

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 Order a partial wind up of the Imperial Oil Limited Retirement Plan, Registration Number 0347054, under section 69(1)(d) of 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 *Act*, relating to the Imperial Oil Limited Retirement Plan, Registration Number 0347054;

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
and THE 111 PENSION RIGHTS ASSOCIATION,**

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
Mr. Lawren Murray

For the 111 Pension Rights Association:

Mr. Ari Kaplan
Ms Michelle Landy-Shavim

For the Superintendent of Financial Services:

Ms Deborah McPhail

HEARD:

October 28, 2010

Decision on Motion

This is a motion brought jointly by the Applicant, Imperial Oil Limited (IOL) and the Respondent, The 111 Pension Rights Association (the Association) to implement a settlement agreement reached between IOL and the Association. The motion is brought in the course of applications for a hearing brought by IOL pursuant to s. 89(8) of the *Pension Benefits Act, R.S.O. 1990, c. P.8* (the *PBA*). These applications arise out of Notices of Proposal dated January 16, 2009 (NOP#1) and January 6, 2010 (NOP#2), issued by the Respondent the Superintendent of Financial Services (the Superintendent), who is also the Respondent to this motion. NOP#1 proposed to make an order partially winding up the IOL Retirement Plan (the Plan) under s. 69(1)(e) of the *PBA*, with respect to members and former members who ceased to be employed by IOL at its location at 111 St. Clair Avenue West, Toronto (St. Clair) during the period from September 28, 2004 until June 30, 2006. NOP#2 proposed to make an order partially winding up the Plan under s. 69(1)(d) of the *PBA* in relation to members or former members who ceased to be employed by IOL as a result of the discontinuance of all or part of its business or as a result of the reorganization of the business of IOL, flowing from the move from St. Clair to Calgary, during the same period. On April 12, 2010, the Tribunal ordered that the hearings on NOP#1 and NOP#2 be consolidated and heard together.

Background

For many years prior to September 28, 2004, the head office of IOL was located at St. Clair. IOL decided to relocate its head office to Calgary, Alberta, and that move took place over the next several months, until its completion as of June 30, 2006. At the relevant time, the total active membership of the Plan was about 5600 members, of which 722 members were employed at St. Clair. A large number of the latter group were offered

and accepted employment at the new Calgary location, but 188 members either were not offered further employment or declined to accept it. Of these, many were entitled to full pensions out of the Plan. There were, however, thirty-nine members of this group who were entitled to less than full pensions, and who would benefit under the provisions of the *PBA* from the partial wind up which the Superintendent proposes to order. These benefits would arise either as “grow in” rights under s.74 of the *PBA*, or, in the case of seven members whose rights had not vested under the Plan, vesting under s. 73(1)(b) of the *PBA*. The parties to the proceedings under s. 89(8) of the *PBA* agreed that only those members or former members who would benefit financially from a partial wind up would be included in any partial wind up group. Therefore, the above described thirty-nine persons (the included persons) are the only persons who would be included if a partial wind up order were to be made after the conclusion of these proceedings. The monetary value of the benefit to which each of these thirty-nine persons would become entitled if the proposed partial windup is ordered has been actuarially calculated, and the calculations with respect to each individual member have been communicated to that member.

IOL and the Association have agreed to settle these proceedings. The Association does not represent all of the included persons. However, the settlement agreement (the Agreement) has been structured as a contract of adhesion, and any of the included persons are entitled to receive the benefit to which he or she is entitled under the Agreement, if he or she executes the release prescribed therein. Unchallenged evidence before the Tribunal shows that, at present, thirty-six of the included persons have deposited releases with counsel for the Association in anticipation of the Agreement becoming effective. This group includes members and non-members of the Association. The Superintendent opposes the Agreement, on grounds which will be described hereafter.

The Agreement

The Agreement, as set out in Schedule “A” to the Notice of Motion herein, reads as follows:

“The Association and Imperial Oil have agreed to the following principles of settlement of all claims related to the partial wind up issues involving the head office relocation of Imperial Oil from Toronto to Calgary:

- (a) Unless waived by the parties and the settlement is approved by the FST, the settlement requires individual agreement and sign-off from Plan members/former Plan members who would stand to receive a benefit in the event of a partial wind up order arising out of Imperial Oil’s head office relocation (as set out in the actuarial report of Morneau Sobeco prepared October 21, 2009) (the “Actuarial Report”).
- (b) Members with a potential benefit arising out of a partial wind up would receive a payment in the amount of 50% of the grow-in benefit from Imperial Oil.

The grow-in benefit will be the amount set out in the Actuarial Report and will be updated for interest. The interest rate would be the same rate used in the Actuarial Report determining the original commuted value amounts. The rates are the Canadian Institute of Actuaries prescribed rates at the time of each individual's termination of employment.

(c) Imperial Oil will provide a minimum payment of \$1000 to each of the thirty-nine individuals who would receive a benefit by virtue of a partial wind up (as set out in the Actuarial Report).

