reorganization of the business of Shoppers and the number of employment terminations as a result of the reorganization are not in dispute in this proceeding. However, the comments in the *Imperial Oil* decision are helpful. We agree with the submission of the Superintendent that, based on *Imperial Oil* (which was upheld by the Divisional Court and the Court of Appeal), there are two criteria for determining whether a plan member falls within a partial wind up:

- (i) the determination must be contemporaneous with the events that constitute the reorganization; and
- (ii) the determination must be related to the activities that constituted the reorganization.

A very similar position was expressed by Shoppers in its written submissions to this hearing to the effect that the primary basis upon which Shoppers proposed the exclusion of Mr. Kopstick and Ms. Hindman from the partial wind up report was not that their employment terminations occurred outside of the period of the business reorganization but that “their individual circumstances were unconnected to a restructuring”.

We also agree with the position of the Superintendent that, while the Pension Commission in the *Imperial Oil* decision was correct in observing that the Superintendent cannot and should not examine the circumstances of every case, the employer nevertheless has the right to attempt to convince the Superintendent – and ultimately this Tribunal – that the termination was not “a result” of the reorganization.

The Tribunal was also referred to more recent Tribunal decisions that dealt with the causation criterion in clause 69(1)(d) of the Act. In the first, *Marshall Steel*,⁵ the Tribunal held that a

⁴ *Imperial Oil, supra*, at p. 10.

⁵ *Marshall Steel Limited and Associated Companies v. Superintendent of Financial Services and Jeffrey G. Marshall*, November 29, 2002, FST Decision No. P0150-2001-1, at pp. 5-7.

former member who was allegedly terminated for cause was included in the partial wind up for two reasons:

- a) his termination was contemporaneous with the partial wind up events; and
- b) it was a voluntary partial wind up and the employer had defined the partial wind up group sufficiently widely to include this former member.

In the *Marshall Steel* decision, adopting *Imperial Oil*, there was no discussion of the preliminary requirement that the position had been eliminated as a result of a restructuring. In that case, all plant positions were eliminated, including that of the respondent employee.

The second recent Tribunal decision is *CBS*.⁶ In that case, the Tribunal held that a former member should not be included in the partial wind up because the former member's evidence was that he would have retired in any event due to ill health, even if the company had continued to operate for another year at that location.

The Tribunal stated in *obiter* in *CBS*⁷ that the Tribunal has the discretion to, in effect, decline to enter into the causation issue in an appropriate case. An appropriate case could be one in which the numbers are so large that it would be impractical to embark upon such a determination for every former member. However, in this case there are only two former members who have put causation in issue; and their circumstances seem to be unique. We therefore agree with the Superintendent and Shoppers that the Tribunal should consider the causation issue in these two specific instances.

Diane Hindman

Applying the above principles to Ms. Hindman's circumstances, it is clear that Ms. Hindman ceased to be employed contemporaneously with the events giving rise to the reorganization. Furthermore, the Tribunal agrees with the conclusion reached by the Superintendent that the evidentiary part of this hearing that on the balance of probabilities the termination of Ms. Hindman's employment was related or connected to the reorganization and thus was "a" result of the reorganization.

Ms. Hindman first became an employee of Shoppers, rather than an Associate in a store within the Shoppers organization, in August 1994 where she was hired to fill the role of Professional Services Coordinator. Subsequently, she was appointed Director of Health Care Facilities. In 2002, she was given the new title of "Vice President of Health Care Facilities" and became a member of the Plan. In those roles, Ms. Hindman had responsibility for the management of services provided by Shoppers for residents of Long Term Care facilities, which included the supply of prescription medications to residents of LTC facilities by approximately 50 Shoppers stores. She supervised a group of up to 9 employees.

⁶ *CBS Canada Co. v. Superintendent of Financial Services and National, Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 504*, May 16, 2003, FST Decision No. P0164-2001-5, at p. 5.

⁷ *CBS Canada Co.*, *ibid*, at pp. 7-8.

