

**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 by the Superintendent of  
Financial Services to Make an Order under section 69(1)(e) of the  
*Pension Benefits Act*, relating to the Imperial Oil Limited Retirement  
Plan, Registration Number 347054;

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

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

**IMPERIAL OIL LIMITED**

**Applicant**

**- and -**

**SUPERINTENDENT OF FINANCIAL SERVICES,  
THE 111 PENSION RIGHTS ASSOCIATION,  
JANEEN BOWES, CATHERINE SCHELL, JEAN  
TOWNSEND, and LINDA ZWICKER**

**Respondents**

**BEFORE:**

Mr. Ralph Scane  
Member of the Tribunal and Chair of the Panel

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

Ms. Heather Gavin  
Member of the Tribunal and of the Panel

**APPEARANCES:****For the Applicant:**

Mr. Brett Ledger,  
Ms. Catherine Weiler

**For the 111 Pension Rights Association:**

Mr. Ari Kaplan  
Ms. Michelle Landy

**For the Superintendent of Financial Services:**

Ms Deborah McPhail  
Ms. Alena Thouin

**HEARD:**

September 3, 2009

**DECISION ON MOTION**

This is a motion brought by The 111 Pension Rights Association (“the Association”) as an interlocutory proceeding in an application brought by Imperial Oil Limited (“Imperial”) pursuant to s.89(6) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended (“the *PBA*”), for a hearing concerning a Notice of Proposal, dated January 16, 2009, (“the NOP”) issued by the Deputy Superintendent, Pensions (“the Superintendent”) of the Financial Services Commission of Ontario (“FSCO”). The NOP proposed “to make an order under section 69(1)(e) of the *PBA* that Imperial Oil Limited Retirement Plan, Registration Number 347054 (the “Plan”) be partially wound up in relation to those members of the Plan who ceased to be employed by Imperial Oil Limited at its location at 111 St. Clair Ave. West Toronto (the “St. Clair location”) during the period September 28, 2004 until June 30 2006.” The motion brought by the Association in form seeks to vary the statement of “Matters in Issue”, as framed by the original parties and approved by the Tribunal at a pre-hearing conference held on April 23, 2009. These issues related to the applicability of s.69(1)(e) of the *PBA* as authority for the order of a partial wind up of the Plan by the Superintendent, and, if applicable, the extent of such wind up. The variation requested by the motion would add issues as to the applicability of s.69(1)(d) as an alternative ground to authorize the partial wind up, and the extent of such wind up, to the “Matters in Issue”. At the time the “Matters in Issue” were settled and approved, the Association was not a party to the proceedings. It was granted full party status by an order of the Tribunal made at a pre-hearing conference held July 28, 2009. The Respondents Bowes, Schell, Townsend and Zwicker were granted limited party status at the same pre-hearing conference.

Imperial denies the jurisdiction of the Tribunal to extend the hearing to a consideration of s.69(1)(d) of the *PBA* as an alternative ground for the proposed wind up, on the grounds that the subsection was not so referred to in the NOP. Imperial also alleges that, even if jurisdiction to make the order sought by the Association in this motion does exist, it ought not to be so exercised in the circumstances of this case. The Superintendent and the respondent Catherine Schell attended the hearing on the motion, but did not make submissions. The other individual respondents did not attend and were not represented.

### *Factual Background*

These proceedings arose as a result of a decision of Imperial, announced to employees in September, 2004, to move its corporate “head office” functions as well as its Products and Chemicals management from its premises at 111 St. Clair Avenue West in Toronto to Calgary, Alberta. Some of those employed at the St. Clair location accepted transfers to Calgary. Others were not offered employment in Calgary or elsewhere; some chose not to make the move, but to take early retirement, or otherwise leave employment with Imperial, and some were involuntarily terminated. Some of the employees who did not continue as employees had a combination of age plus years of continuous employment or membership in the Plan equalling at least fifty-five. If the Superintendent is entitled to, and does order a partial wind up of the Plan, such members to whom the partial wind up extends will be entitled to receive the rights specified in s.74 of the *PBA*, commonly referred to as “grow-in rights”. These rights become available only in the event of a partial or whole wind up of a pension plan. It is the possible existence of these “grow-in rights” which gives rise to the dispute between the parties.