(d) Imperial Oil's payments to Plan members/former Plan members are to be made outside of the Plan.

(e) Imperial Oil's payments are to be made in a lump sum (with normal employment income withholding).

(f) The parties are considering the most tax efficient means of making the payments. If Plan members/former Plan members have room in their RRSPs, as evidenced by their last notice of assessment, then Imperial Oil could transfer the settlement payment (up to the RRSP limit shown by their most recent assessment) to an RRSP account without withholding.

(g) Alternatively, for the more substantial payments, members could elect to receive payments over time in the form of a life-time annuity. Such annuities would not be eligible for ad hoc increases. Particulars of the amount of monthly annuity payments could be calculated and provided if required.

(h) Counsel for Members in the Association will advise the Superintendent and the Tribunal that they wish to withdraw any request for a partial wind up arising out of the head office relocation.

(i) The Tribunal is to be asked to make an order including the terms of settlement and directing the Superintendent to refrain from carrying out the Notices of Proposal to order a partial wind up of the Plan in respect of the head office relocation.

(j) Members in the Association and any other Plan members/former Plan members receiving payments will provide full and final releases (to be prepared by Imperial Oil) in return for the payments.

(k) Counsel for the Association will be paid their fees in a total amount of \$200,000 by Imperial Oil which would include all fees relating to the proposed partial wind up (both 69(1)(d) and 69(1)(e) proceedings) and including fees going forward in respect of the completion and implementation of the settlement and proceedings before the Tribunal relating to the approval of the settlement and obtaining an Order from the Tribunal setting out the terms of settlement."

During the hearing on the motion, the Tribunal expressed concerns with respect to setting out the terms of the Agreement as an integral part of any order the Tribunal might make on this motion. After discussion, the parties to the Agreement agreed that this would no longer be a condition of the Agreement, but that the Agreement would remain effective if the Tribunal would direct the Superintendent to refrain from carrying out the two Notices of Proposal, and incorporate the Agreement into its reasons for decision. In practice, this reduced this motion to a motion for judgment.

The Superintendent's Objections

In his formal submission on this motion, the Superintendent stated that he “does not dispute the fairness and benefit to all parties of the Settlement, and he also recognizes that the Settlement would avoid potentially lengthy litigation with unpredictable results.” He stated that he “neither consents nor opposes, but simply submits that he does not have the statutory authority to support the Settlement...”. The basic reasons given are twofold. First, the Agreement would contravene the minimum statutory standard set by s. 74 of the *PBA*. It provides for payment of only half of the value of the grow-in rights specified by the *PBA* to most of the persons entitled to those rights. A few would get more than one-half of the value due to the \$1000 minimum payment. Second, “[t]he discretion that the Superintendent has in this matter is said to only operate if the members were being given all of the benefits they would receive on a partial wind-up under the *PBA*.”

In support of his first reason, the Superintendent refers to *Re St. Mary's Paper Inc.* (1994), 19 O.R.(3d) 163 (C.A.) for the proposition that minimum requirements established by the *PBA* must be met, and cannot be bargained away. In that case, the Court said (at p. 173):

The [*PBA*] requires that its minimum funding standards be met. It does not allow for special deals which dilute or might eliminate these minimum funding requirements. Thus, the fact that the workers may be taken to have agreed that the appellant would not be responsible for the plans' unfunded liabilities is no assistance to the appellant.

Accordingly, it is argued, the Agreement cannot operate to relieve the Plan of the obligation to pay the full value of the grow-in rights, and the Superintendent (and, in turn, the Tribunal) does not have the statutory authority “to support a settlement that provides less than the full minimum standard”.

The Superintendent's second argument on the exercise of his discretion is closely linked to his first argument. If the Superintendent were to exercise his discretion against ordering a partial wind up merely because it was on the whole likely to be beneficial to the members or former members, considering risks to the parties, costs and delays in obtaining a final decision, this would “open the door to compromising any minimum standard in order to avoid risk and delay.”

Decision

The Tribunal will first consider the position of the Superintendent. The basic argument contains a fatal flaw. It assumes that those of the included persons who would receive grow-in rights if a partial wind up is eventually ordered at the conclusion of these proceedings have such “rights” at the present time. As this Tribunal said in *Sutton v. Superintendent of Financial Services and AIG Canada*, (FST Decision No. P0245-2004-2), “the “rights” provided by s. 74 of the PBA... are only “rights” if a wind-up is instituted.” A wind up is not instituted by a Notice of Proposal. At the present time, the included persons have only a *hope* that one will eventually be ordered. There are presently no “statutory minimum standards” of payment to such persons to be met, as these persons presently have no claim upon any assets of the Plan funds other than the normal termination benefits which they have already received.

Accordingly, the Tribunal holds that the Superintendent was not barred from “supporting the settlement”, whether by becoming a party to it or otherwise (e.g. by agreeing to withdraw the two NOPs), if he saw fit to do so. In turn, the Tribunal has the same powers. The question is whether it should exercise them in this case.