When Ms. Hindman was Vice President of Health Care Facilities, Shoppers conducted a review of the LTC operations, including the possibility of centralizing those operations. In 2001, Shoppers senior management concluded that the economics of expanding the business through centralized LTC operations were not attractive in view of the high cost of establishing centralized operations and decided instead to continue to service LTC facilities through the retail stores. Ms. Hindman accepted that decision as being valid on business grounds and subsequently, her title was changed in October 2001 to Vice President, Prescription Operations and Health Care Facilities. At Ms. Hindman's meeting with her supervisor, Mr. Stephen Gill, and Mr. Donald Casey (Shoppers Vice President, Human Resources) on December 6, 2001 she was advised of her termination. She ultimately obtained legal advice and was able to negotiate an improved severance package which extended her salary and benefits for a severance period ending on December 5, 2002.

We accept Ms. Hindman's evidence that she was told at the December 6, 2001 meeting that her termination was the result of the restructuring of Shoppers business. The reference letter subsequently provided to her, signed by Mr. Gill, stated that Ms. Hindman left Shoppers "as the result of a restructuring and refocus on our internal processes."

We also accept Ms. Hindman's testimony that her performance reviews had consistently been positive and she had received no negative comments regarding her performance. Mr. Casey acknowledged that performance concerns were not mentioned at the December 6, 2001 meeting and that he had not previously communicated any performance concerns to Ms. Hindman.

Mr. Casey testified that Ms. Hindman's termination was a stand-alone event which was not related to the numerous other head office terminations that occurred in 2000 and 2001. We find that testimony to be inconsistent with Ms. Hindman's testimony that at the December 6, 2001 meeting she was told that her termination was the result of the restructuring of the Shoppers business. It is also inconsistent with the letter from Mr. Gill stating that Ms. Hindman left Shoppers "as the result of a restructuring and a refocus of our internal processes."

We also accept Mr. Boy's testimony, given from his perspective as a former Senior Vice President, Operations Planning of Shoppers, regarding the changes in Shoppers operations in the late 1990s and early 2000s. Specifically, Mr. Boys noted that following the changes made to centralized purchasing and distribution facilities and systems, which was completed in the late 1990s, it was recognized that the skill set of Shoppers corporate staff needed to be changed in the new environment. We also accept his evidence regarding the review by Shoppers of its management which led to a benchmarking of staffing levels against some large drug store chains in the United States, leading to the conclusion that Shoppers corporate operations were over-staffed. Specifically, Shoppers recognized the lack of efficiency, with too many staff calling on stores and too many layers of management, leading to a decision that Shoppers needed to reduce its head office staff by about 330 people, including some people who had been added during the centralization project who were no longer needed.

It is clear that at the time of Ms. Hindman's termination Shoppers was in the midst of a corporate reorganization reflecting its evolution to a tighter management structure and other considerations. The reorganization was an ongoing and evolving process as Shoppers reviewed

its business operations and staffing, including matters such as lines of business to be continued if restructured and relative performances of employees. We find that on the balance of probabilities, Ms. Hindman's termination was connected to the reorganization and therefore "a result" of the reorganization. We would have reached that conclusion even if Ms. Hindman's testimony and Mr. Gill's letter had not specifically referred to the connection to the reorganization, however that testimony and letter reinforce our conclusion. We do not accept, having regard to the evidence, the submission of Shoppers that the long-term care project was entirely separate and apart from the Shoppers reorganization.

Mr. Kopstick

Mr. Kopstick was a long-term Shoppers employee, with approximately 33 years of service within the organization. He eventually was appointed to the position of Director, Operations, which he held for about 8 years prior to being appointed as a Vice President, Operations in 1992. In 1999, Mr. Kopstick's position was changed to Vice President, New Store Concepts, a newly created position under which he was given significantly reduced responsibilities that effectively were limited to the management of a new Shoppers retail store in the Bayview Village Shopping Centre in Toronto. That store was owned and operated directly by Shoppers and did not have an Associate as its owner/operator.

