

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 Notice of Intended Decision by the Superintendent of Financial Services under sections 69(1)(d) and 69(1)(e) of the Act, to partially wind up 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

Respondent

BEFORE:

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

APPEARANCES:

For the Applicant:

Mr. Brett Ledger
Mr. Lawren Murray

For the Superintendent of Financial Services:

Ms Deborah McPhail

Applicant for Party Status:

Ms Kathryn Hnyp on her own behalf

HEARD:

September 30, 2011

DECISION ON MOTION

Introduction and Issues

The Applicant (alternatively referred to below as “Imperial Oil”), the Superintendent of the Financial Services Commission of Ontario (the “Superintendent”) and Kathryn Hnyp (“Ms. Hnyp”) agreed at a pre hearing conference in this proceeding held by teleconference on August 30, 2011, that the following two issues were to be decided by preliminary motion on September 30, 2011:

- (a) Should Ms. Hnyp be granted party status in this proceeding; and
- (b) Whether the Superintendent has the discretion to withdraw his Notice of Intended Decision (the “NOID”) in the circumstances of this matter relating to his intention to require a partial wind-up of the Imperial Oil Limited Retirement Plan, Registration No. 347054 (the “Plan”) (the “jurisdictional issue”).

In written submissions filed with respect to this preliminary motion, and at the hearing of the motion, Imperial Oil opposed Ms. Hnyp’s application for party status. It took the position that the jurisdictional issue, relating to the Superintendent’s discretion to withdraw the NOID, should be addressed by a grant of an order by the Tribunal on one of the following two bases:

1. a declaration that the Superintendent has the discretion to withdraw the NOID even in the event that Ms. Hnyp is granted party status in which case there will be no partial wind-up hearing; or
2. in the alternative, directing the Superintendent to refrain from making the intended decision indicated in the NOID, which proposes to require a partial wind-up of the Plan under section 69(1)(d) or 69(1)(e) of the Act.

The Applicant also had requested that the Financial Services Tribunal (the “Tribunal”) award its costs of this hearing as against Ms. Hnyp. However at the conclusion of the hearing of the preliminary motion it withdrew that request without prejudice to any position it may wish to take with respect to other costs relating to this proceeding if Ms. Hnyp’s application for party status is granted and the Tribunal does not agree with the Applicant’s position that the Superintendent can withdraw the NOID and does not direct the Superintendent to refrain from making the intended decision set out in the NOID.

The Superintendent did not oppose Ms. Hnyp’s application for party status in this proceeding. The Superintendent accepted the split of the jurisdictional issue into two sub issues as proposed by Imperial Oil. In his submissions to the Tribunal, the Superintendent expressed concerns with respect to his jurisdiction to withdraw the NOID if Ms. Hnyp is granted party status and if she opposes the withdrawal of the NOID. However, the Superintendent took no position on whether the Tribunal has jurisdiction to direct him to withdraw the NOID.

As proposed by the Superintendent and the Applicant at the commencement of the hearing of the motion, Ms. Hnyp's application for party status and the jurisdictional issue were heard together recognizing that some of the submissions to be made by them would be relevant to both issues. That approach also was intended to give Ms. Hnyp the opportunity to make submissions in the context of the motion on the jurisdictional issue.

Background Facts

The relevant facts relied upon by the Applicant were set out in an affidavit by Mr. Brian MacIntyre, an officer at Imperial Oil. The following summary of facts, which is drawn in large part from the summary included in the written submissions of the Superintendent for this motion, is consistent with the facts set out in Mr. MacIntyre's affidavit. Some of the facts summarized below also relate to the decision of this Tribunal in *Imperial Oil Limited v. Superintendent of Financial Services and The 111 Pension Rights Association*, the December 8th, 2010, FST decision No. P0346-2009/P0427-2010-1 (the "Prior Decision").

a) Prior Proceeding

In 2004, the Applicant closed its head office in Toronto and moved it to Calgary, Alberta. Out of 722 Plan members who were employed at head office, 188 had their employment terminated as a result of this move. Ms. Hnyp falls within that terminated group.

The Superintendent issued a Notice of Proposal to partially wind up the Plan under section 69(1)(e) of the Act on January 16, 2009. The Applicant requested a Tribunal hearing. During the course of that proceeding, standing was granted to an association of former members of the Plan, the 111 Pension Rights Association (the "Association"). The Association did not represent all of the terminated members. The Association was represented and advised by Mr. Ari Kaplan of the Koskie Minsky law firm.

The Superintendent issued a second Notice of Proposal to partially wind up the Plan under section 69(1)(d) of the Act on January 6, 2010. Again the Applicant requested a Tribunal hearing. The two proceedings were consolidated.

It was agreed in the prior proceeding that if a partial windup was directed to be ordered it would only apply to former members of the Plan who stood to gain something from a partial wind up. Therefore, the group of 188 terminated members was narrowed down to 39 former members who were either not vested at the time of termination or had 55 points in age plus service but did not retire on an unreduced pension.

On October 28, 2010, the Tribunal heard a "settlement motion" in the prior proceeding. The motion was brought by the Applicant and the Association for an Order approving the settlement made between those two parties. The settlement involved payment of 50% of the grow-in benefits to which the 39 former members would otherwise be entitled on partial wind up, with a minimum payment of \$1,000.00.

The settlement had the consents and releases of 36 of the 39 former members. The 3 dissenting members were not represented by the Association, and none of the 3 dissenting members attended the settlement motion or sought party status at any stage.