### *Decision*

The Tribunal holds that it lacks jurisdiction to make the order requested in the motion, and that accordingly, the motion fails.

The motion, in essence, is to enlarge the grounds upon which the proposed partial wind up order may be made by the Superintendent in this case from that stated in s.69(1)(e) of the *PBA*, upon which the Superintendent solely relied in his NOP, to also include that stated in s.69(1)(d). As interpreted in many previous decisions, the several subsections of s.69 establish necessary factual conditions, at least one of which must exist before the Superintendent may make a wind up order. When one of these necessary conditions is established, the Superintendent has the power to make the order, but it lies within the Superintendent’s discretion as to whether the power should be exercised in the particular case.

Section 69(1) of the *PBA*, so far as it has been argued to apply in this case, reads:

“69(1) The Superintendent by order may require the wind up of a pension plan in whole or in part if,

.....

(d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;

(e) all or a significant portion of the business carried on by the employer at a specific location is discontinued;”

It appears that the proper interpretation of s.69(1)(e) will be in issue when the original application by Imperial for a hearing is argued. However, the Tribunal holds that, whatever the proper interpretation of that subsection, while the two subsections may overlap, in the sense that either subsection could enable a partial wind up which, in some fact situations, would include some of the same plan members as would the other, they require that different factual conditions precedent be established. Consequently, they require differently directed investigations as to whether those necessary preconditions exist. Also, under s.89(5) of the *PBA*, “...the Superintendent may require the administrator [of the plan proposed to be wound up wholly or partially] to transmit a copy of the notice [of proposal] and the written reasons on such other persons or classes of persons or both as the Superintendent specifies in the notice to the administrator.” The Superintendent would have to have regard to different criteria under each section in considering which persons or groups if any should receive such notices. Under s.89(6), a person served with such notice is entitled to give written notice requiring a hearing. Although the various subsections of s.69(1) of the *PBA* all establish a ground for an order by the Superintendent to wind up a plan, they are separate and distinct causes of action, and the fact that one of them may be applicable to a given situation does not give any basis for an assumption that other subsections may also apply to that situation.

If the Tribunal has jurisdiction to direct the Superintendent to order a wind up on a basis which the Superintendent did not select, and which the Superintendent may or may not have fully investigated and considered, it must find that jurisdiction in s.89(9) of the *PBA*.

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

The Tribunal first notes that it is now trite that the subsection empowers the Tribunal to act in cases where the Superintendent proposes to refuse to make an order, as well as cases where the Superintendent proposes to act affirmatively. It also appears that the Tribunal may hold a hearing and give directions as described in the subsection where the Superintendent has decided not to make an order, but has not issued a formal NOP to that effect. *Maynard v. Ontario (Superintendent of Pensions)*, (1999), *Pension Bulletin*, Vol. 8, Issue 2, p.58 (Ont. Pension Comm.), affd. (2000) 23 *C.C.P.B.* 145 (Div. Ct).

The Tribunal's predecessor, the Ontario Pension Commission, has also noted that s.89(9) fits into a statutory scheme which "contemplates that the Superintendent will enquire into a possible wind up before the Commission holds a hearing into the matter. Indeed, if the Superintendent declines to make an order, there will be no hearing. In short, the Superintendent must enquire into the matter before it comes before the Commission." *Stelco Inc. v. Ontario (Superintendent of Pensions)*, (1993) *PCO Bulletin*, Vol. 4, P.48 at p. 49.