After Mr. Kopstick resumed his responsibilities at the Bayview Village store, Shoppers received a considerable number of complaints regarding Mr. Kopstick from the store employees under his supervision as summarized in the review of facts set out earlier in these reasons. Subsequently at a meeting on September 15, 2000 with Mr. Russell Cohen, his immediate superior, and Mr. Todd Small, Mr. Kopstick was informed of the concerns relating to his management of the Bayview Village store. He agreed to an action plan to improve the atmosphere of the store and he also agreed to meet with a counsellor who was hired to assist him to make behavioural changes. Subsequently on January 26, 2001, Mr. Kopstick attended another meeting with Mr. Cohen and Mr. Van Laare (Senior Vice President, Operations), at which he was informed that his employment with Shoppers would be terminated effective February 11, 2001.

We accept Mr. Kopstick's testimony that, at the termination meeting, he was informed that his position as Vice-President, New Store Concepts, was being eliminated, because Shoppers needed to reduce costs in connection with its major investment in new technology and that Shoppers had been unable to find another suitable position for him within the company.

Mr. Kopstick had received numerous performance reviews up to and including 1997, all of which were favourable, although the final review in 1997 was somewhat less positive. Surprisingly, Mr. Kopstick was not given any performance reviews subsequent to 1997, even though Shoppers policies called for performance reviews to be conducted at least annually. [The lack of any performance reviews following 1997 casts at least some doubt on any argument that his performance was so poor prior to the reorganization that he would have been terminated during the reorganization solely on poor performance without any regard to the reorganization.]

We also accept the evidence of Mr. Todd Small (the current Vice-President, Operations) regarding the serious concerns he and his fellow district coordinators at Shoppers had regarding

Mr. Kopstick's management style and alleged micromanagement, which he testified were communicated to Mr. Kopstick's immediate superior, Mr. Russell Cohen.

We find that Mr. Kopstick's performance as a Shoppers executive had deteriorated by the time of his appointment as Vice-President, New Store Concepts in 1999 and that Shoppers was becoming increasingly concerned at that time that he might no longer have the requisite skills or personal management style to perform effectively as Vice-President, Operations under the revised management structure that Shoppers was anticipating implementing. He effectively was being given a last chance to establish his value to Shoppers as an executive in the impending new Shoppers business environment when he was appointed as Vice-President, New Store Concepts, with significant reduced responsibility. Ultimately, Shoppers concluded that Mr. Kopstick's performance in his new role was not satisfactory. We found that his termination was for performance-related reasons, but clearly not done on the basis of "cause". As Mr. Casey testified, Mr. Kopstick was having difficulty with Shoppers transition from a very entrepreneurial organization to a more tightly managed one. It is not surprising that Shoppers in the course of planning and implementing its reorganization and ongoing staffing needs, including a significant reduction of senior staff as Mr. Small acknowledged in the Ontario Region who had the title Vice-President Operations, identified Mr. Kopstick eventually as an executive who no longer fit the business requirements of Shoppers. It is also not surprising (as is implicit in the comments in the *Imperial Oil* decision) that a weaker performing employee is more likely to be designated for termination when a business restructuring takes place.

Although the termination of Mr. Kopstick's employment focussed on performance related reasons, we also have concluded, based on the facts including an assessment of the testimony of the witnesses, that Mr. Kopstick's termination was at least in part connected and related in a meaningful degree to the restructuring of Shoppers business, including the focus on transition from a very entrepreneurial organization to a more tightly managed one as indicated in Mr. Casey's testimony. Accordingly, we conclude that his termination was "a result" of the Shoppers' reorganization.

There may be circumstances (such as, but not limited to, a termination for cause) of a employment termination occurring during the period of reorganization which is not connected and related to the reorganization. However, we have concluded that on balance of probabilities there was a meaningful connection and relationship between the Shoppers' reorganization and the termination during the reorganization period of Mr. Kopstick.

2. Issue (2): If the answer to Issue 1 is yes, are there any discretionary reasons not to require Shoppers to include Ms. Hindman in the partial wind up?

The parties agree that this issue relates only to Ms. Hindman. In particular, Shoppers acknowledged that if Mr. Kopstick otherwise qualified for inclusion in a partial wind up that he would be entitled to "grow-in" under the Act.