In approving the settlement in its Decision dated December 8, 2010, the Tribunal in the Prior Decision stated:

The Tribunal has considered the fact that a decision to order the Superintendent to refrain from carrying out the NOP's, 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.** (Emphasis added)

(b) Present Proceeding

On January 12, 2011, the Superintendent issued the NOID under sections 69(1)(d) and 69(1)(e) of the Act. The NOID states that it intends to order a partial wind up of the Plan in relation to the 3 former members who were not affected by the settlement made between the Applicant and the Association, as incorporated into the Tribunal's Prior Decision.

The Applicant requested a hearing. A Pre-hearing conference was held on May 18, 2011. Certain preliminary motions were scheduled to be argued on July 18, 2011, but the Applicant abandoned those motions.

As is the usual practice at the first pre-hearing conference relating to such a matter, notice of the pre-hearing conference was not given to the 3 former members. Notice originally was to have been given to the 3 former members of the preliminary motions, but because those motions did not proceed notice was not given at that point.

In July and August of 2011, the Applicant advised the Superintendent that it had reached a settlement with 2 of the 3 former members affected by the NOID. The Superintendent subsequently received letters from each of the 2 former members confirming their respective settlements (the details of which are confidential and not known to the Superintendent) and requested the Superintendent not to proceed with the NOID or the hearing on their behalf.

The third former member is Ms. Hnyp.

In August 2011, the Applicant sent Ms. Hnyp a cheque representing the minimum amount payable under the settlement, which in the view of the Applicant (not disputed by the Superintendent) exceeds the total grow-in amount to which Ms. Hnyp would be entitled if a partial wind up were ordered or directed to be ordered. Mr. MacIntyre's affidavit states that Imperial Oil's offer to Ms. Hnyp was based on a calculation prepared by Mr. Vettese of Morneau

Shepell, the pension plan actuaries in respect of this matter. For this motion hearing, Mr. Vettese prepared a calculation (updated for interest) attached to Mr. MacIntyre's affidavit of what Ms. Hnyp's entitlement would have been had a partial wind up of the plan occurred. He advised, in a letter dated September 14, 2011 as follows:

“If a partial wind up had occurred and Ms. Hnyp had elected the commuted value option as opposed to a monthly pension, she would have been entitled to an additional lump sum amount \$1,021 as of July 31, 2011 as a result of applying the grow-in rules under the Ontario Pension Benefits Act. Notionally, this additional lump sum is actuarially equivalent to increasing Ms. Hnyp's monthly pension amount by \$4.00 a month.”

After the Applicant sent this payment, made directly by the Applicant (not as an enhanced payment from the Plan) the Superintendent put Ms. Hnyp on notice that the Superintendent would be withdrawing the NOID if the Applicant withdrew the hearing request. The Superintendent also advised Ms. Hnyp to contact the Tribunal to participate in the pending pre-hearing teleconference if she had any concerns. The Superintendent had informed the Applicant prior to the mailing of the cheque to Ms. Hnyp that the Superintendent would be providing notice to Ms. Hnyp of the intended withdrawal of the hearing request and NOID.

After receiving the notice from the Superintendent, Ms. Hnyp contacted the Tribunal and filed an application for party status and to participate in a pre-hearing conference.

The pre-hearing conference was held by conference call on August 30, 2011. During this teleconference, Ms. Hnyp advised that she was requesting party status for three reasons:

- a) she wants her grow-in benefits added to her accrued pension in the Plan;
- b) she wants the partial wind up to be pursued to benefit the members who settled;
- c) she wants due process to be observed and to have a partial wind up ordered.

Ms. Hnyp has advised that she will not cash the cheque that Imperial Oil sent to her in August of 2011. Ms. Hnyp is currently receiving a reduced pension from the Plan.

Mr. MacIntyre's affidavit set out his understanding that, among other things, Ms. Hnyp seeks to have the \$4.00 per month estimated amount added to her monthly pension (as opposed to receiving a commuted value cheque) in respect of the grow-in benefits she would have if the plan were partially wound up.

Mr. MacIntyre stated in his affidavit that the terms of the Plan would not permit such a payment without an amendment to the Plan by resolution of the Applicant's Board of Directors and that such an amendment would be inordinately expensive to implement and administer in light of Imperial Oil's tender of the full amount of the grow-in plus interest by way of commuted value cheque. Counsel for the Applicant made supplementary submissions at the hearing uncontested by the Superintendent and Ms. Hnyp, to support its position that such an amendment, having

regard to applicable legislation and to the current Plan text, would be particularly expensive to implement and administer.

Submissions by Ms. Hnyp

At the motion hearing and in written submissions filed prior to the hearing Ms. Hnyp presented her arguments in support of her application for party status and in that context outlined the reasons for her application for seeking that status. Her position is outlined in this part of these reasons. She did not make submissions on the two pronged jurisdictional issue which she referred to as the “technical issue”.

The positions of the Superintendent and the Applicant on the two aspects of the jurisdictional issue are outlined below in the applicable part of these reasons.

Ms. Hnyp prior to the hearing filed materials relating to this motion particularly with respect to her request for an order of the Tribunal granting her party status. Those materials consisted mainly of various correspondence from or with Mr. MacIntyre, counsel for Imperial Oil and counsel for the Superintendent. Some of those materials also were included as attachments to the affidavit of J. Brian MacIntyre.

