

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c.P.8 (“the *PBA*”), as amended by the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 (“the Act”);

AND IN THE MATTER OF an Intended Decision of the Superintendent of Financial Services to Refuse to Make an Order under sections 19(3) and 87(1)(a) of the *PBA* relating to the **Pension Plan for Executives of Shoppers Drug Mart Inc., Registration Number 1066083** (the “Plan”);

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

B E T W E E N:

R. BOYS

Applicant

and

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

and

SHOPPERS DRUG MART CORPORATION

Respondent

Before:

Elizabeth Shilton, Member of the Tribunal and Chair of the Panel
Heather Gavin, Member of the Tribunal and of the Panel
Shiraz Bharmal, Member of the Tribunal and of the Panel

Appearances:

For the Applicant: R. Boys
For the Superintendent: Deborah McPhail
For Shoppers Drug Mart Corporation: Alan Merskey

Date of Hearing:

October 31, 2011

DECISION

INTRODUCTION

1. On February 11, 2000, the Applicant, Mr. Boys (“Boys”), was terminated from his position with Shoppers Drug Mart. While Boys had held his position for several years, his termination took place some eight days after the completion of a corporate transaction in which ownership of the business was transferred to Shoppers’ Drug Mart Corporation (“Shoppers”). The arrangements for the transfer of the business included an agreement that executives such as Boys would transfer their pension plan membership from the Imperial Tobacco Corporate Pension Plan (the “Imasco Plan”) to a new successor pension plan established by Shoppers: the Pension Plan for Executives of Shoppers Drug Mart Inc. (the “Plan”). At the time of his termination, Boys had only belonged to the Plan for eight days and his basic pension entitlement qualified as a “small pension” under both the Plan and the *Pension Benefits Act* (the “PBA”). In the exercise of its discretion under the Plan, Shoppers insisted that he commute and cash out that entitlement, although Boys’ preference was to leave it in the Plan as a deferred pension.

2. Although Boys’ termination was part of a broader restructuring, Shoppers did not initially declare a partial wind up of the Plan. Subsequently, in settlement of proceedings before the Superintendent and this Tribunal, Shoppers agreed to a partial wind up. As a member of the partial wind up group, Boys was entitled to grow-in benefits valued at \$89,087. Boys wished to have this money treated as a deferred pension. Shoppers refused this option, arguing that the grow-in benefit must be commuted and cashed out like his prior payout, despite the fact that the amount now at issue considerably exceeded the “small pension” threshold.

3. Boys sought relief against Shoppers’ decision from the Superintendent of Financial Services (the “Superintendent”), asking for an order that Shoppers treat his benefits as a deferred pension. The Superintendent issued a Notice of Intended Decision (“NOID”) on May 25, 2011 indicating his intention to refuse to make such an order. Boys has now filed a Request for Hearing before this Tribunal, challenging the Superintendent’s NOID, and seeking to have his entitlement under the Plan treated as a deferred pension.¹ For the following reasons, we have determined that he is entitled to the relief he seeks.

I THE CONFIDENTIALITY MOTION

4. Before addressing the merits of Boys’ Request for Hearing, we propose to discuss briefly certain issues that arose in the course of a motion hearing on October 12, 2011. Boys had sought an order that “all documents which are used in the course in these proceedings which contain personal information be kept confidential”. His notice of motion also requested that his given

¹ As circumstances have evolved, it is likely that Boys is now entitled to an immediate rather than a deferred pension. This issue was not addressed in argument before us, and we have continued to refer to the pension as a deferred pension.

name not be used in “all documents, notices, listings and other materials produced in the course of these proceedings and which may be accessible via the internet”. The motion was heard by the Panel Chair, Ms Shilton. After hearing submissions from the parties, she advised the parties that as an administrative matter, the style of cause would be amended to replace Boys’ given name with his first initial. She dismissed the balance of the motion, and advised that brief reasons for that decision would be provided as part of these reasons.

5. Confidentiality orders are governed by Rule 11 of the Tribunal’s Rules of Practice and Procedure. They are not given lightly. In making confidentiality orders, the Tribunal must balance the interest of the parties in confidentiality against the public interest in open and transparent legal proceedings. Public policy in Canada strongly favours the latter interest: see *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41; *Kernius and Ontario Power Generation Inc. v. Superintendent of Financial Services*, FST Decision No. P0303-2008-1. Any party seeking a confidentiality order under Rule 11 must clearly identify the document(s) sought to be protected by the order, and must state “the reasons for the request, including the nature and extent of the specific harm that might result if the document were publicly disclosed” (Rule 11.03 (a)(i)). The fact that documents may contain personal information is not sufficient. The test is a balancing test; an applicant for a confidentiality order must persuade this Tribunal that disclosure of information sought to be protected would be sufficiently harmful that the applicant’s interest in confidentiality outweighs the public interest in open justice (see Rule 28.02, incorporated by reference into Rule 11). Boys’ primary concern in this motion was simply the protection of his privacy. Without more, that interest will not attract a confidentiality order.

6. A privacy interest in “personal information” in the custody of certain public institutions is protected in Ontario by the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 (“*FIPPA*”). The precise relationship between this statute and the public record in administrative adjudications is not entirely clear, and has never been directly addressed by this Tribunal. We do not propose to address it in any detail here. We need to make it clear to parties that appear before us, however, that documents and evidence filed with this Tribunal that are not subject to a confidentiality order will normally become part of the public record. Parties who file such documents and evidence should have regard to their own obligations under *FIPPA*, if any. In addition, all parties should consider whether documents they propose to file in evidence could be redacted by the removal of personal information without harm to the evidentiary value of those documents, particularly where that information concerns non-parties. If the parties do not wish to expose personal information to public view and it is not necessary to their case, they should simply not tender it in evidence. They should not count on obtaining confidentiality orders to shelter it; such orders will not be issued unless the documents in question fall into the narrow category of documents (or parts of documents) that meet the Tribunal’s stringent balancing test.

7. Ms Shilton’s order dismissing the motion was made without prejudice to Boys’ right to renew his application on proper grounds at the hearing, if necessary. In addition, Boys was given leave to review the Agreed Book of Documents, Agreed Statement of Facts and his own written submissions which had already been filed with the Tribunal, for purposes of considering whether personal information could be removed. We understand that he completed this review

and arrangements were made to remove certain personal information without objection from the other parties. No further request for a confidentiality order was made.