With respect to Ms. Hindman, all of the parties acknowledged that her age at the time of her termination of employment was 46. It was Shoppers' position, which the Superintendent supported, after considering the evidence presented in the evidentiary part of the hearing, that she

did not qualify for the enhanced grow-in entitlement under subsection 74(1) of the Act on the basis that her continuous service, as defined in the Act and for purposes of subsection 74(1), was only slightly more than 8 years. Therefore, Shoppers submitted that Ms. Hindman did not meet the “55 points” test for grow-in entitlement under subsection 74(1) of the Act. That provision reads, *inter alia*, as follows:

“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 55, at the effective date of a wind up of the pension plan in whole or in part, has the right to receive ...”.

All of the parties agreed that Ms. Hindman’s actual employment by Shoppers (ignoring the issue below regarding any service with a retail store within the Shoppers’ organization, including her service as an Associate in the Whitby store), determined as at the date of the termination of her employment from Shoppers, totalled a continuous service period of 8.3 years. Accordingly, the issues to be considered by the Tribunal was whether she met the 55 points test under subsection 74(1) of the Act, based on submissions of the parties and the facts, having regard to either her employment as an Associate within the Shoppers’ organization prior to August, 1994 (approximately 2 years) or to an argument (considered below) that in the context of this particular partial wind up her continuous service for purposes of subsection 74(1) should be based on deemed termination of her employment “on the effective date of the wind up” (April 22, 2005) in accordance with clause 73(1)(a) of the Act. We will address below each of those arguments.

(a) **Commencement of Diane Hindman’s continuous service for purposes of subsection 74(1) of the Act**

The argument on behalf of Diane Hindman was that her employment with the retail stores in the Shoppers organization immediately prior to her becoming directly employed by Shoppers, including her two years as an Associate with the Whitby store was part of her “continuous employment” for purposes of the grow-in test in subsection 74(1) of the Act. If that position is accepted she would meet the 55 points test and be entitled to the statutory “grow-in” enhancement.

We do not accept Ms. Hindman’s position on that issue. We have concluded that Ms. Hindman’s continuous employment with Shoppers for purposes of the Plan and subsection 74(1) commenced only upon her employment by Shoppers on August 22, 1994.

The argument presented on Ms. Hindman’s behalf in effect was that having regard to the various factual controls Shoppers had over certain operations and activities of Shoppers’ stores, such as the Whitby store, Shoppers should be regarded for purposes of determining her “continuous service” as the *de facto* employer of persons employed in such stores in the retail pharmacy chain having regard to generalized principles of employment law.

The facts summarized above make it clear that each of the retail stores is owned and operated by a separate corporation established by an Associate who then enters into an agreement with Shoppers relating to the operation of the store. There are significant financial controls imposed by Shoppers on the operation of the stores and equity is provided by Shoppers. Shoppers also guarantees a specific minimum level of compensation and there is provision for a sharing of profits between Shoppers and the Associate if a store is profitable, with Shoppers receiving the bulk of the profit. However, it is clear that Associates and store employees are not remunerated directly by Shoppers but instead receive their remuneration from the store corporation.

Store service is expressly excluded from the definition of “employee” in the Employee Plan. That provision is consistent with the provisions of the Act which define employer and employment as follows:

“ “Employer” in relation to a member or former member of a pension plan means the person ... from which the member or former member receives or received remuneration to which the pension plan is related, and employed and employment have a corresponding meaning.”⁸ (emphasis added)

We agree with the submissions of Shoppers that Ms. Hindman’s store service must be determined in accordance with the terms of the Act and the Plan and that under both the Act and the Plan the correct conclusion on the facts is that store service is irrelevant.

The Act provides that employment is with respect to the entity which was paying the member’s remuneration. Associates and store employees are not paid by Shoppers. Furthermore, a pension plan is “related” to the “remuneration” if benefits are being accrued corollary to a person’s salary. That right only occurs when an individual is employed by Shoppers.