At the Pre Hearing Conference Ms. Hnyp had stated that the calculation of her personal entitlement is not an issue in this proceeding. However, she clarified that position at the motion hearing by indicating her uncertainty as to whether the amount - while likely quite small - was correctly calculated and expressing the desire that the calculation be reviewed by the actuary for the Superintendent in the context of the process that would be adopted (in her view) if a partial wind-up were ordered.

At the Pre Hearing Conference it was agreed that no oral evidence would be tendered at the motion. Ms. Hnyp was provided at that time with a general explanation of the difference between giving oral evidence at the motion and making a presentation of her legal position based on a record of materials to be filed in accordance with an agreed schedule in advance of the Motion. However, at the motion hearing, as it is not unusual on the case of a self represented person appearing before the Tribunal, Ms. Hnyp’s oral presentation periodically included some unsworn observations or allegations. Those observations or allegations related to her past employment history with Imperial Oil, to the administration of the pension plan, the move of the head office of Imperial Oil from Toronto to Calgary in regard to the potential order of a partial wind-up of the Plan, the circumstances (from her perspective) relating to the settlement accepted by other persons affected by any partial wind-up of the plan as a result of the move of Imperial Oil’s head office from Toronto and her concerns about the impact on any future closures or downsizings of Imperial Oil operations as they would relate to pension entitlements of other members of the pension plan. Counsel for Imperial Oil took the very reasonable position that he would not object to Ms. Hnyp’s statements on the basis that it was understood that Imperial Oil was not to be taken as agreeing with matters of fact stated by Ms. Hnyp in her presentation and that its failure to object was without prejudice to any position it may decide to adopt at any future continuation of the proceeding to challenge all or any part of her statements of a factual nature. I

agreed with Imperial Oil's position on the understanding that Ms. Hnyp's presentation might facilitate the hearing of the preliminary motion.

In brief Ms. Hnyp submitted that as a member of the Plan affected by the events in question and as an individual who had worked in an accounting role that included some matters related to the Plan she had a limited personal financial interest in how the NOID proceeded, she was in a position to offer a knowledgeable perspective on the partial wind-up issue (in light of her former roles at Imperial Oil) and was concerned that a fair process be followed. She noted her concern (presumably tied in part to the fact that the offer of additional payments from Imperial Oil to her and to others was being made outside the Plan as noted below) that the Superintendent's actuarial staff would not be involved in reviewing calculations of pension entitlements related to the events in question unless a partial plan wind-up was ordered. She also wanted the NOID to proceed so that she would have the opportunity to potentially facilitate the enhancement of the pension entitlements of others affected by the move of the head office of Imperial Oil from Toronto events or possibly affected by any future downsizing or closing of a location by Imperial Oil that might occur prior to the coming into effect of recent amendments to the Act which will eliminate the power of the Superintendent to order a partial plan wind-up.

Issues and the Law

1. Should Ms. Hnyp be granted party status in this proceeding?

Imperial Oil objected to Ms. Hnyp's application for party status in this proceeding. The Superintendent supported her application.

I have concluded that Ms. Hnyp should be granted party status subject to certain conditions set out below.

Section 89(11) of the Act provides that the Superintendent, the person who requires a hearing and such other persons as the Tribunal specifies are parties to the proceeding before the Tribunal under section 89.

Before a pension plan can be partially wound up, the Superintendent first must serve the plan's administrator and employer with a Notice of Intended Decision (section 89(5) of the Act). The administrator or employer, in this case the Applicant, then has the right to request the hearing before the Tribunal to consider the merits of the intended decision (section 89(6) of the Act). In contrast in such circumstances a Plan member who is potentially affected by a NOID that proposes a partial plan wind-up is not automatically a party to the proceeding. Instead, one of the issues typically addressed by the Tribunal at a pre hearing conference in respect of a pension plan matter relating to a NOID proposing a partial plan wind-up is the identification of the persons who may have an interest in the proceeding and who should be given notification of the right to seek party status.

The Superintendent took the position in this matter, as he typically has in other pension plan matters before the Tribunal, that he does not represent the members of a pension plan.

Ms. Hnyp followed the process set out in Rule 38.01 of the Tribunal's Rules of Practice and Procedure for Proceedings Before the Tribunal (the "Rules") which sets out the steps to be taken by a person who is not a party and who is interested in actively participating in a proceeding as a party, including filing and service of a written Application for Party Status Form. Ms. Hnyp's Application for Party Status was made on a timely basis in accordance with the Rules.

Rule 38.04 of the Rules lists the following factors that the Tribunal may consider on an application for party status:

- a) the nature of the proceeding;
- b) the issues;
- c) whether the person has a material interest in the outcome of the proceeding;
- d) the likelihood of the person being able to make a useful and different contribution to the understanding of the issues;
- e) any delay or prejudice to the parties; and
- f) any other matter the Tribunal considers relevant.

The Applicant took the position that Ms. Hnyp should not be made a party to the proceeding on the following basis as noted in its written submissions:

- “(a) Ms. Hnyp does not have a material interest in the outcome of the proceeding. Imperial Oil has already offered to pay Ms. Hnyp 100% of her potential grow-in entitlement, plus interest. Whether Ms. Hnyp receives this potential entitlement as a lump sum or as an enhanced pension of a few additional dollars per month cannot be characterized as “material” interest.
- (b) Adding Ms. Hnyp as a party would prejudice Imperial Oil and the public interest. At the time of Ms. Hnyp's application for party status, Imperial Oil and the Superintendent had agreed to the withdrawal of the NOID. Ms. Hnyp now seeks to intervene as a party to attempt to prevent this withdrawal of the NOID (which is also in the public interest given the cost of the hearing for the taxpayers) from taking place.
- (c) The only reasons Ms. Hnyp has provided for seeking party status are inaccurate, irrelevant and immaterial.”