8. We turn now to the matter before us.

II THE FACTS

9. The evidence in this case consisted primarily of an Agreed Statement of Facts and Agreed Book of Documents filed by all parties. This evidence was supplemented by the testimony of two witnesses: Boys, who testified on his own behalf, and Lyle Teichman, called by Shoppers to testify with respect to professional services provided in connection with a related case. That evidence established the following.

10. As explained in a prior decision of this Tribunal, the issues which give rise to this proceeding arose out of a series of corporate transactions designed to “facilitate the effective acquisition by institutional investors, through ownership of Shoppers, of the Shoppers Drug Mart business previously carried on by Imasco Ltd. or one of its controlled affiliates” (*Del Grande et al. v. Shoppers Drug Mart Inc. et al.*, August 4, 2009, FST Decision No. P0330-2008-1, para. 2 (“*Del Grande No. 1*”). Shoppers Drug Mart Corporation was established as a new corporation on February 4, 2000, and its shares were sold to these institutional investors. Shoppers took over the business on the same date.

11. Shoppers established the Plan on February 4, 2000 as a successor plan to the Imasco Plan. The Plan is a defined benefit single-employer pension plan, registered in Ontario and administered by Shoppers. Pursuant to a “wraparound agreement” between Shoppers and British American Tobacco (Canada) Limited, the Plan was designed to provide benefits substantially comparable in the aggregate to the benefits that had been provided to executives of Shoppers under the Imasco Plan. The Plan did not assume the obligation for benefits accrued under the Imasco Plan; all accrued assets and liabilities up to that date remained in the Imasco Plan. The Plan did, however, assume the obligation for increases in previously accrued benefits resulting from increased earnings, early retirement subsidies, and increases in pension limitations. As was explained to Plan members in a communication memo at the time the Plan was established, the links between the two plans were designed so that: “Your total benefit from the [Plan] and the [Imasco Plan] will equal the pension you would have received if you had stayed in the [Imasco Plan] for your entire career with Shoppers Drug Mart”. Boys was a member of both plans.

12. On February 11, 2000, Boys was terminated by Shoppers. At that time, he had accumulated almost seventeen years of credited service in the Imasco Plan. On termination, the Imasco Plan offered him the option to leave his pension entitlement in the plan as a deferred pension, which he chose to do. With respect to the Shoppers’ Plan, however, the Option Form presented to him did not offer a deferred pension option. The two options offered were both cash-out options; he was given a choice between taking his entitlement in cash outside of a registered vehicle (and taking the tax consequences) or transferring the sum to a non-locked-in Registered Retirement Savings Plan. Boys delayed returning the form for some time because he did not want to take his money out of the Plan. Ultimately, however, he was advised by Shoppers

that it would cash his pension out by default, whether or not he made an election. He then signed the form on March 29, 2002, electing to transfer both \$110.89 (the lump sum commuted value of his pension) and a further \$392.60 (a return of his contributions in excess of 50%) to a non-locked-in RRSP.

13. Appendix B of the Plan, which applies to Ontario Plan members,² permits Shoppers to require members whose pension benefits will fall below a certain threshold to commute their pensions and “cash out” of the Plan. Headed “Commutation of Small Pensions”, the relevant provisions of Appendix B read as follows:

An annuity required to be paid under the Plan may be commuted and paid in a lump sum at the discretion of the Administrator if the annual retirement income that would be payable to the Member at Normal Retirement Date is not more than 2% of the YMPE as at the Date of Determination. The amount of any such form of benefit settlement shall be the Actuarial Equivalent of the benefit remaining to be paid.

The Year’s Maximum Pensionable Earnings (YMPE) for the year 2000 was \$37,600.00. Two per cent of that amount is the sum of \$752.00. The commuted value of Boys’ entitlement at the time of his termination, calculated as \$110.89, would have yielded an annual pension considerably below this threshold.

14. The restructuring initiative which resulted in Boys’ termination also affected a significant number of other Shoppers executive employees who were members of the Plan. Although Shoppers did not itself initially declare a partial wind up, the Superintendent issued a Notice of Proposal (“NOP”) to partially wind up the Plan on June 8, 2005. In response to that NOP, Shoppers requested a hearing before this Tribunal. The matter was settled before reaching a hearing. Pursuant to Minutes of Settlement, Shoppers agreed to partially wind up the Plan effective April 22, 2005 with respect to members of the Plan who ceased to be employed between January 1, 2000 and October 26, 2004.³ Boys was included in the partial wind up group.

15. On November 11, 2009, the Board of Directors for Shoppers made a number of amendments to the Plan to address the partial wind up. These included an amendment providing that any affected member who had elected to transfer his benefit as a lump sum on termination would also be required to transfer his grow in benefits as a lump sum (Appendix D, Section D4).

² The Plan is a national pension plan. Since regulatory rules differ from jurisdiction to jurisdiction in Canada, Appendices to the Plan address differences in member rights depending on which provincial legislation governs their rights. The “small pension” provision under which Shoppers forced Boys to cash out his pension is enabled by s.50 of the *PBA*.

³ This information on the time-span covered by the partial wind up comes from the Agreed Statement of Facts. It appears to be somewhat inconsistent with the facts on this same partial wind up put before the Tribunal in *Del Grande No. 1* (see para. 8, which suggests that the cut-off date was January 15, 2003), and in *Del Grande et al. v. Shoppers Drug Mart Inc. et al.*, Sept. 8, 2009, FST Decision No. P0330-2008-2 (“*Del Grande No. 2*”) (see para. 1.13, which suggests that the cut-off date was April 25, 2003). Neither the Minutes of Settlement nor the partial wind-up report were before us in this case. Since Boys was terminated on February 11, 2000, these differences are not material here.