The specific financial controls by Shoppers over the retail store, identified by Mr. Boys in his testimony, which exist under the franchise arrangement do not make Shoppers the *de facto* employer. The evidence presented on Ms. Hindman’s behalf does not support a conclusion that payment of Ms. Hindman’s remuneration with respect to store service effectively was made by any of the store corporations on Shoppers’ behalf.⁹

An argument was made on behalf of Ms. Hindman that the Supreme Court of Canada’s decision in *Sagaz Industries Canada Inc. v. 67122 Ontario Ltd.*¹⁰ supports the position that Ms.

⁸ Subsection 1(1) of the Act.

⁹ The Tribunal appreciates that the determination of who is an “employer” may yield a different answer for purposes of other statutes depending upon the wording and objective of such other statutes. Accordingly the facts relating to a specific franchise arrangement could result for purposes of such other statutes in a conclusion that a franchisor was the employer or was, with respect to an employee of a franchisee, in a position similar to an employer of that employee. See, for example, the decision of the British Columbia Labour Relations Board in *Shoppers Drug Mart Inc. v. Art Lamb Drugs Ltd. et al.* B.C.L.R.B. #B110/2006. That conclusion in our view is not applicable to the Act. In that decision, in a labour relations context and having regard to the *Labour Relations Code* of British Columbia, the B.C.L.R.B. determined that Shoppers was neither the true nor the common employer of the store employees.

¹⁰ [2002] Part 3 Case 12.

Hindman's service while working with the retail stores was ultimately controlled by Shoppers and therefore she was an employee of Shoppers when working in the role. That case is not relevant to Ms. Hindman's situation. It involved consideration as to whether, in the context of potential vicarious liability for misconduct of an individual consultant, that individual was an "employee" or an "independent contractor" of Canadian Tire. In contrast, there is no dispute then Ms. Hindman was an employee. The issue is whether in her circumstances she was only an employee of the retail stores before joining Shoppers or whether she should also be regarded in that capacity as a Shoppers employee for purposes of the Act.

In view of the foregoing, we have concluded that Ms. Hindman's store service prior to her direct employment by Shoppers was correctly excluded by Shoppers in the partial wind up report for purposes of determining her entitlement to grow-in under subsection 74(1) of the Act.

(b) What is the final date as of which Ms. Hindman's entitlement to grow-in should be determined?

It is necessary to determine, having regard to the provisions of the Act and the relevant facts recited above, when Ms. Hindman's employment with Shoppers ended for purposes of subsection 74(1). Specifically, Ms. Hindman would meet the 55 points test if for purposes of subsection 74(1) of the Act either her "continuous employment" or her "membership in the pension plan" is determined at the April 22, 2005 effective date of the wind up of the pension plan in whole or in part rather than at the date of her termination of employment.

Subsection 73(1) of the Act provides that for purposes of determining the amount of pension benefits "and any other benefits and entitlements" on a full or partial wind up of a pension plan:

"(a) the employment of each member of the plan affected by the wind up shall be deemed to have been terminated on the effective date of the wind up;

(b) each member's pension benefits as of the effective date of the wind up shall be determined as if the member had satisfied all eligibility conditions for a deferred pension; and

(c) provision shall be made for the rights under Section 74." (emphasis added).

Accordingly, termination of employment in the context of partial plan wind up "for the purposes of determining the amount of pension benefits and any other benefits and entitlements on the winding up of a pension plan" - which in the context of subsection 73(1) clearly includes grow-in entitlement under Section 74 - is to be determined on the basis that employment was deemed to have been terminated on "the effective date of the wind up." That provision requires that continuous service of a person who was a member of a plan affected by a winding up is to be determined on the effective date of the wind up.

That conclusion is consistent with subsection 74(1) of the Act which specifically looks to the “effective date of the wind up of a pension plan in whole or in part” for purposes of determining the 55 points test if an individual was “a member in Ontario of a pension plan”.

Ms. Hindman was a member of the Plan. We concluded above that her employment was a result of the business reorganization and she should be included in the partial wind up. April 22, 2005 was stated to be the effective date of the partial plan wind up in the Minutes of Resolution and the partial wind up report (which refers to the corresponding determination by Shoppers). There is no indication (as we will consider below) that any earlier effective date was designated by the Superintendent in accordance with the Act to be the effective wind up date. Therefore, on the basis of the facts presented to the Tribunal, Ms. Hindman’s continuous service for purposes of subsection 74(1) of the Act should be determined to be April 22, 2005 and she is entitled to the grow-in enhancement provided by that subsection.