In addition, Imperial Oil argued that there was no evidence that Ms. Hnyp would make a useful and different contribution to the understanding of the issues.

The Applicant stressed the timing of Ms. Hnyp's application and specifically noted that she had never sought to intervene as a party until she was sent the cheque in the full amount as calculated by the Plan actuaries, of the value of her potential grow-in entitlement. However I agree with the

Superintendent's position that Ms. Hnyp provided an explanation as to the timing of her Application which was quite reasonable.

Imperial Oil further submitted that Ms. Hnyp should not be permitted "to hijack this proceeding and force the parties to conduct a multi-day hearing of the merits in respect of one member who has already been offered 100% of the value of her potential grow-in benefits under section 74 of the PBA. Proceeding with the hearing would, under the circumstances, be an abuse of the Tribunal's process ... to permit this abuse of the Tribunal's process would be a waste of time and make a mockery of the partial wind-up proceedings set out in the PBA."

The Superintendent in his written submissions took the position that if Ms. Hnyp's interest is found to be material, she should be granted party status. The Superintendent also submitted that she brings a different perspective to the proceeding, as a Plan member and as a person familiar to some degree from an accounting perspective with the administration of the Plan, and is not seeking to delay or otherwise prejudice the hearing.

On the issue of the materiality of Ms. Hnyp's interest, the Superintendent observed that if a partial wind-up were to be ordered Ms. Hnyp would have the right to have her grow-in benefits added to her accrued benefits under the Plan and, although this may affect Ms. Hnyp's pension in a small amount (based on the estimate of \$4.00 per month) there is no "small amount" or de minimus exception in the Rules. Furthermore, the nature of a person's interest, such as the interest of a member of a plan directly affected, may also be relevant in a determination of materiality under Rule 38.04. Accordingly, the Superintendent submitted with respect to the materiality aspect that it is arguable Ms. Hnyp's interest in having her grow-in benefits added to her accrued pension in the Plan is a "material interest".

The parties agreed that Rule 38.04 lists factors that the Tribunal "may consider" in its discretion on an Application for Party Status. The materiality of her interest is only one factor in the "outcome of the proceeding". I have concluded that, after consideration of all of those factors, Ms. Hnyp should be granted party status.

It is not unusual, as Superintendent's counsel noted and in my experience on the Tribunal, for the dollar amounts involved in a pension matter before the Tribunal relating to a plan member directly affected by the matter to be relatively small or for the amount to be significantly less than the potential costs involved in the proceeding. That result seems consistent with the role of the Tribunal as an adjudicative Tribunal, in providing an expeditious, just and cost effective hearing, in accordance with the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter 22, as amended ("the SPP Act") to appropriate persons on matters within its jurisdiction.

I am not aware of any circumstance in which this Tribunal has rejected an Application for Party Status by a person who is a member in a pension plan who has direct interest, regardless of the amount, and who potentially would be affected by a partial plan wind-up. Counsel for the Superintendent stated her similar experience.

The Applicant and the Superintendent agreed, presumably in light of the comments of the Tribunal in the prior decision, that if Ms. Hnyp's application were rejected, or if it were granted and the Superintendent withdrew the NOID in the circumstances of this case, she would have no further right to appeal to the Tribunal. In that event she presumably would have to consider what alternative avenues of appeal would be available in a different forum recognizing that an application to a Court might be prohibitively expensive and would be unlikely to be undertaken by Ms. Hnyp.

In my view having regard to the nature of the proceeding (a potential partial plan wind-up commenced by a NOID), the issues raised and the direct interest Ms. Hnyp has as a member who would be affected if a partial plan wind-up were to be ordered, Ms. Hnyp should be granted party status notwithstanding the apparently limited financial value of her interest. The direct nature of her interest, in my view also is a relevant factor in determining materiality. The financial aspect of the materiality of an interest may well be a more significant factor in applications for party status relating to other pension matters that may be raised before the Tribunal particularly when an individual is not a member of a pension plan directly affected by the issues raised in the Tribunal.¹

The Rules must be applied in the context of the particular statute and issues being addressed in a proceeding. Under section 25.1(3) of the SPP Act rules of a tribunal are to be consistent with the Act to which they relate. The Rules are intended to address appeals or applications to the Tribunal under several other Ontario statutes in addition to the Act (e.g. mortgage brokers and agents, insurance agents and companies, and credit unions) under which a wide range of persons may have a direct or indirect interest in a proceeding.

Conditions to Grant of Party Status

I understand the Applicant's concern that the granting of party status to Ms. Hnyp arguably could result in unnecessary delay and expense if a four day hearing were to result automatically from granting Ms. Hnyp party status. The NOID - in accordance with the prior decision of this Tribunal - was issued only in respect of Ms. Hnyp and two other individuals, and the other two individuals apparently have agreed to accept the settlement offer from the Applicant. Other persons whose employment was terminated with respect to the closure of the Toronto office and the move to Calgary have already had their rights determined by the Tribunal in the Prior Decision.