16. As a result of the partial wind up, it was determined that Boys was entitled to grow-in benefits by virtue of s.74 of the *PBA*, including the right to an unreduced pension at an earlier age. On or about November 6, 2009, the Applicant received an option statement from Shoppers advising that the commuted value of his additional pension benefits (i.e. in addition to the \$110.89 benefit already calculated) were in the amount of \$89,087.00,⁴ and offering the same two options that were originally offered to him with respect to the \$110.89 to which he was entitled on his termination: a cash refund, or a transfer to an RRSP (available only if he had RRSP contribution room). Again, no deferred pension option was offered. The Applicant asked that Shoppers permit him to take his benefits as a deferred pension. Shoppers refused to permit this.

17. Boys has requested Shoppers to hold the cheque for his remaining benefits in abeyance pending the outcome of this proceeding.

18. Throughout this process, Boys has made it clear that what he wants from the Plan is a deferred pension rather than the commuted value of his benefits. Furthermore, he is no longer in a position to make a transfer to an RRSP. If he is forced to cash out his benefits, the money will not be tax-sheltered. Boys testified that if he uses the cash value to purchase an annuity outside the Plan, it will produce a monthly payment that will be 57% less than the pension benefit he would have received from the Plan.

19. Boys protested Shoppers' decision to the Superintendent. In response to inquiries from the Superintendent's staff, Shoppers wrote a letter on September 28, 2010 stating:

Further to our discussion of September 22, 2010, please accept this letter as confirmation that on April 19, 2010 our pensions advisor, Towers Watson, received guidance from the Canada Revenue Agency ("CRA") confirming that the *Income Tax Act* and *Regulations* do not permit additional grow-in benefits to be paid as lifetime retirement benefits from a registered pension plan where the individual has already commuted and transferred the full amount of his or her initial benefits out of the particular registered pension plan.

20. This information was based on a letter from CRA to Lyle Teichman, Shoppers' professional representative, dated April 19, 2010, which stated as follows:

This is further to our letter of February 2, 2010, in response to your letter dated October 2, 2009 regarding the Plan. We apologize for the delay in our response.

In our letter, we indicated that, in the situation where an individual had previously transferred his benefit entitlement to a registered retirement savings plan or to a registered income fund, and subsequently became entitled to additional benefits due to the provincial growing-in rules, that we would allow the additional benefits to be paid through an immediate annuity and that retroactive lump sum benefits would be permitted under section 1 of Newsletter 09-1. Upon review of the situation, this advice is incorrect.

⁴ The \$89,087 is the sum Boys was advised on November 6, 2009 he was entitled to, consisting of \$47,551 in grow-in benefits, plus interest (see NOID, para. 7). The dramatic difference between the basic benefit Boys was entitled to under the Plan and the grow-in benefit is likely accounted for by his credited service in the Imasco Plan: 16.76160 years, compared to eight days in the Shoppers Plan.

The Income Tax Act and Regulations do not permit the additional growing-in benefits to be paid as additional lifetime retirement benefits from a registered pension plan (RPP) where the individual has already commuted and transferred the full amount of his or her initial benefits out of the particular RPP.

21. This April 19, 2010 letter from CRA arose as a result of a prior order of this Tribunal involving the impact of this same partial wind up on one Groskopf, who had also been a member of the Plan (see *Del Grande*, No. 1). Like Boys, Groskopf was terminated within the partial wind up period and was included in the partial wind up group. Like Boys, his basic pension benefits under the Plan were determined and initially dealt with without regard to the impact of the partial wind up.⁵ However, Groskopf's pension benefit, as initially calculated, was not a "small pension" under the Plan, and he was thus initially offered the option of leaving his money in the Plan as a deferred pension. He chose not to do so; instead, he elected to commute his entitlement and transfer it to a (locked-in) RRSP. When he was advised of his grow-in benefits, Groskopf then decided that he preferred a deferred pension. While he initially sought to reverse his initial election in total (i.e. to have his total entitlement converted to a pension), by the time his case was argued before the Tribunal he had revised his position, and sought only to leave the grow-in benefit in the plan. It was on this basis – that he sought to make a different election for his grow-in benefit than he had for his basic benefit – that the Tribunal approached Groskopf's case.

22. In its decision in *Del Grande No. 1*, the Tribunal concluded that Groskopf had not intended his initial election – a transfer of his benefits to an RRSP – to apply to any grow-in benefits. The Tribunal took the view that Groskopf should be permitted to make a new and different election for the grow-in benefits. Mindful of the potential tax implications, however, the Tribunal noted:

[A]s counsel to the Superintendent and counsel for Shoppers have observed, if Mr. Groskopf's request were granted unconditionally, it could lead to practical difficulties. In particular, it would enable him to make a different election with respect to the Additional Benefit than he made with respect to his prior benefit (before the increase as a result of the partial plan wind up). That result might be viewed as unacceptable by the Canada Revenue Agency under the *Income Tax Act* (the "ITA"). Such an action by the Canada Revenue Agency could in theory, although the practical risks may be low, result in disqualification of the Plan under the ITA and thereby the loss of related favourable tax treatment for Canadian income tax purposes to Mr. Groskopf and other terminated and continuing Plan members. Mr. Groskopf agreed the tax qualification of the Plan was integral to the Plan and to his position in seeking an additional transfer option.

Accordingly, the Tribunal made a conditional order:

⁵ *Del Grande No.1* does not indicate when Groskopf was terminated, although it does tell us that he took his initial payout from the plan on March 22, 2006. While this date is *after* the effective date of the partial wind up, it is clear from the decision that like Boys' initial pension cash-out, Groskopf's initial entitlement calculation did not include his grow-in benefits; Groskopf gave evidence that "the options he was provided at the time of his election did not mention a partial wind up"

[W]e order that Mr. Groskopf be given the same options with respect to his Additional Benefit as were granted to him with respect to the previous lump sum payment provided that Canada Revenue Agency grants its approval to that effect. It is the responsibility of the Plan administrator to make reasonable efforts to seek that approval from the Canada Revenue Agency.

23. Lyle Teichman gave evidence about the process followed by Shoppers in implementing the Groskopf order. Teichman is a highly experienced lawyer and consultant with Towers Watson. Following the Tribunal's decision, he was engaged by Shoppers with respect to the Groskopf situation. On October 2, 2009, he wrote a letter to CRA on behalf of Shoppers fully setting out the circumstances surrounding Groskopf and the Tribunal order in *Del Grande No. 1*. The letter seeks CRA confirmation that "Shoppers may provide the same settlement options to Mr. Groskopf with respect to his grow-in benefits as were provided with respect to his basic pension entitlement, independent of the settlement option previously elected by Mr. Groskopf".