In reaching that conclusion, we were cognizant of and considered carefully submissions made by Shoppers to the contrary. We refer in particular to Shoppers’ submission that, while Ms. Hindman may have been a “member” of the Plan under the definition of the term in the Plan, in view of her entitlement to a deferred pension, her employment had in fact terminated on December 5, 2002 (during the partial wind up period) and that following her termination of employment she became a “former member” in accordance with the definition of that term in Section 2 of the PBA. The Act defines a former member as a person who has terminated employment or membership in a pension plan and “is entitled to a deferred pension payable from the pension fund”. Shoppers’ submission was that the status of a former member generally is indicative of a condition in which an individual is no longer accruing or able to accrue additional service credit by employment activities with an employer. Accordingly, that condition ends at the employee’s credited service end date (Ms. Hindman’s credited service and membership in the plan continued until December 2, 2002 as a result of Shoppers’ agreement to grant salary continuance).

Shoppers’ argument does not take into account the specific deemed employment provision in subsection 73(1) which, in the context of an individual affected by a plan wind up, provides that employment termination must be determined on the effective date of the wind up and therefore would be applicable in Ms. Hindman’s circumstances to determining her status as a member or former member for purposes of the Act. In addition, it does not take into account or give appropriate weight to the requirement in subsection 74(1) which requires that determination of continuous service or membership in a plan of a person who was a “member” affected by a partial wind up must be made as at the effective date of the plan wind up. Ms. Hindman clearly was a “member” (and not simply a “former member”) by virtue of the termination of her employment within the partial plan wind up period “as a result of” the reorganization of Shoppers’ business. Accordingly, she is entitled to the extended grow-in protection provided in the context of a partial plan wind up under subsection 73(1) and its related “grow-in” enhancement under subsection 74(1) of the Act.

We must also consider the legislative intent of subsection 74(1) of the Act. The clear legislative intent is to protect eligible pension plan members whose employment is terminated in connection with the events precipitating a partial or total plan wind up from the loss of any early retirement

benefits for which they might otherwise have become eligible. If, as Shoppers suggests, those members whose employment terminated during the wind up period but prior to the effective date of the wind up are to be considered “former members” and as such not entitled to grow-in, the legislative intent would be defeated, and grow-in would apply only to those members whose employment terminated on or after the effective date of the wind up. This would be inconsistent with the purpose of the Act, as discussed further below.

We also have considered the suggestion made by Superintendent’s counsel that the reason for selecting the effective date of April 22, 2005, rather than an earlier date or dates (recognizing that the partial wind up was with respect to all members and former members who ceased to be employed between January 1, 2000 and April 25, 2003), was to include former members who were placed on salary continuance. If that was an objective of the Superintendent, it should not detract from or limit other consequences of the selection of the April 22, 2005 effective date of the wind up.

With respect, we do not agree with the further and apparently main submission on the issue by the Superintendent that the determination of this issue should be made in the context that the partial wind up is not one under Section 68 of the PBA but instead on the basis that it commenced under Section 69 of the PBA and then resulted in a settlement. Specifically, the Superintendent submitted that “the fact that the matter settled does not convert the partial wind up into a wind up under Section 68”. The Superintendent went on to suggest that no partial wind up under Section 69 of the PBA could possibly comply with the notification provision relating to partial wind ups in subsection 68(5) of the Act, discussed below because by its very nature, a partial wind up ordered by the Superintendent comes after the events that give rise to the partial wind up. The Superintendent submitted that the effective date of a partial wind up under Section 69 of the PBA is invariably earlier than the date notice was given to members.

The Superintendent’s submission is with respect, not consistent with the facts in this case. The Superintendent issued a Notice of Proposal under which the Superintendent proposed to order a partial wind up of the Plan under Section 69. However, the Minutes of Resolution and the partial wind up report (including the reference in that report to the declaration by Shoppers of the wind up) make it clear that this was a partial wind up declared by Shoppers as the employer pursuant to subsection 68(1) of the Act. As a result of the settlement there was no determination by the Tribunal in the previous proceeding, relating to the previous notice of proposal to require a wind up of the Plan in accordance with the determination of the Superintendent pursuant to subsection 69(1) of the Act. Instead, that previous notice of proposal was withdrawn by agreement of the parties.