Ms. Hnyp wants any decision by the Tribunal in this matter to potentially benefit any other Plan members who may be affected by a future event that (subject to the recent amendments to the Act) might result in a partial Plan wind-up order. However, the Act contains clear powers for the Superintendent to address any such future circumstances (and for a related application to the Tribunal) which would be based on the particular facts relevant to such a future event.

¹ I make no comment on other circumstances in which a person seeking party status may have a less direct interest than such a pension plan member, such as (to cite an example raised by Superintendent's counsel) an association of other employers or employees who may have some interest in the issue or a former employer of such members whose pension obligation was assumed by the current plan sponsor.

Rule 39.01 states that “the Tribunal may, by order, grant party status to a person who has applied for such status, but may, by the terms of the order, restrict or impose conditions upon that persons participation as a party”. Pursuant to that Rule and having regard to the specific and limited wording of the NOID and to the Prior Decision, the Tribunal’s order granting Ms. Hnyp party status shall be subject to the condition, if the NOID is not withdrawn (as addressed below), that the proceeding go forth in a two-stage process:

- a) at stage one assuming, without prejudice to the positions the parties may take at stage two if it is required, that the conditions exist to empower the Superintendent or the Tribunal to grant a partial plan wind-up order under the Act, the issue will be whether the Tribunal would be prepared to exercise its discretion to order a partial plan wind-up with respect to Ms. Hnyp’s interest under the Plan; and
- b) at stage two, if the Tribunal is prepared to so exercise its discretion on the foregoing assumed basis at stage one, the Tribunal will determine if the conditions to a partial plan wind-up exist under section 69(1)(d) or section 69(1)(e) of the Act with respect to this proceeding.

Does the Superintendent have the Discretion to Withdraw the NOID?

- (a) Can the Superintendent Withdraw the NOID?

The Superintendent expressed concern at the hearing of the motion as to his jurisdiction to withdraw the NOID if Ms. Hnyp is granted party status and if (as was the case at the motion) Ms. Hnyp opposes the withdrawal of the NOID. However, the Superintendent took no position on whether the Tribunal has jurisdiction to direct the Superintendent to withdraw the NOID.

The Rules do not expressly contemplate the withdrawal of a NOID. In contrast, Rule 41.01 states that a person (in this proceeding the Applicant) may withdraw a request for hearing before the Tribunal in certain circumstances. If the requestor withdraws a hearing request then the NOID is no longer challenged and the Superintendent issues a final Order based on the NOID. In addition, if the person to whom the NOID refers, does not require a hearing, section 89(7) of the Act provides that the Superintendent may make the intended decision indicated in the NOID.

The Superintendent expressed the concern that it appears that neither the Rules nor the Act contemplate the withdrawal of a NOID. Instead, as the Pension Commission of Ontario observed in *Stelco Inc. Retirement Plan for Salaried Employees*, March 18, 1993 XDDEC-17, they in the Superintendent’s submission seem to contemplate a two-step process: the Superintendent issues an intended decision; if there is a hearing request, then the Tribunal deals with it.

The Applicant submitted that regulators generally have the authority to act in a way which is incidental to their powers and that the Superintendent is no different. It argued that while the PBA does not explicitly authorize the Superintendent to withdraw a Notice of Intended Decision, the Superintendent continues to have the discretion to withdraw an intended decision to partially

wind-up a pension plan as this power is necessarily incidental to the Superintendent's power to issue a Notice of Intended Decision.

Furthermore, the Applicant submitted that not every incidental power relating to a statutory discretion need be expressly set out in the statute. The Applicant referred to section 78 of the Ontario *Legislation Act*, 2006, S.O.2006 Chapter 21, Schedule F:

“78. If power to do or to enforce the doing of a thing is conferred on a person, all necessary incidental powers are included.”

The Applicant further argued that the PBA gives the Superintendent powers with respect to partial wind-ups. It submitted that in this case, the Superintendent must have the power to vary or revoke a Notice of Intended Decision to wind-up as circumstances change as it is necessary to attain the objectives of the PBA, and in particular the legislative purpose of the wind-up provisions and the effective functioning of the Superintendent's statutorily-given discretion to make or refuse to order a partial wind-up of a pension plan.

The Applicant submitted further that the Superintendent has discretion acting “in the public interest” to withdraw the NOID. However, I agreed with the position of the Superintendent that neither the Act nor the *Financial Services Commission of Ontario Act, 1997* (the “FSCO Act”) confer such a discretion, based on the concept of the public interest, on the Superintendent. The FSCO Act simply states that the Superintendent shall “administer and enforce” the Act and “supervise generally the regulated sectors” (see FSCO Act, section 5(2)(c) and (d)). I also agree with the Superintendent that even if the Act or the FSCO Act did give the Superintendent the express jurisdiction to act in the public interest - as is the case, for example, with the *Securities Act* - that discretion is not unlimited. The regulator is still limited by and must consider the protection of interests under its governing statute. (See *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario* (Securities Commission), [2001 2 S.C.R. 143, 2001 SCC 37, at paragraphs 39, 41 and 45.)

In support of its position regarding withdrawal of a NOID the Applicant cited the Prior Decision of this Tribunal relating to Imperial Oil's head office relocation and also the decision of this Tribunal in *CBS Canada Co. v. Ontario* (Superintendent of Financial Services) et al, Decision No. P0164-2001-4.

