

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

REASONS FOR DECISION

A. BACKGROUND

On the 8th day of September 2009, we issued our decision (the “September 8 Decision”) relating to 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 in that decision.

The September 8 Decision concluded with various orders issued by the Tribunal including an order that the Superintendent proceed with approval of a Notice of Proposal to approve the partial wind-up of the Plan subject to 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 that decision.

We noted in the September 8 Decision that the Stage Two applicants (Ms. Hindman and Mr. Kopstick) had indicated they might wish to make submissions regarding costs. Accordingly that decision specified that we would consider submissions received from the parties relating to costs providing those submissions were received within 30 days of the date of our order. We reminded the parties of the comments relating to costs requested by certain of the Applicants in Stage One of the hearing set out in our decision dated the 4th day of August, 2009 (the “August 4 Decision”) which addressed the limited circumstances in which the Tribunal is empowered to order costs.

On October 7, 2009, the Tribunal received a written submission from Diane Hindman in support of a request from Ms. Hindman that the Tribunal award unspecified costs totalling \$21,489. No breakdown was provided for the costs claimed except for a statement to the effect that total costs incurred by Ms. Hindman relating to the hearing process included the services of Mr. Boys, out-of-pocket, GST and travel costs.

Responding written cost submissions from Shoppers Drug Mart Inc. (“Shoppers”) were received by the Tribunal on October 16, 2009.

On November 2, 2009, Diane Hindman filed with the Tribunal a reply submission (the “Reply”) relating to the award for costs. The reply submission included a somewhat more detailed breakdown of the claim for costs which were stated to total \$21,552 (adjusted from the prior total) as follows:

- “a. Fees for services which may be described as legal in nature based on descriptions in the Law Society Act - \$9,828 including GST
- b. Fees for services which can be described as non-legal in nature - \$10,920 including GST
- c. Out-of-pocket expenses - \$133
- d. Travel costs for Ms. Hindman - \$671”

Ms. Hindman’s Reply also addressed various positions in the responding submissions of Shoppers objecting to the claim for fees of Mr. Boys with particular regard to the provisions of the *Solicitors Act* and *Law Society Act of Ontario* raised by Shoppers that are addressed below. The Reply effectively acknowledged that Mr. Boys was not a licensed practitioner under the *Law Society Act* and stated that “of course, if the Tribunal determines that unlicensed representatives are not permitted to charge fees then none will be charged or claimed”. It appears therefore that Mr. Boys has not to date charged any fees to Ms. Hindman for legal services relating to this matter in potential contravention of the *Law Society Act* and he does not intend to do so unless this Tribunal concludes that such fees would be appropriate under that legislation.

B. DECISION RELATING TO MS. HINDMAN’S CLAIM FOR COSTS IN STAGE TWO

Failure to Meet Rule 45

As noted in the Tribunal’s August 4 Decision relating to costs of Stage One of the hearing addressing the request of costs of a number of Applicants involved in Stage One, 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 states that:

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;
- (c) whether the party’s participation assisted the Tribunal in understanding the issues;
- (d) failure to cooperate with other parties during preliminary proceedings or at the hearing;
- (e) failure to attend a hearing or other proceeding, or to send a representative, despite notice being provided to the party;
- (f) the party’s degree of success in the proceeding; and
- (g) any other matter it considers relevant.

We observed in our August 4 Decision that it is apparent from the criteria under Rule 45 that a claim for costs must be based upon conduct related to the proceeding. That decision referred to some examples set out in the Tribunal’s Practice Direction on Cost Awards, as revised effective

August 1, 2004, which 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 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 ...

We have considered the lengthy submissions and Reply presented by Ms. Hindman, as well as the submissions by Shoppers, on the issue of costs in light of the September 8 Decision (including the findings of fact therein), the conduct of the hearing that led to that Decision, Rule 45.01, and the comments in the above noted Practice Direction. Ms. Hindman alleges that Shoppers engaged in conduct which is unreasonable, frivolous or vexatious, and unreasonably prolonged the proceeding (see paragraphs (a) and (b) of Rule 45.01).

We agree with the submissions of Shoppers that, having regard to the facts as set out in the earlier decision and our observation of the conduct of the hearing, Shoppers did not engage in any conduct which we consider to be contrary to any of the factors the Tribunal is directed to consider under Rule 45.01. Specifically, we would characterize Shoppers' conduct during Stage Two of the hearing as being reasonable and professional as well as appropriately restrained including giving recognition to the fact that Ms. Hindman was not represented by counsel familiar with hearings before an administrative tribunal.