The latter case cited can no longer be regarded as valid insofar as it may be taken to hold that, in any case where the Superintendent "declines" to make an order, there can be no hearing. However, it does indicate the importance of a decision by the Superintendent as the foundation for subsequent action by the Tribunal, and the Tribunal holds that it is still valid in this regard. The word "declines" may be too broad, and the Tribunal now believes that the Superintendent must do more than "enquire into the matter" in order to entitle persons to the "hearing" which is the precondition for the Tribunal exercising its jurisdiction under s.89(9) of the *PBA*. The Superintendent is assigned both an investigative role and a quasi-judicial role by the *PBA* and other similar statutes which expressly or by necessary implication impose duties upon that office. After investigating a matter, the Superintendent may conclude that he or she should take certain action under the relevant statute. If that statute is the *PBA*, the Superintendent will be required to alert interested parties by issuing a notice of the proposed order. If the Superintendent concludes that action will not be taken, a notice of proposal to that effect may be issued, but might not be.

However, the Superintendent's decision against taking a particular action, such as making a wind up order, may occur either because, following an investigation, he or she has exercised the quasi-judicial function and, on the basis of the information gathered in the investigative function, made the decision, or because in the course of carrying out the investigative function, he or she concludes that circumstances do not justify further resources being devoted to that investigation, and terminates it. In that case, the quasi-judicial function of the office is not engaged. In the *Maynard* case, cited above, that quasi-judicial function had been exercised. Although a formal notice of proposal to decline to make the order requested by the applicant was not issued, it was clear from the correspondence that the Superintendent's staff had completed an investigation, that the Superintendent had "fully and carefully considered" the results of that investigation, had decided that no grounds existed to order a partial wind up of the plan in question, and that he would not make such an order. A preliminary objection to the Commission's jurisdiction to hold a hearing with respect to the refusal, on the ground that there was no formal notice of proposal, was dismissed. The Tribunal agrees with that decision.

However, if the failure to issue an order on a matter arises from a decision not to proceed with an investigation, or to abort an investigation already started before a considered decision on the matter being investigated is reached, because the Superintendent does not consider the matter worthy of expenditure, or further expenditure, of resources, the Tribunal holds that this is not a situation where the Superintendent is subject to review by the Tribunal. In such cases, the Superintendent is not required, under the various

provisions of s.89 of the *PBA*, to issue notices to specified persons. By s.89(6), these notices would have to include notice of entitlement to a hearing. By s.89(8), it is where “the person requires a hearing by the Tribunal in accordance with subsection (6)” that a hearing is held, and it is in respect to that hearing that the Tribunal exercises its jurisdiction under s.89(9). The phrase “the person” in s.89(8) clearly refers back to a person who has received a notice complying with s.89(6). The Tribunal concludes that decisions of this nature, where it is the Superintendent’s investigative function, rather than the judicial function, which is sought to be reviewed, are beyond the jurisdiction of the Tribunal. It follows that the Tribunal may not acquire jurisdiction to review such matters by permitting or ordering them to be included in hearings concerning other issues over which the Tribunal does have jurisdiction. To hold otherwise would subject purely investigative functions of FSCO, of which the Superintendent is the chief executive, to review and direction from the Tribunal. The Tribunal cannot read this legislative intention into s.89(9) of the *PBA*.

In this connection, there is a passage in a previous decision of the Tribunal, *CBS Canada v. Ontario (Superintendent of Financial Services)*, (2002), 34 *C.C.P.B.* 199, 216, which must be read with caution.

“When an issue is raised before the Tribunal without the benefit of any findings on the underlying facts, if they are disputed, or without any considered opinion of the Superintendent, the Tribunal would be entitled, under subsection 89(9), to refer the matter back to the Superintendent to make the appropriate findings and to take a position on the issue. However, we think that the referral approach is in the discretion of the Tribunal and that subsection 89(9) also permits the Tribunal to address such an issue as one of first impression. If any fact finding is required, the Tribunal is not without its own processes for engaging in that exercise.”