The Superintendent agreed with Imperial Oil that there have been cases, such as in the *CBS Canada* decision and the Prior Decision relating to the head office relocation to Calgary in which the Superintendent withdrew the Notice of Proposal after a hearing request had been made. However, as noted by the Superintendent, those cases involved settlements by all parties (in contrast to the present situation in which Ms. Hnyp is a party objecting to the settlement) in which the process implementing the settlement was to withdraw the hearing request and then the Notice of Proposal. The circumstances changed once Ms. Hnyp applied for party status and advanced her claim that she wanted her grow-in benefits to be added to her accrued pension benefits. Once she was granted party status she had the right to a “hearing” under section 89(8) of the Act.

The Applicant further submitted that other judicial authorities have also considered situations where an administrative decision maker did not have explicit authority to withdraw a decision, drawing a distinction between interim decisions such as a Notice of Intended Decision and final decisions which directly impact people's rights. For example in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12 (particularly at paragraphs 29, 40 and 43), the question raised before the Supreme Court of Canada was whether the Minister of Fisheries could revoke an authorization to grant a fishing licence, under s. 7 of the federal *Fisheries Act*, where there was no direction given in the statute explicitly permitting the Minister to revoke the previously given authorization. The Supreme Court of Canada after considering the statutory regime under which the Minister had the "absolute discretion" to issue, suspend or cancel lobster fishing licences, concluded that the Minister had an "absolute discretion" to issue and revoke licences in the context for his "continuing power" to do so. That court also noted at paragraph 42 of its reasons that decisions on licensing applications involves policy considerations which like other decisions of policy (which is essentially variable) include an inherent power to using an order or power to entertain fresh proceedings and make a different decision.

The Applicant submitted that the Supreme Court's reasoning is equally applicable to this situation and that unless otherwise stated in the relevant provincial legislation, powers can be exercised as required (see the Legislation Act cited above).

In contrast to the position expressed by the Applicant, the Superintendent noted that, as expressed by the Supreme Court of Canada at page 13 of its decision, the breadth of an administrative decision must be coincident with the overall context of the applicable legislation. I agree with the Superintendent that the decision of the Supreme Court of Canada in *Comeau's Sea Foods* follows clearly from its decision regarding the absolute nature of the Minister's discretion (including policy considerations) and inherent continuing process in the circumstances of that case and in the context of the federal *Fisheries Act*. *Comeau* involved a statutory regime under which the Minister had the "absolute discretion" to issue, suspend, or cancel lobster fishing licences. The question was whether the Minister had the discretion to revoke an authorization to issue a licence that had not yet been issued. The Court held that a distinction was to be made between powers of a continuing character and powers which, once exercised, are finally expended so far as concerns the particular case.

In contrast to the Fisheries Act, the Act under consideration in the current proceeding in my view does not give the Superintendent inherent continuing powers to deal with a NOID once a hearing request has been made. The Act instead sets out a specific procedure to be followed when the Superintendent is considering a partial plan wind-up including issuing a NOID review and reconsideration de novo of the decision by way of application to the Tribunal which can agree with the Superintendent or substitute its own opinion.

I agree with the Superintendent that his authority in the circumstances is analogous to the authority of the Canadian Human Rights Commission (the "Commission"), as determined by the Federal Court in *Canadian Museum of Civilization Corp. v. Public Service Alliance of Canada, Local 70396* [2006] F.C.J. No. 884 (Fed Ct)("Canadian Museum").

In *Canadian Museum*, the Commission conducted an investigation into a complaint and then asked the Chair of the Canadian Human Rights Tribunal (the “CHRT”) to conduct a further inquiry. Later on the Commission advised that it was no longer seeking a remedy based on an expert report it had obtained. The employer requested that the Commission withdraw the complaint it had referred to the CHRT.

The Federal Court held at paragraphs 60-61 of its decision that the Commission had no authority to withdraw the complaint for two reasons: a) it had issued a final decision in making the referral and was therefore *functus officio*; b) there was no statutory provision allowing the Commission to revisit its decision.

Although the Superintendent’s NOID is not a final decision, in the sense that it is an intended decision, these principles nevertheless in my view apply to the scheme under the Act whereby proposed decisions of the Superintendent proceed to the Tribunal which then steps into the Superintendent’s shoes as decision maker. A NOID cannot be amended once a hearing request has been made unless the Tribunal by order directs or authorizes the Superintendent to amend it.

This is similar to the statutory scheme that applied in *Canadian Museum*. In that case, the Federal Court states at paragraphs 67 and 68 of its decision the following respecting the role of the Commission once a complaint has been referred by the Commission to the CHRT:

Further, as the Commission submits in this application for judicial review, the Commission may very well decide that no public interest purpose is served by its involvement at the Tribunal hearing, and as a consequence the Commission may not appear as a party. Even if the Commission were to withdraw itself as a party in the present case, PSAC (the union) could, and has stated that it would continue to push forward with its Complaint. Moreover, as PSAC and the Commission submit, a finding that the Commission can unilaterally withdraw the Complaint would clearly interfere with PSAC’s right to pursue its own interests as a party before the Tribunal. ... this Complaint is PSAC’s complaint, not the Commission’s complaint... .

the proper mechanism to remedy an allegedly wrong decision arising from the Commission’s screening function is to judicially review that decision; it is not to allow or require the Commission to revisit its decision to refer a complaint during the course of the Tribunal’s proceedings. The Commission’s decision made pursuant to subsection 44(3), as I stated above, is final as regards referral even though (and I believe this is what Chairperson Lederman had in mind) the Commission needs to continuously assess its position as a party to the proceedings before the Tribunal, and that may mean taking a different position from the one it held at the time of the referral.