24. Teichman testified that CRA's initial response was favourable. By letter date-stamped February 2 or 3, 2010, CRA advised that a pension option was "acceptable". By April 29, 2010, however (as is clear from the CRA letter quoted in para. 20 above), CRA had changed its mind. Why did this happen? Teichman answered that question in his evidence. He testified that he was "surprised" by CRA's response to his initial request of approval. He clearly thought that CRA should *not* have found this option acceptable. Accordingly, he phoned the author of the CRA letter to discuss his concerns. He testified that in the course of this discussion, the CRA official to whom he spoke realized that he had been wrong in his interpretation of the legal requirements. The result was the letter dated April 19, 2010, containing CRA's revised opinion – that the deferred pension option could *not* be offered.

25. Teichman was frank about the nature of the conversation between himself and the CRA representative. He testified that their discussion centred on splitting payments into two different components, and on the "tax planning opportunities" such splitting could provide for individual taxpayers seeking to circumvent the income tax caps on the amount of money that can be tax-sheltered by individuals. This could be a particular hazard, he testified, in the case of taxpayers with individual pension plans, who have the power to control the nature of their pension payouts. Such taxpayers could deliberately split their entitlements into two parts by engineering a partial wind up of a plan, transferring funds relating to their basic benefits out of their pension plans without triggering immediate tax liability and still retaining a deferred pension under the plan. Teichman agreed that the gist of the relevant policy concern was reflected in the following passage from Shoppers' written submissions in this case:

[I]t is Shoppers' understanding that CRA's concern as a matter of tax policy is that permitting first lump sum payments and then deferred pensions will artificially increase the tax sheltered room available between registered plan and individual RRSP vehicles. The CRA is therefore circumscribing the ability of any individual to engage in tax planning in this fashion by splitting the benefit transfers (para. 27).

26. Teichman acknowledged in his evidence that what Boys seeks here does not implicate the "tax planning" policy issue raised in his discussion with CRA and in his evidence before us.

Unlike Groskopf, Boys does not want to split his benefit entitlement into two different transfer options; on the contrary, he seeks to have all of his entitlement treated as a deferred pension.

27. For Boys to achieve his objective, however, there would have to be a reversal of the original transaction in which his basic benefit was commuted and cashed out into an RRSP. On Teichman's evidence, such a reversal would create a new set of problems; while conceptually possible, such a reversal would be "messy", since CRA does not provide clear procedures for reversals, dealing with them on a case-by-case basis. He testified that a reversal of a pension pay-out like Boys' would typically require CRA approval. He acknowledged, however, in response to questions from Tribunal members, that in view of the very small amount paid out at the time of Boys' original commutation, a plan administrator might make a discretionary decision to reverse the transaction without seeking CRA approval. In his view, CRA approval could not be counted on, and the process involved in seeking it would be complex, time-consuming, potentially costly, and more difficult because of the passage of time.

28. Shoppers has not made any inquiries of the CRA concerning Boys' situation, and CRA has not issued any ruling on his situation.

III THE ISSUES AND THE PARTIES' POSITIONS

29. These facts give rise to a number of legal issues, stated by the parties in a pre-hearing memorandum as follows:

- 1) Did the plan administrator (Shoppers) contravene the Act in paying out the Applicant's entitlement as a "small pension" in May 2002?
- 2) Does the inclusion of the Applicant in the partial wind up group as at April 22, 2005 mean that the Applicant's entitlement under the Plan does not qualify as a "small pension", and that he should be given the options provided under the Act and Regulation for a deferred pension?
- 3) What is the effect of any Canada Revenue Agency ruling, if any?
- 4) What remedies should flow from the Tribunal's ruling?

30. These issues are closely intertwined. At the core of the dispute is Shoppers' refusal to permit Boys to take the pension benefits he is entitled to as a result of the partial wind up in the form of a deferred pension. As noted above, Shoppers relies primarily for its refusal on its view of the effect of the CRA ruling in the Groskopf case; it argues that it is required by the *Income Tax Act* to treat Boys' grow-in benefits in the same way that it treated his basic benefit. It is this argument of Shoppers' – that the treatment of the second payment must be identical to the treatment of the first – that has prompted Boys to challenge the initial treatment of the basic benefit, which he frankly concedes he would not otherwise have done.

31. On Issue #1, Boys argues that Shoppers' decision to cash out his original entitlement as a "small pension" was unlawful for two reasons:

- a. Section 80 of the *PBA* entitles him to the same transfer options under the Shoppers plan as he had under the predecessor Imasco Plan, including the right to elect a deferred pension; and
- b. As a matter of plan interpretation, his original pension entitlement under the Plan was not a “small pension”; properly interpreted, the term “annual retirement income” in Appendix B (see para. 13, above) includes his pension entitlement under both the Shoppers and the Imasco plans.

32. Shoppers disputes these arguments on their merits. In addition, it vigorously contests Boys’ right to now challenge a decision made in 2002, when he did not challenge it at the time.

33. The Superintendent also disputes Boys’ arguments on their merits. He argues that s.80 does not transfer from a predecessor to a successor plan the right to elect a deferred pension. In addition, he argues that since Boys’ pension was unquestionably a “small pension” in 2002, Shoppers properly exercised its discretion under the Plan at that time to force a cash-out over Boys’ objections. He argues that s.42(11) of the *PBA* provides a statutory discharge to a plan administrator who has made a pension transfer in accordance with the Act. By implication, he argues, the lawfulness of such a transfer cannot be revisited. With respect to Boys’ argument based on the interpretation of Appendix B of the Plan, the Superintendent argues that contextually interpreted, the Plan supports Shoppers’ original interpretation.