As noted in previous decisions of this Tribunal, the Superintendent (or, in his place, the Tribunal) must be satisfied that the conditions of mixed fact and law set out in one of the subsections of s.69 of the *PBA* have been met before a wind up or partial wind up *may* be ordered under that section. However, even if this finding has been made, the Superintendent retains a discretion not to order the wind up or partial wind up if he considers that it is not in the overall interest of members or former members of the plan in question to make such an order. It has also been held that, where the conditions set out in one or more of the subsections of s. 69 exist, there is no presumption in favour of ordering a wind up or partial wind up, requiring the Superintendent to show cause why a wind up should not be ordered. *Sutton, supra*, at page 5.

Where the Tribunal is hearing a matter under s. 89(8) of the *PBA*, it may disagree with the Superintendent who has proposed to issue an order under s. 69 on the basis that it does not agree that necessary conditions under one or more of the subsections of that section have been met, or, if they have, with the Superintendent’s decision not to exercise his discretion against issuing the order, or both. In this case, the Tribunal has not yet held a hearing on the merits on the possible application of ss. 69(1)(d) and 69(1)(e), and is accordingly unable to agree or disagree with the Superintendent’s conclusion that the threshold conditions for the application of these subsections have been met. While the bare facts relating to these conditions do not appear at present to be much in issue, the legal consequences of these facts with respect to the preconditions for an order stipulated in the two subsections are very much in contention in this hearing. Accordingly, if the Tribunal is to direct the Superintendent to refrain from carrying out NOP#1 and NOP#2, which is the core of what it is asked to do by this motion, and which is the remaining condition precedent for the coming into operation of the Agreement, it must do so on the basis that the discretion to refrain from making a partial wind up order, notwithstanding that the threshold conditions must be assumed for these purposes to have been met,

conferred by s. 69 of the *PBA*, should have been exercised in this case. This issue has been fully explored before the Tribunal on this motion.

In considering whether to exercise its discretion against making a partial wind up order, the Tribunal is entitled to consider all the evidence properly before it at the hearing. This may consist of evidence which was not before the Superintendent, and in particular, evidence of facts which were not in existence at the time of the Superintendent's decision. We hold that this follows from the fact that the Legislature has chosen to direct the Tribunal to conduct a hearing regarding the Superintendent's proposed orders, rather than an appeal from an order made. In this case, the Agreement was not in existence until after the hearing had commenced, and is very relevant to a consideration of the exercise of the discretion by the Tribunal in this case.

In our opinion, the Agreement makes it desirable to exercise our discretion against allowing the proposed partial wind up to proceed. While we have not heard all of the evidence or the arguments on the issues, our own knowledge of the problems which may arise in determining whether the threshold requirements of ss. 69(1)(d) and 69(1)(e) have been met, and the sketches of the arguments on those matters which we have heard on this motion lead us to conclude that both sides to the argument are at risk. Whether the respective risks are substantially reflected in the Agreement terms is an issue that we do not need to consider, at least as long as those terms are not patently unfair to the Plan members or former members, which we do not find to be the case here. In this particular case, it is not suggested that any of the possible parties to the Agreement, whether as members of the Association or by later admission, are not persons fully competent to contract in their own interest. Moreover, the affected members were given considerable amount of information about the settlement and its effect, and had access to experienced counsel prior to making their decisions. In addition to the actual risks as to the result, there is the likelihood of considerable delay in ascertaining the final result, particularly if one or more of the potential layers of judicial consideration of a decision of the Tribunal should be called upon. Also, the costs of continuing on with this dispute if an agreement is not reached will be a substantial, if not prohibitive, burden upon some or all of the members or former members who would benefit from a partial wind up if one is ultimately ordered.

The Tribunal has considered the fact that a decision to order the Superintendent to refrain from carrying out the NOPs, and thereby make the Agreement operative, will indirectly affect the three persons who, as of the date of the hearing of this motion, had not deposited the required release in exchange for receiving a benefit under the Agreement. Whether the Superintendent would revisit the matter and propose to order a partial wind up limited to those who have not released their rights by taking their benefits under the Agreement is speculative. If he will not, an order to refrain from carrying out the NOPs will, in practice, remove their option to pursue their claim for full wind up benefits.

However, the evidence on the motion indicated that the thirty-six members or former members of the Plan who have deposited releases in anticipation of the Agreement taking effect constitute 92.3% of the included persons, and that the amounts payable to those

thirty-six persons would constitute 93.6% of the dollar amount which would be payable under the Agreement. Further, counsel for IOL has stated to the Tribunal that the terms of the Agreement will remain open to those three persons if the Agreement comes into effect. Given all of the above considerations, the Tribunal finds that, viewed at the present time, it is in the best interests of the included persons that the Agreement come into effect. Accordingly, the Tribunal exercises its discretion against ordering the proposed partial wind ups under each of the NOPs.

Order

The Superintendent is ordered to refrain from carrying out the Notices of Proposal referred to above as NOP#1 and NOP#2.

Dated at Toronto this 8th day of December, 2010

“Ralph Scane”

Ralph 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