In summary, I agree with the Superintendent that he has the discretion (as he indicated he will exercise in this case) to change his position or even to take no position. However, after issuing the NOID the Superintendent generally does not have the authority to amend or withdraw it except to the extent that all affected parties agreed to a settlement as it affects them, that is

implemented in part by withdrawing the NOID and except in such circumstances as the Tribunal orders or directs in accordance with subsection 89(9) of the Act (considered below).

Whether the Tribunal Should Step Into the Place of the Superintendent and Order the NOID to be Withdrawn Under Subsection 89(9) of the Act.

The Superintendent clearly indicated to Imperial Oil his intention to withdraw the NOID once Imperial Oil withdraws its hearing request. That intention of the Superintendent was in my view appropriately subject to the conclusions on the jurisdictional issue addressed in this Motion.

Imperial Oil submitted that to the extent that the Superintendent is unable to exercise his discretion and withdraw the NOID with respect to Ms. Hnyp's interest, the Tribunal at this stage should direct the Superintendent to refrain from making the intended decision set out in the NOID.

Such a decision at this stage of the proceeding would be consistent, in the submission of the Applicant, with the Tribunal directing a withdrawal of the previous Notices of Proposal notwithstanding less than 100% of affected persons signed onto the Settlement.

Section 89(9) of the PBA puts the Tribunal in the Superintendent's shoes with respect to whether to carry out a Notice of Intended Decision:

At or after the hearing, the Tribunal by order may direct the Superintendent to make or refrain from making the intended decision indicated in the notice 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.

Imperial Oil disputes the position taken by the Superintendent in the NOID that the conditions set out in either Section 69(1)(d) or Section 69(1)(e) of the PBA apply in this situation. It argues further that even if these conditions are satisfied, there is no statutory presumption in favour of winding up. (See *Imperial Oil Limited v. Ontario (Superintendent of Financial Services)* (2002), 35 C.C.P.B. 221, para. 22.; *Sutton v. Ontario (Superintendent of Financial Services)*, (6 September 2005) Decision No. P0245-2004-2 (Fin. Serv. Trib.), p. 4-5). The Superintendent's authority to order a wind-up is discretionary and the Superintendent "can properly weigh the equities in the balance in the exercise of that discretion." (See *Imperial Oil Limited v. Ontario (Superintendent of Financial Services)* (2002), 35 C.C.P.B. 22, para. 22 (Fin. Serv. Trib); and s. 89(9) of the PBA)

Imperial Oil argued that this is a proper and compelling case for the Tribunal to exercise its discretion to direct the Superintendent to refrain from making the intended decision indicated in the NOID. The proposed payment to Ms. Hnyp, it submitted, represents benefits equivalent to those provided under Section 74 of the PBA as stated in Mr. MacIntyre's affidavit. Ms. Hnyp's position is analogous to other terminated members who were receiving unreduced pensions. Imperial Oil argued that in those circumstances, the Tribunal ordered that the partial wind-up in

respect of those members would be inappropriate and in the Prior Decision they were excluded from the partial wind-up group.

Imperial Oil noted that Ms. Hnyp seeks to have her potential grow-in benefit added to her monthly pension payable from the Plan - which Mr. MacIntyre's affidavit indicates would amount to an additional approximately \$4 per month. In order to fulfill this demand, Imperial Oil argues that, as supported by Mr. MacIntyre's affidavit and the additional materials it presented at the motion hearing, it would have to amend the Plan by resolution of its Board. It submitted that such an amendment, to provide a miniscule additional monthly payment of \$4, is unnecessary to deliver to Ms. Hnyp the value of her potential grow-in benefit and would be inordinately expensive to complete in light of Imperial Oil's previous tender of the full amount of the value of Ms. Hnyp's grow-in plus interest by way of lump sum cheque. And, in any event, there is no pre-partial wind-up entitlement to such an amendment (see *Sutton v. Ontario (Superintendent of Financial Services)*, (6 September 2005) Decision No. P0245-2004-2 (Fin. Serv. Trib.), p. 4-5). Imperial Oil argued that Ms. Hnyp's position is an abuse of process which each of the Superintendent and the Tribunal have the ability to prevent.

The Superintendent did not express a clear position as to whether the Tribunal has the jurisdiction, in the circumstances of this case, to direct the Superintendent to withdraw the NOID or alternatively, by order to direct the Superintendent not to proceed with the NOID. It was the position of the Superintendent that the Tribunal may well have this jurisdiction under subsection 89(9) of the Act, which allows the Tribunal to direct the Superintendent to make or refrain from making the intended decision and to take such action as the Tribunal considers the Superintendent ought to take in accordance with the Act and regulations.

The Superintendent did not endorse Imperial Oil's argument that Ms. Hnyp's position was an abuse of process.

The Tribunal clearly is empowered "at or after the hearing" under subsection 89(9) to direct the Superintendent to make or refrain from making the intended decision and to take such action as the Tribunal considers the Superintendent ought to take in accordance with the Act and the regulations and "for such purposes, the Tribunal may substitute its opinion for that of the Superintendent". Subsection 89(9) of the Act gives the Tribunal jurisdiction to make such a request or order "at or after the hearing".