34. On Issue #2, Boys argues that his overall pension entitlement was not a “small pension”, since his grow-in benefit exceeded 2% of YMPE. Accordingly, he argues, Shoppers has no right to require him to cash it out; Shoppers’ decision to deny him a deferred pension is a clear violation of his statutory right to leave his money in the Plan as a deferred pension. On Issue #3, he argues that there is no CRA ruling with respect to his situation; the only relevant ruling relates to Groskopf, and his own case is distinguishable from Groskopf’s.

35. With respect to both Shoppers and the Superintendent, it is difficult to separate arguments on Issue #2 from arguments on Issue #3, since both take the position that CRA’s requirements must drive our decision on what options Boys should have been offered after the partial wind up. Shoppers’ position is summarized in para. 32 of its written submissions:

Shoppers accepts without dispute that the Applicant’s entitlement subsequent to the partial wind-up is no longer a small pension. However, the Applicant remains in the same position as Groskopf. The receipt of a prior lump sum, however innocently obtained, cannot be reversed.

In Shoppers’ view, “in light of the CRA ruling, the Applicant’s other arguments are, in essence, moot” (para. 31); “the CRA ruling is largely dispositive of the matters before this Tribunal” (para.18).

36. The Superintendent likewise concedes that once the grow-in benefits to which Boys was entitled under the partial wind up are included as part of his entitlement, Boys’ pension is no longer a “small pension” (para. 32, Superintendent’s written submissions). However, the Superintendent relies on the fact that at the time of the original cash-out, Boys’ entitlement was properly characterized as a small pension. There is no provision in the *PBA* explicitly requiring

administrators to reverse a small pension cash-out if that pension subsequently ceases to qualify as a small pension. Accordingly, the Superintendent argues, an administrator is not required to reverse such a transfer. In her oral submissions, Superintendent's counsel expressed sympathy for Boys, describing his situation as resulting from a "technicality". Nevertheless, she argued that Shoppers' lawful conduct in 2002 in forcing the cash-out places effective limits on Boys' subsequent transfer rights.

37. With respect to remedy (Issue #4), Boys argues that that he should be offered the option of treating his benefits as a deferred pension. Both Shoppers and the Superintendent argue that Boys' claim should simply be dismissed. In the alternative, they argue that any order in favour of Boys should, like the Groskopf order, be made conditional on CRA approval.

IV DECISION

38. As we indicated at the outset, we have determined that Boys is entitled to a deferred pension under the Plan and cannot be forced to take his entitlement as a lump sum. We do not accept Boys' arguments that Shoppers violated his rights when it treated his entitlement as a "small pension" in 2002. In our view, Shoppers' exercise of its discretion in 2002 was not unlawful at that time. As events transpired, however, Boys' rights changed. Once the partial wind up was declared, his entitlement from the Plan was *not* a "small pension". Under these changed circumstances, the *PBA* gives him the right to insist that his entitlement be treated as a deferred pension. Shoppers did not offer him that option. The only remaining question, then, is whether income tax rules justify this violation of Boys' rights under provincial law. In our view, they do not. The following are our reasons for these conclusions.

Issue #1: Did the plan administrator (Shoppers) contravene the Act in paying out the Applicant's entitlement as a "small pension" in May 2002?

39. We first address the argument made by Boys that Shoppers acted unlawfully when it forced him to cash out his pension in 2002. He argues that Shoppers failed to properly apply s.80 of the *PBA*; that provision, he argues, imports into the successor pension plan (i.e. into the Plan) the right to elect a deferred pension which he had acquired under the predecessor plan (i.e. under the Imasco Plan). In addition, he argues that Shoppers wrongly interpreted the relevant language of Appendix B when it concluded that his entitlement was a "small pension", since it failed to include the amount to which he was entitled under the Imasco Plan.

40. Counsel for Shoppers argues that it is too late for Boys to challenge the administrator's 2002 interpretation of the Plan. He points out that the arguments Boys is now making with respect to this issue were available to him back in 2002; having declined to make those arguments at that time, he cannot now bring them forward to attack the decision. There is considerable merit to this submission. Boys does not claim that these arguments were not available to him in 2002. He candidly acknowledges that he did not challenge Shoppers' decision in 2002 because the amounts at stake at that time were not significant; it was simply not worth it. It is the grow-in benefit that has changed that calculus. He argues that since the stakes have now changed, he should be permitted to proceed with a challenge.

41. We have some serious concerns with Boys' argument here. While there is no specific limitation period in the *PBA* on raising such issues, established principles of administrative law dictate that parties who "sleep on their rights" may lose the opportunity to assert those rights altogether. This principle has important ramifications in the pension context, where funding considerations require as much certainty as possible.

42. We need not decide this issue on the basis of the timeliness argument, however, since we are also not persuaded by Boys' arguments on the merits. We first address the s. 80 argument. Section 80 (1) provides as follows:

Where an employer who contributes to a pension plan sells, assigns or otherwise disposes of all or part of the employer's business, a member of the pension plan who, in conjunction with the sale, assignment or disposition becomes an employee of the successor employer and becomes a member of a pension plan provided by the successor employer,

- a. continues to be entitled to the benefits provided under the employer's pension plan in respect of employment in Ontario or a designated jurisdiction to the effective date of the sale, assignment or disposition without further accrual;
- b. is entitled to credit in the pension plan of the successor employer for the period of membership in the employer's pension plan, for the purpose of determining eligibility for membership in or entitlement to benefits under the pension plan of the successor employer.

43. Section 80(1)(a) clearly preserves the benefits accumulated in the predecessor plan. Section 80(1)(b) gives plan members credit in the successor plan for time spent as a member of the predecessor plan for determining *eligibility* for membership or *entitlement* to benefits, a valuable right which may entitle transferred employees to join the new plan without any waiting period, or to establish their eligibility for benefits for which a period of service in the plan is a qualification. It does not, however, affect the *amount* of benefits under the new plan, which may be based only on the amounts they earn under the successor plan.

44. Nor does s.80 ensure that employees will be treated seamlessly for all purposes as if they had continued as members of the predecessor plan. Section 80 does not guarantee that there will *be* a successor plan, or that any successor plan will provide the same level of benefits as the predecessor plan. It is for that reason that "wrap around" agreements are desirable from a members' perspective; such agreements can help to close gaps left by the statute when employees move from a predecessor to a successor plan. Since "wrap around" agreements are voluntary, however, they are custom-tailored only to fill such gaps as the parties to the agreement choose to fill. In this case, the wrap-around agreement protects the value of employee service under the predecessor plan for purposes of the new plan benefit formula. It does not, however, change the fundamental proposition that the benefits paid out under the new plan must be earned under the new plan.