If this passage means that the Tribunal hearing a matter can refer an issue not decided by the Superintendent as part of the quasi-judicial function of the office back to the Superintendent for investigation or further investigation, and direct the Superintendent to make a quasi-judicial decision which can then be reviewed by the Tribunal, this present panel of the Tribunal disagrees that s.89(9) gives this power. It also does not agree that the Tribunal may, on its own initiative, raise and decide upon an issue entirely separate and distinct from one previously pronounced upon by the Superintendent, concerning which the hearing has been requested. This panel of the Tribunal does not believe that the words “and to take such action as the Tribunal considers the Superintendent ought to take ...”, found in s.89(9), should be read completely disjunctively from the preceding words, “the Tribunal by order may direct the Superintendent to carry out or refrain from carrying out the proposal”. Such an untrammelled power should at least merit its own section.

The Tribunal has reviewed the agreed documents filed in the principal application and the documents submitted for this motion. In particular, from the Agreed Book of Documents agreed upon by Imperial and the Superintendent (the Association had not been added as a party at the time of its preparation), we have reviewed an exchange of correspondence

between Imperial and FSCO between November 2005 and November, 2008 in which FSCO was seeking information with respect to the closing of the Toronto head office as it might affect Imperial's pension plans. The early correspondence reveals that the Superintendent was considering the possibility of making an order under the subsections of s.69(1), and in particular was considering the relevance of subsections (d), (e) and (f). By the end of October, 2007, FSCO is referring only s.69(1)(e) as a basis for possible action by the Superintendent, and inviting Imperial to make further submissions on this issue. There were some references to s.69(1)(d) in later correspondence, but in that originating at FSCO, these references were only in respect to some comparisons of wording between the two subsections. There were more mentions of s.69(1)(d) in correspondence originating with Imperial, which was arguing that the business it carried on at the St. Clair location was not discontinued, but only relocated. Any terminations under the move, it argued, could only justify a wind up under s.69(1)(d), which did not apply, it was further argued, because there was no discontinuance of part of the business or reorganization of the business of Imperial.

On the evidence available to the Tribunal at the motion hearing, there is nothing which enables a conclusion that it is more probable than not that the Superintendent had reached a decision whether s.69(1)(d) of the *PBA* applied to the facts as he had ascertained them to be, or, if he had, that he would exercise his discretion against ordering a partial wind up on this basis. Accordingly, the Association, the mover on the motion, has failed to establish that there is a decision on the applicability of s.69(1)(d) to the facts in this case made by the Superintendent in his quasi-judicial role which the Tribunal may review. Accordingly, the Tribunal is without jurisdiction to incorporate this issue into the present proceedings.

While the above decision with respect to the Tribunal's lack of jurisdiction to review the application of s.69(1)(d) of the *PBA* in the circumstances of this hearing disposes of the motion, the parties also argued extensively as to whether, assuming that the Tribunal did have jurisdiction to add consideration of s.69(1)(d) to the matters to be considered in this hearing, it should exercise that jurisdiction in this case. Therefore, the Tribunal will consider this question, should it be held to be in error on the question of jurisdiction.

Imperial submits that, in the exercise of the Tribunal's discretion, it should refuse to add consideration of s.69(1)(d) to the issues at this hearing. The grounds upon which it relies are: (1) that granting the request would significantly delay resolution of the issues raised by the NOP, in that the hearing is presently scheduled for October 1 and October 2, 2009. Addition of the new issue would require substantial investigation by Imperial to adequately prepare its case, and might well require notices to different former plan members than received notices for the hearing as presently constituted; (2) that granting the request would be unfair and prejudicial to Imperial, in that it has been engaged in lengthy fact-gathering process and review of its legal position based upon the issues raised in the NOP, which would have to be replicated with respect to the proposed new issues at a much greater cost than if it had had notice from the NOP that the application of s.69(1)(d) would also be in dispute at the hearing, and (3) that Imperial did not oppose granting party status to the Association after it had sought and received assurance that the

Association's participation as a party to the hearing would not delay the scheduled hearing, and the Association should not be allowed to resile from the assurance upon which Imperial had relied. Also, the Association should not be permitted to "reverse field" after it had already received Imperial's submissions alleging the inappropriateness of the Superintendent applying a s.69(1)(d) test to s.69(1)(e).