The Minutes of Settlement specified, and the wind up report adopted, the effective wind up date of April 22, 2005 as agreed by Shoppers and the Superintendent in their capacity as parties to those Minutes of Resolution.

Subsection 68(5) of the Act provides that the effective date of a wind up (assuming as in this situation a non-contributory plan) cannot be earlier than “the date notice is given to members”. The notice is a notice of proposal to wind up a pension plan that is to contain prescribed information in accordance with subsection 68(4) of the Act which the plan administrator is

required to communicate to, among other persons, the Superintendent and each member and former member of the pension plan.

The Superintendent is empowered by subsection 68(6) of the Act to issue an order to change the effective date of the wind up if the Superintendent is of the opinion that there are reasonable grounds for the change. The Superintendent has acknowledged that no order was issued fixing a different effective date of the wind up pursuant to subsection 68(6) of the Act. In the absence of such order being issued by the Superintendent fixing another date, the effective date of the partial wind up of the Plan on the basis of the evidence is April 22, 2005. In any event we expect that any different date that might be specified by the Superintendent will not be earlier than April 22, 2005, as provided in the Minutes of Resolution.

Shoppers, did not accept the Notice of Proposal by the Superintendent in the previous proceeding to order a wind up under Section 69 of the Act. A settlement flowing from that previous Notice of Proposal might have included negotiations as to the terms of such a Superintendent ordered partial wind up such as the effective date or dates of a partial wind up which the Superintendent might have been prepared to specify under subsection 69(2) of the Act. Instead, the negotiated settlement reflected a decision to proceed with a wind up under subsection 68(1) of the Act and to adopt an effective partial wind up date of April 22, 2005.

Shoppers initially could have had proceeded at the time of its reorganization with a voluntary wind up of the plan in accordance with subsection 68(1) of the Act and given timely notice of the proposed partial wind up in accordance with subsection 68(5) of the Act. In that event it would have sought to negotiate with the Superintendent pursuant to subsection 68(6) of the Act an earlier effective date or series of dates than was ultimately selected by it pursuant to the settlement.

Our conclusion is based on reading the Act and our understanding of its purpose. We were cognizant in that regard of the comments of the Ontario Court of Appeal in *GenCorp Canada Inc. v. Ontario (Superintendent, Financial)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.) at paragraph 16:

“The Pension Benefits Act is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans and “evinces as a special solicitude for employees affected by plant closures”.¹¹

C. Costs

The Stage Two Applicants indicated they might wish to make submissions regarding costs. Therefore we will entertain written submissions received by the Tribunal from the parties

¹¹ See also paragraph 28 of the decision of the Supreme Court of Canada in *Mullen v. Kerry (Canada) Inc.*, 2009 S.C.C. 39.

relating to costs provided these submissions are received within 30 days of the date of our Order below. We remind the parties of the comments in our reasons issued with respect to Stage One of this hearing which address the limited circumstances in which the Tribunal is empowered to order costs.

D. Order

We order that the Superintendent proceed with approval of the Notice of Proposal to approve the partial wind up of the Plan subject to the following:

- (a) our conclusions in Stage One of this hearing relating to the payment options to be made available to Mr. Groskopf with respect to his additional grow-in entitlement;
- (b) recognition in the partial wind up report of the grow-in entitlements of Ms. Hindman and Mr. Kopstick and their inclusion in that report in accordance with these Reasons for Decision; and
- (c) any determination the Superintendent may ultimately make regarding the appropriate partial wind up date in accordance with subsection 68(6) of the Act.

Dated at Toronto this 8th day of September, 2009.

“John Solursh”

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

“Jeffrey Richardson”

Jeffrey Richardson
Member of the Tribunal and of the Panel

“David Short”

David Short
Member of the Tribunal and of the Panel