45. Boys argues that s.80 preserves benefits accumulated in the predecessor plan, and that the right to elect a deferred pension is such a benefit. He may well be right. However, it is s.80(1)(a)

that protects the benefits under the predecessor plan. Importantly, that subsection binds only the predecessor plan, not the successor plan. It imposes no obligations on Shoppers. Boys' right to a deferred pension under the Imasco Plan was respected. Section 80(1)(b), which applies to the successor plan, requires only that the new plan recognize "the period of membership" in the predecessor plan for purposes of calculating entitlements to benefits dependent on service, and for meeting qualifying periods. Section 80(1)(b) stands in the way of imposing delayed vesting of benefits on employees in Boys' position. But it does not stand in the way of Shoppers making a determination under Appendix B that Boys' pension is a "small pension", a purely mathematical calculation that is not dependent on how long Boys had been a member of the Plan.

46. Boys makes a valiant effort to bolster his argument here by pointing out that the upper limit for small pensions under the Plan (2 % of YMPE) is equivalent to the benefit that would be accumulated through one year of full-time service. If he had remained a Plan member for a year, he would have accumulated enough benefits under the Plan to avoid a compulsory cash-out. Accordingly, he argues, the "small pension" threshold is the functional equivalent of a one-year qualifying period for a deferred pension, and qualifying periods cannot be applied against a successor member pursuant to s. 80(1)(b). This argument, while ingenious, must ultimately be rejected. Section 80 is scrupulous in maintaining a distinction between qualifying periods and benefit amounts. The fact that in this case there is an overlap between these two concepts does not alter the fact that the small pension threshold is determined by quantity of benefits, and not by length of time as a member.

47. Section 80 of the *PBA* therefore does not assist Boys with his argument on Issue #1. Without statutory assistance, Boys' argument must stand or fall on the language of the Plan. Boys argues that the term "annual retirement income" in Appendix B should be interpreted to include income both from the Plan and from the Imasco Plan. While he is unable to point to any language in the Plan itself supporting such an interpretation, he argues that the term "annual retirement income" is ambiguous. He relies on the *contra proferentum* rule; that rule, he argues, places the onus on Shoppers, as the drafter of the plan, to persuade us that its interpretation of the Plan is correct and that the interpretation which favours plan members is not correct. He refers us to *McIntosh v. Equitable Life Insurance Co. of Canada*, [2000] O.J. No. 3071. In support of his own interpretation of the Plan language, he draws our attention to documents in evidence showing that when Shoppers reported individual pension entitlements to members of the Shoppers' Plan, they did not just report the amount earned under the Plan; they also showed the amount earned in the Imasco Plan. He also relies on the wrap-around agreement and the representations made to Plan members that with the creation of the successor plan, their total pension benefit would equal the benefit they would have received if they had stayed in the Imasco Plan. Shoppers counters by arguing that there is no ambiguity in the language; while it concedes that the Plan does not define the term "annual retirement income", it argues that in the context of the Plan, the term cannot be interpreted as including income from sources other than the Plan. The Superintendent concurs with this view.

48. We are not persuaded that the term "annual retirement income" is ambiguous in the context of the Plan. Even if we had been, we would not have been prepared to accept, based on the scant evidence before us, that Boys' interpretation is the correct one. In the context of the

Plan, the term “annual retirement income” most logically refers to income from the Plan. The documents to which Boys refers in support of his more idiosyncratic interpretation appear to relate to how Shoppers calculated individual pension entitlements under the Plan. Since the Plan formula requires any such calculation to take into account income from the Imasco Plan, it is logical that such individual calculations would include reference to income from that plan. Such inclusion therefore tells us nothing about the meaning of Appendix B.

49. Accordingly, the *contra proferentum* rule does not assist Boys here. It applies only to ambiguous documents, and we have found that the relevant language of Appendix B is not ambiguous. We need not decide, therefore, whether the rule goes so far as to place an onus on Shoppers to prove that Boys’ interpretation is not correct, as Boys argues. We reject the submission that Shoppers improperly interpreted the relevant provisions of Appendix B when it looked only at Boys’ entitlement from the Plan and ignored his entitlement under the Imasco Plan in calculating “annual retirement income”. Accordingly, Boys’ argument on Issue #1 fails: Shoppers’ treatment of his pension as a small pension in 2002 did not contravene the *PBA* at the time.

50. On the view we take on Issues #2 & 3, however, the outcome of Boys’ claim does not ultimately turn on the events of 2002. Regardless of whether or not his entitlement from the Plan qualified as a “small pension” in 2002, it clearly did *not* qualify as a small pension once the partial wind up was declared. And it is the characterization of Boys’ entitlement on partial wind up that ultimately dictates what transfer options he should have been offered. We turn now to that issue.

Issue #2: Does the inclusion of Boys in the partial wind up group change his transfer options?

51. As framed by the parties, this issue reads: “Does the inclusion of the Applicant in the partial wind up group as at April 22, 2005 mean that the Applicant’s entitlement under the Plan does not qualify as a ‘small pension’, and that he should be given the options provided under the Act and Regulation for a deferred pension?” To the first part of this question there can only be one answer. Indeed, all parties in effect conceded this point: the pension amount underlying the commuted value of \$89,087 is *not* a small pension within the meaning of s.50 of the *PBA* or under Appendix B of the Plan (which mirrors the statutory minimum standard). What is controversial is the issue raised by the second part of the question: does the change in value of Boys’ entitlement, resulting from the partial wind up, mean that he should be given the option of a deferred pension?