The Tribunal finds it convenient to deal with these arguments in reverse order.

With respect to argument (3), certain dates are relevant. The NOP was issued on January 16, 2009. Imperial's Request for Hearing was filed February 11, 2009. At a pre-hearing conference held on April 23, 2009, at which Imperial and the Superintendent were represented, the issues relating to the applicability of s.69(1)(e) were settled, and, *inter alia*, the Superintendent agreed to provide Imperial with its position "as to which groups should and which groups should not be included in the partial wind up" by May 12, 2009. Imperial was to mail the Notice of Hearing "to all members and former members affected by the discontinuance of business between September 28, 2004 and June 30, 2006 and identified by the Superintendent..." by May 28, 2009. A continuation of the pre-hearing conference was scheduled for July 28, 2009. On June 29, 2009, an application for party status on behalf of the Association was filed by its present solicitors. On July 15, 2009, counsel for the Association, in the course of an e-mail exchange on another matter relating to this hearing, asked if the Association's application for party status would be opposed. Counsel for Imperial replied, "Similarly, [Imperial] does not oppose, subject to your position on July 28 with respect to procedural matters. Our client is not supportive of any participation which will delay the scheduled hearing dates of October 1 and 2, 2009." On July 16, 2009, counsel for the Association, in the course of an e-mail on various matters relating to the hearing, replied, "You mention below that [Imperial] does not oppose our client's application for party status, subject to consideration of our position on July 28 with respect to procedural matters. We have not been provided with the FST's pre-hearing conference memorandum that scheduled the July 28 pre-hearing nor any other documents that describe any outstanding "procedural matters", so we are unable to comment on any positions we have. It would be helpful if you could forward the PHC memo or any documents that delineate any outstanding procedural questions." Earlier in the same e-mail, counsel, in the course of referring to the Agreed Statement of Facts arrived at between Imperial and the Superintendent, said, "...our clients also do not wish to see any adjournment of the Oct. 1 and 2 hearing dates."

At the July 28, 2009 pre-hearing conference, the Association was granted full party status in the hearing process. This was not opposed by Imperial nor by the Superintendent. The Association was directed to file its written submissions by August 25, 2009. This was after the dates previously set for filing of submissions by Imperial and the Superintendent, namely August 4 and August 18, 2009 respectively, which dates were confirmed.

A further pre-hearing conference was held on August 19, 2009. In the course of this conference, counsel for the Association advised that he had concluded that he should argue for the inclusion into the hearing of an issue that a wind up was also justified under

s.69(1)(d) of the *PBA*. The hearing of a formal motion to this effect was set for September 3, 2009.

The Tribunal does not consider that this issue is worthy of weight in deciding any issue of discretion as to whether the motion should be granted. The e-mail exchange was too vague to be relied upon as an undertaking that no step would be taken on behalf of the Association which would jeopardize the set hearing dates. In any event, given the obvious interest of the members of the Association in supporting a partial wind up which would cover them, it is far from obvious that the application for party status would have been refused if opposed by Imperial, even had the Association's intention to seek to widen the scope of the hearing been known at that time. The Tribunal would more likely have granted party status, and accepted the Association's right as a party to bring such motions with respect to the future hearing as it saw fit. The Tribunal also does not accept the "reverse field" argument as the Association should be allowed in any event to make its best case without restriction.