Ms. Hindman's application in the main matter and Shopper's response to it appropriately raised questions of fact which merited presentation to and careful consideration by the Tribunal in order to reach a conclusion. Ultimately the Tribunal decided that Ms. Hindman was entitled to grow-in rights under the *Pension Benefits Act* (the "PBA") having regard to the facts brought out through testimony (including Ms. Hindman's testimony) during the hearing. The Tribunal's decision was not based on the legal positions originally submitted by Ms. Hindman. Instead, it was based on an interpretation of a provision of the PBA raised by the Tribunal which was the subject of separate written submissions made by the parties at the Tribunal's invitation relating to the issue of the final date as of which Ms. Hindman's potential entitlement to grow-in should be determined.

We would also note that at the commencement of the hearing relating to Ms. Hindman, the Superintendent's counsel reserved the Superintendent's position regarding her entitlement. Ultimately the Superintendent's counsel, after hearing the testimony of various witnesses, supported Shoppers' position that Ms. Hindman was not entitled to the grow-in rights she was claiming.

The Tribunal's criteria for an award of costs by it against Shoppers as set out in the Tribunal's Rules of Practice and Procedure have not been met with respect to Ms. Hindman. Accordingly, the Tribunal has decided no costs shall be awarded to Ms. Hindman with respect to the proceeding.

C. COSTS CLAIM COMPRISED IMPROPER ELEMENTS

Even if we had decided (subject to the comments in this part of our decision) that the Tribunal's criteria for an award of costs against Shoppers as set out in the Tribunal's Rules of Practice and Procedure had been met and assuming that the costs claim submitted by Ms. Hindman ultimately was supported by adequate detail, we have concluded for the additional reasons below that we should not grant an award of costs in favour of Ms. Hindman against Shoppers.

A substantial portion of the costs claims by Ms. Hindman relate to fees which, assuming a favourable award by this Tribunal, would be paid to Mr. Boys.

Pursuant to the *Solicitors Act* and the *Law Society Act*, no individual may provide legal services unless the individual is licensed to do so or provides those services under an exemption in accordance with that applicable legislation.¹ That legislation and related regulations and by-laws of the Law Society of Upper Canada (the "applicable legislation and regulations"), including By-Law 4, also limits the circumstances in which an individual can charge for legal services. The applicable legislation and regulations make it clear that representation of a party before a court or administrative tribunal and the provision of related legal advice constitute the practice of law and accordingly such activities are subject to the prohibition against charging for legal services unless licensed or permitted under an exemption.

Mr. Boys has acknowledged that he is not a lawyer or paralegal licensed under the applicable legislation. The applicable legislation and regulations (primarily By-Law 4) specify several exemptions. The only exemption which would potentially be applicable on the facts in this case to Mr. Boys' services is the occasional provision of legal services to a friend or relative on the basis that the provider does not expect or receive any compensation, including a fee gain or reward, direct or indirect, for the provision of the legal services. It is clear from Mr. Boys acknowledgment that he will not charge a fee if it is not awarded by this Tribunal, that he has not yet charged a fee and has no intention of doing so in the absence of an award of costs by this Tribunal which would include a fee payable to him.

Any costs award relating to services provided by Mr. Boys with respect to the hearing (which is the extent of the jurisdiction of the Tribunal in relation to costs that might be charged by him)

¹ *Solicitors Act*, R.S.O. 1990, c. S. 15, s. 1 and the *Law Society Act*, R.S.O. 1990, c. L. 8, s. 26.1-26.2.

would contravene the prohibitions of the Ontario legislature on the provision of unlicensed legal services. An award to Ms. Hindman against Shoppers for reimbursement of his fees would result in a breach of the applicable legislation and regulations and accordingly would be contrary to public policy. Accordingly the requested award of costs for fees Mr. Boys might otherwise charge must be refused.

We also agree with the submission of Shoppers that any travel costs or out-of-pocket costs incurred by Ms. Hindman as a witness on her own behalf should not be awarded by the Tribunal. It is generally not appropriate to award a party the cost of their own attendance as a witness.²

D. ORDER

In summary, the Tribunal has decided that it will not make an order for costs in favour of Ms. Hindman against Shoppers.

Dated at Toronto this 17th, day of December, 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

² See for example *Alloto – Importers, A. Larsson v. A.V. v. Fairbanks*, [1991] N.S.R. (2d) 290 (Nova Scotia Supreme Court – Appeal Division), *the Moon v. Sher* (2004), 246 D.L.R. (4th) 440 (Ontario Court of Appeal), and *Orkin*, *The Law of Costs*, Second Edition, paragraphs 204 and 209.14.