52. To answer this part of the question, it is necessary to look first at the *PBA* rules governing the rights of members who leave a pension plan prior to retirement, and then at how those rules are modified if the member’s departure takes place in the context of a partial wind up. The *PBA* generally favours the right to a periodic pension over lump sum pay-outs. The default option for plan members whose rights are vested and who leave a plan before retirement is a deferred pension. Where plan members have acquired a right to a deferred pension, section s.42(1) of the *PBA* provides certain additional rights which give those members a choice to commute their deferred pension and transfer its commuted value out of the plan, as follows:

A former member of a pension plan who, on or after the 1st day of January, 1988, terminates employment or ceases to be a member of the pension plan and who is entitled to a deferred pension is entitled to require the administrator to pay an amount equal to the commuted value of the deferred pension,

- (a) to the pension fund related to another pension plan, if the administrator of the other pension plan agrees to accept the payment;
- (b) into a prescribed retirement savings arrangement; or
- (c) for the purchase for the former member of a life annuity that will not commence before the earliest date on which the former member would have been entitled to receive payment of pension benefits under the pension plan.

53. Section 42(1) confers rights, however, not obligations. These rights *supplement* the default option. They do not replace it. In the normal course, the member may choose not to exercise the right to commute his or her entitlement, but to leave it in the plan. The only relevant exception here is s.50(1), the “small pension” exception; where an amount falls below the s.50 threshold, the *PBA* permits the administrator to force a member to commute his or her pension and remove it from the plan. If the pension is above the threshold, however, the statute makes it clear that the choice to commute or not to commute belongs to the member.

54. As we have seen, Boys’ initial pension calculation fell below the s.50 threshold. As his rights subsequently evolved in consequence of the partial wind up, however, it ceased to do so; as of the effective date of the partial wind up, his pension was not a small pension. The key question, then, is whether we should focus our inquiry as to his rights on the date of his actual termination (or on the date his initial benefits were cashed out), or on the effective date of the partial wind up.

55. Shoppers and the Superintendent ask us to focus on Boys’ date of termination, February 11, 2000 (or on 2002 when the cash out was implemented). They argue that because his pension entitlement when it was cashed out fell below the small pension threshold, the administrator acted lawfully when it treated it as a small pension. That original characterization, they argue, cannot be changed. In support of that submission, they rely primarily on the absence from the statute of an express obligation to offer plan members a right to make new choices about previously exercised transfer options if their pension entitlements change as a result of subsequent developments. In addition, as noted above, the Superintendent relies on the statutory discharge provided to a plan administrator under s. 42(11) of the *PBA*. While Superintendent’s counsel did not flesh out this argument in her oral submissions, the implication of the s.42 argument is that if the administrator was discharged of liability when it made the “small pension” lump sum payment in 2002, it cannot now be held liable for any consequences flowing from that payment.

56. In effect, Shoppers and the Superintendent are arguing that Boys’ rights with respect to whether or not to transfer his money out of the plan were ‘carved in stone’ once his initial pension entitlement was calculated and paid out; they cannot be changed regardless of the

partial wind up. In our view, this argument flies in the face of important aspects of the statutory scheme with respect to plan wind ups, set out particularly in ss. 73-74 of the *PBA*. Section 74, dealt with in more detail below, provides a set of special benefits to plan members affected by a full or partial wind up, including early retirement benefits for qualifying employees (“grow-in benefits”) and the immediate vesting of all employer contributions. The effective date for purposes of calculating these benefits is very important for plan members, since it may determine both their eligibility for certain wind up benefits, and the amount of benefits to which they may be entitled. Although the *PBA* requires that an effective date be established for the plan wind up, not all affected employees will have their employment terminated on that date; some may have been terminated before that date, some after, and some not terminated at all. To provide for certainty and uniformity, the legislature has chosen a common “termination” date for employees affected by the wind up. Section 73(1) of the *PBA* provides as follows:

For the purpose of determining the amounts of pension benefits and any other benefits and entitlements on the winding up of a pension plan, in whole or in part:

- (a) the employment of each member of the plan affected by the wind up shall be deemed to have been terminated on the effective date of the wind up;
- (b) each member’s pension benefits as of the effective date of the wind up shall be determined as if the member had satisfied all eligibility conditions for a deferred pension; and
- (c) provision shall be made for the rights under section 74.

Pursuant to s. 73(1), individual affected employees are deemed to be terminated on the effective date of the wind up. Entitlement calculations for each employee, including calculation of any special wind up benefits under s.74, are then to be made as of the date of “deemed termination”, not as of the date of actual termination. If the effective date of the wind up comes after the actual termination date, initial entitlement calculations and pay-outs may already have been made. The clear implication of the statute, however, is that if they have already been done they must be redone, since all pension rights must be determined as of the effective date of the wind up.

57. The issue of the relevant date for calculating individual entitlements in a partial wind up situation was addressed by this Tribunal in *Del Grande et al. v. Shoppers Drug Mart Inc. et al.*, Sept. 8, 2009, FST Decision No. P0330-2008-2 (“*Del Grande No. 2*”), a companion decision to *Del Grande No. 1* arising out of this same partial wind up. One of the issues in *Del Grande No. 2* involved a determination of whether a particular member, Hindman, was entitled to grow-in benefits under s. 74 of the *PBA*. Section 74(1) provides that:

A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

- (a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;
- (b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,
 - i. the normal retirement date under the pension plan, or
 - ii. the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or
- (c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

Hindman had been terminated prior to the effective date of the wind up. The key issue for her was the effective date for purposes of calculating her continuous service. Shoppers and the Superintendent argued that her service should be calculated as of her date of actual termination. Hindman argued that the proper calculation date was the effective date of the partial wind up.

58. The Tribunal determined that the relevant date was the effective date of the partial wind up; Hindman should be deemed to be continuously employed until that date. This gave her enough service to entitle her to grow-in benefits. The Tribunal reasoned:

[T]ermination of employment in the context of partial plan wind up “for the purposes of determining the amount of pension benefits and any other benefits and entitlements on the winding up of a pension plan” - which in the context of subsection 73(1) clearly includes grow-in entitlement under Section 74 - is to be determined on the basis that employment was deemed to have been terminated on “the effective date of the wind up”. (p.20)

The Tribunal went on to observe:

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

59. Shoppers had argued that plan members who terminate prior to the effective date of the partial wind up have ceased to be “members” of the plan before the wind up; they are “former members”, and cannot take advantage of s. 73(1). The Tribunal rejected that interpretation as contrary to the intent of the wind up provisions of the *PBA*:

The clear legislative intent is to protect eligible pension plan members whose employment is terminated in connection with the events precipitating a partial or total plan wind up from the loss of any early retirement benefits for which they might otherwise have become eligible. If, as Shoppers suggests, those members whose employment terminated during the wind up period but prior to the effective date of the wind up are to be considered “former members” and as such not entitled to grow-in, the legislative intent would be defeated, and grow-in would apply only to those members whose employment terminated on or after the effective date of the wind up. This would be inconsistent with the purpose of the Act ... (pp. 21-22).