I am not satisfied that in this early stage of this proceeding recognizing Ms. Hnyp's request to be a party entitled to participate in a hearing, that this proceeding matter is at the hearing state contemplated in subsection 89(9) or that in any event the Tribunal should grant the requested order at this stage.

The parties agreed at the pre-hearing conference, in accordance with Rule 14.06, that the issue addressed at the motion hearing and in their related filings were to be decided by way of preliminary motion. That Rule contemplates that the issues at such a motion can be dealt with prior to the main hearing or as part of the main hearing. That approach is consistent with the overall structure of the Rules which - consistent with the SPPA Act - differentiate different

stages of a proceeding. The main stages are “pre-hearing procedures” (Part IV of the Rules) and “hearings” (Part V of the Rules).

Part V of the Rules relating to “hearings” contemplates *inter alia* a prior “Notice of Hearing” be given by the Tribunal or at its direction (Rule 22) to the parties or other persons as the Tribunal determines or requires. The notice is to set out certain information and warnings in accordance with the rules.

I am not aware that any Notice of Hearing was being issued with respect to the motion. In contrast it is my understanding that in the case of the Prior Decision, at which a settlement with identified Plan members was approved by order of the Tribunal, the motion hearing leading to the order was preceded by a Notice of Hearing.²

In its written submissions Imperial Oil took the position that Ms. Hnyp has no right in the circumstances to request a hearing, particularly not in the face of the Superintendent’s agreement to withdraw the NOID. It further submitted that “it is contrary to the public interest to proceed with a partial wind-up hearing when there is absolutely nothing to be gained from such a hearing.” The reference to a “partial wind-up hearing” is a reference to the issues that would be reviewed at the main hearing as identified by Imperial Oil, including whether the conditions set out in either section 69(1)(d) or section 69(1)(e) of the Act apply in this situation and even if so whether the Tribunal should refrain in its discretion from ordering a partial plan wind-up.

In the present circumstances it appears to me that Ms. Hnyp reasonably contemplated that the motion was to address the preliminary issues agreed at the pre-hearing conference which, if resolved in her favour, could give her the opportunity to participate in a main hearing on the partial wind-up issues (or one or more of them as would be determined by the process set by the Tribunal). The hearing would give her the fair opportunity she is seeking to fully present in a focused manner her position on the partial plan wind-up issues including any evidence she wishes to appropriately present and to question any evidence introduced by Imperial Oil.

I would note that Part VII of the Rules including Rule 37 contemplates a process for dismissal by the Tribunal without a hearing in various circumstances following notice to the parties and a related process. That process is consistent with section 4.6 of the SPP Act, and with the Tribunal’s power to control of its procedures and practices under section 25.0.1 of the SPP Act. For example, the dismissal process can be applied, after the Tribunal gives written notice and reasons to all parties, where a party has initiated a proceeding that in the opinion of the Tribunal is “frivolous, vexatious or is commenced in bad faith”.

Imperial Oil appropriately did not refer in its submissions to the summary dismissal provision in section 37 of the Rules, presumably because it applies only in the circumstances set out in Rule

² It is arguable that a Notice of Hearing may not always be required if for example the persons affected by an order resulting from a motion understood that the hearing of a motion was intended to be the opportunity to fully address the issues set out in Notice of Intended Decision and waived the Notice of Hearing.

37.01(a) and thereby is limited to a party who initiated the proceeding and because the Rule sets out a process that is only at the initiative of the Tribunal. It was clear at the hearing motion that the Superintendent did not regard Ms. Hnyp's position as frivolous, vexatious or taken in bad faith or abusive of the Tribunal's processes. In any event any risk of abuse of the Tribunal's processes as expressed by Imperial Oil can be adequately addressed in this case if the granting of party status to Ms. Hnyp is conditional on her first establishing at a hearing that the Tribunal should exercise its discretion to order the Superintendent to proceed with a partial wind-up as contemplated in the NOID assuming the conditions in section 69(1)(d) or section 69(1)(e) are eventually established to have been met. That approval may, depending on the decision of the Tribunal in the stage one discretion issue, defer and potentially eliminate the need for a much longer hearing as to whether one of those conditions has been met.

Orders

For the foregoing reasons:

1. It is ordered that Ms. Hnyp is granted party status in this proceeding on condition that the proceeding go forth in accordance with the following two stage process:
 - (a) at stage one the Tribunal will decide if it is prepared to exercise its discretion under the Act to order a partial wind-up of the Plan with respect to Ms. Hnyp's interest in the Plan. This stage will proceed under the assumption, which will be without prejudice to the positions Imperial Oil or the Superintendent may take on the issue at stage two if it is required, that the conditions under the Act to a partial Plan wind-up order of the Superintendent or the Tribunal exist; and
 - (b) at stage two, which would proceed only if the Tribunal is prepared to exercise its discretion to order a partial plan wind-up at stage one, the Tribunal will decide whether conditions to such a partial plan wind-up exist under section 69(1)(d) or section 69(1)(e) of the Act.
2. It is declared that:
 - (a) the Superintendent does not have the discretion to withdraw the NOID; and
 - (b) the Tribunal is not prepared at this preliminary stage of the proceeding to grant the request for an order that the Superintendent be directed to refrain from making this intended decision indicated in the NOID proposing to require a partial wind-up of the Plan under section 69(1)(d) or Section 69(1)(e) of the Act.

DATED at the City of Toronto, this 3rd day of November, 2011.

“ John M. Solursh ”
John M. Solursh,
Chair of the Tribunal and of the Panel