With respect to argument (2), the Tribunal notes that the efforts and resources expended by Imperial in researching for a dispute as to the applicability of s.69(1)(e) of the *PBA* are not thrown away. That issue is still in dispute at this hearing. The Tribunal is prepared, for the sake of the argument, to accept the probability that preparation now for an argument as to the applicability of s.69(1)(d) at this stage adds significantly to the effort and cost which would have been incurred had the preparation for both issues proceeded together. However, the portion of responsibility for any delay on coupling the two issues for preparation purposes to be borne by the Association is relatively small. The members who organized the Association would not have received notices of hearing until sometime after May 28, 2009. There was no evidence that the members who formed the Association had any knowledge of the state of the proceedings launched by FSCO, or had started to organize to protect their interests in the proceedings, before this date.

With respect to argument (1), the Tribunal also agrees that addition at this stage of the new alleged ground for declaring a wind up would almost certainly require an adjournment of the scheduled hearing dates, which would be an undesirable consequence. Against this, the fact that, on repeated occasions, courts and this Tribunal have stressed that the *PBA* is remedial legislation intended to protect pension rights of employees and should be interpreted and applied accordingly must be considered. Here, former plan members represented by the Association have a great deal at stake with respect to obtaining or not obtaining grow-in rights in their pension entitlements, and the additional ground for arguing for a wind up sought to be added here would increase the chances of at least some of them of getting this enhancement if the argument was successful. If, as a matter of discretion, the Association's application to add the additional ground were refused, the Association would not be barred from approaching the Superintendent for a further investigation of and decision as to the inclusion of this ground, and even if refused, might have a right to a hearing on a refusal to order a wind up on this ground. Obviously, this might become a far more costly way of proceeding than if the proceedings could be combined as is requested here. Given the obvious imbalance of resources between Imperial and the individuals who are represented by the Association,

the Tribunal finds that, after considering the “balanced approach” to the interpretation of pension legislation mandated by the Supreme Court of Canada in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, it would not, on the ground of delay, exercise its discretion against the Association’s request. Delay in pension cases is particularly undesirable as plan members are always getting older, but here, the likely delay as it presently appears to us must be weighed against the desirability of affording these members an opportunity to argue what they believe is their best case.

Member Heather Gavin concurs in the conclusion that the Tribunal lacks jurisdiction to make the order requested, and with the order dismissing the motion. However, she does not agree with the reasons expressed herein for reaching that conclusion. To avoid delay in issuing the decision, she is signing this order, but will deliver separate reasons at a future time.

### **Order**

The motion is dismissed.

Dated at Toronto this 23<sup>rd</sup> day of September, 2009.

“Ralph E. Scane”

---

Ralph E. Scane  
Member of the Tribunal and Chair of the Panel

“Shiraz Bharmal”

---

Shiraz Bharmal  
Member of the Tribunal and of the Panel

“Heather Gavin”

---

Heather Gavin  
Member of the Tribunal and of the Panel

## DISSENTING REASONS

The majority held that the Tribunal lacks the jurisdiction to make an order which would increase the “Matters in Issue” before the current panel by including s.69(1)(d) of the *Pension Benefits Act (the PBA)* as an alternative ground for the proposed partial plan wind up for the Imperial Oil Limited Retirement Plan (IOL). As stated in the decision I agree that the Tribunal lacks the jurisdiction to grant such an expansion of the Notice of Proposal to include s.69(1)(d) within the “Matters in Issue”. However this conclusion is reached from a different perspective.

The factual background provided in the decision is adequately summarized and I adopt it. Therefore it is unnecessary to repeat it.

The *PBA* is structured so that matters heard by the Tribunal are first dealt with by the Superintendent. The Superintendent has the duty to administer and enforce the *PBA*. In order to do this, the Superintendent is given broad powers to investigate and, flowing from such investigations, he may issue a Notice of Proposal outlining the action required to comply with the *PBA*.

The issuance of the NOP may trigger the right to a hearing before the Tribunal (*PBA* s. 89(6)). Once the application for a hearing has been made, the Tribunal’s jurisdiction is outlined in s.89(9) of the *PBA*.

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

The jurisdiction conferred by the *PBA* s.89(9) should be read to allow for the Tribunal to determine all questions of fact or law that arise before it and to exercise the powers conferred on it. One such power is the ability to substitute its opinion for that of the Superintendent after hearing the matter before it.

The construction of s.89(9) is important to this motion. The Tribunal’s powers are framed so that **at or after the hearing** the Tribunal can substitute its opinion for that of the Superintendent. The literal meaning of this suggests that the Tribunal must hear the matter and then can exercise its jurisdiction to determine the matter according to the remedial nature of the *PBA*. The Tribunal cannot in the first instance determine what matters it will consider outside of the NOP issued by the Superintendent. However, if in the course of the hearing it believes that there are grounds to consider another section of the *PBA*, it can decide to do so.

This is the basis of difference with the majority ruling in this matter. The conclusion the majority reached is that the Superintendent’s investigative functions are beyond the jurisdiction of the Tribunal to consider, or second guess. The majority relied on the

investigative powers of the Superintendent to conclude that the Tribunal may not acquire jurisdiction to review such matters by permitting or ordering them to be included in hearings concerning other issues over which the Tribunal does have jurisdiction. I believe that this goes too far.

In order to carry out the Superintendent's duties under the *PBA*, it will always be necessary for him to carry out an investigation into the matters that come to his attention. At the conclusion of such enquiries, he may, as in this instance, issue a NOP requiring certain action to be taken. In the IOL, an NOP was issued under s.89(5) proposing to order a partial plan windup under s.69(1)(e).

Once an NOP under s.89(5) is issued, the person on whom the notice is served is entitled to a hearing before the Tribunal as stated in s.89(6) of the *PBA*.

Earlier cases of the Tribunal, such as the *Independent Order of Foresters* (FST P0155-2001) have stated that the Tribunal is a 'separate body that does not simply review decisions or proposed decisions of the Superintendent but hears each case *'de novo'*'. Within this context the Tribunal has also held in the *CBS Canada* decision (which is cited in the majority decision):

“When an issue is raised before the Tribunal without the benefit of any findings on the underlying facts, if they are disputed, or without any considered opinion of the Superintendent, the Tribunal would be entitled, under subsection 89(9), to refer the matter back to the Superintendent to make the appropriate findings and take a position on the issue. However, we think that the referral approach is in the discretion of the Tribunal and that subsection 89(9) also permits the Tribunal to address such an issue as one of first impression. If any fact finding is required, the Tribunal is not without its own processes for engaging in that exercise.”

I believe that these cases are relevant to this hearing for two reasons. First, this is the correct interpretation of the Tribunal's powers; second, it leads to a route for the consideration of all matters of law or fact that are appropriate under the *PBA*. However, I am mindful that s.89(9) starts with “At or after the hearing” the Tribunal may direct the Superintendent to carry out an order that differs from the original NOP. If in the course of the hearing, there is appropriate evidence that s.69(1)(d) should be considered, then the Tribunal should give due consideration to such evidence and arguments. As stated in *CBS Canada*, the Tribunal would have several remedies at its disposal. It could refer the matter back to the Superintendent for consideration, or substitute its opinion and direct the Superintendent to carry out a different order.

In the present matter, there have been no such findings and we currently have an NOP that does not give consideration to a partial plan windup under s.69(1)(d). Therefore I believe that we are not given the jurisdiction to add “Matters in Issue” to the hearing. However if in the course of the hearing there is evidence that leads the Tribunal to s. 69(1)(d), I believe we have the jurisdiction to give consideration to that section of the *PBA*.

For the reasons stated above, I agree that the Tribunal lacks the jurisdiction to add issues to the hearing prior to the start of the hearing, but the Tribunal does have the jurisdiction to consider the issue during the hearing.

Dated at Toronto this 10th day of November, 2009.

“Heather Gavin”

Heather Gavin

Member of the Tribunal and of the Panel