With respect, we agree.

60. The clear purpose and effect of s. 73(1)(a) is to change the date on which pension entitlement is to be determined for affected plan members, from their individual date of termination to the effective date of the partial wind up, in order to ensure that their grow-in benefits and any other partial wind up entitlements are taken into account. Once Boys was included in the partial wind up group, s. 73(1) clearly requires that his benefits and entitlements under the Plan be determined as of April 22, 2005, the effective date of the wind up. The section does not simply require a calculation of additional wind up benefits; it demands a new and global determination of his “pension benefits” and “any other benefits and entitlements on the winding up of the pension plan”, including grow-in benefits. A new determination of entitlements logically demands a new determination as to the pension options which may flow from those entitlements.

61. It is true that in many cases, new calculations triggered by wind ups would not change pension options; they would simply increase benefit levels. But Boys’ situation, in which a new calculation triggers a new right, is not an anomaly; it may occur with some frequency in a partial wind up situation. In addition to an immediate right to an early retirement pension for those who qualify, s. 74 vests the benefits of plan members whose rights were not originally vested, triggering the right to a pension.⁶ If we were to accept Shoppers’ argument, employees whose terminations took place prior to the effective date of the wind up and who had been forced to cash out their benefits would be deprived of this right to a pension. Such an interpretation would defeat a key purpose of ss.73-74, significantly undermining the protection provided by the *PBA* for a group of plan members who have been consistently recognized by our courts as particularly vulnerable, those affected by plan wind ups: see *GenCorp Canada Inc. v. Ontario (Superintendent, Financial)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.) at para. 16); *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54 at para. 13; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, para. 28.

⁶ Because he was a successor member of the new Plan, Boys’ eight day accumulation of pension credits was already vested under the Plan, as it was required to be by virtue of s.80(1)(b).

62. Shoppers and the Superintendent attempt to build a statutory foundation for their argument on the fact, which we accept, that Shoppers' original cash-out of Boys' pension in 2002 was valid at the time. Shoppers acknowledges the Tribunal's holding in *Del Grande #2* that pension entitlements for Plan members within the partial wind up group must be calculated as of the effective date of the partial wind up. In oral argument, however, Mr. Merskey, Shoppers' counsel, attempted to turn that holding to his advantage. He argued that because Boys' new rights did not click in until 2005, they do not operate retroactively, and do not affect the validity of the original decision. Accordingly, that decision still stands. And because it stands, Mr. Merskey argues, it limits Boys' pension options to those that were available to him in 2002, since any expansion of those options requires the plan administrator to offer options not permitted under the *Income Tax Act*.

63. The Superintendent makes a similar argument. On his behalf, Ms McPhail argues that because Shoppers' conduct was lawful in 2002, Shoppers was discharged from any liability under s. 42(11) of the *PBA*, which provides as follows:

The administrator is discharged on making the payment or transfer in accordance with the direction of the former member if the payment or transfer complies with this Act and the regulations.

This statutory discharge, she argues, precludes any subsequent claim inconsistent with Shoppers' 2002 decision. Boys' current claim falls into this category because it may place the plan administrator in conflict with its obligations under the *Income Tax Act*.

64. To bolster these arguments, both Shoppers and the Superintendent argue that the statute does not provide a right to re-elect pension transfer options; on their face, both s.42 (dealing with transfer options in general) and s.74 (dealing with transfer options in a wind up situation) appear to contemplate a one-time-only opportunity to make a choice. They argue that the right Boys is claiming – a right to change his choice of options – is simply not a right provided by the *PBA*.

65. These arguments all depend for their validity on the proposition that if Boys' options were validly determined in the first place, they cannot be changed or expanded upon without calling into question what was done at that time. For reasons we have already outlined above, we see this proposition as untenable under the *PBA*; it would render meaningless a significant part of a statutory scheme which is clearly designed both to confer new pension rights on employees affected by plan wind ups, and to provide a new fixed point at which those rights will be determined. We accept that Shoppers acted lawfully in 2002, and that the partial wind up does not retroactively render that action unlawful. Even if s.42(11) operates as a discharge with respect to the 2002 transaction, however, it clearly does not provide a discharge applicable to the new rights which were triggered later as a result of the partial wind up. If those new rights create new pension options, those new pension options must be respected. There is no need to provide an explicit statutory right of "re-election" (the terms used by Shoppers and the Superintendent) to bring about this result. The statute explicitly creates a new point of departure for the determination of benefits and entitlements; it follows logically that if that determination creates new pension options, they must be offered at that time.

66. What Boys is claiming here is not a right to re-elect with respect to his pension options. What he is claiming is that the pension option newly triggered by the partial wind up – the option to make his own decision about whether to leave his benefits in the plan as a deferred pension, or to commute and cash them out – must be respected. In our view, this claim is soundly based in the *PBA*.

67. In conclusion on Issue #2, we have determined that as a result of his inclusion in the partial wind up group, Boys' pension entitlement was not a "small pension" within the meaning of the Plan or of the *PBA*; the partial wind up changed the value of his pension benefits on termination, taking his entitlement decisively out of the category of a "small pension". Once that became clear, Shoppers was required to offer him the options for his pension that came with his recalculated entitlement, including the option of taking his benefits as a deferred pension. Shoppers' failure to do so violates the *PBA*.

68. The core of the argument put forward by Shoppers and the Superintendent is that plan members cannot be given the option of a pension once their entitlements have been removed from the plan, even if their rights change in consequence of a plan wind up. Once their statutory interpretation arguments have been disposed of, the essential grounding for this argument is that CRA rules will not allow this result. We turn now to the impact of income tax rules on Boys' situation.

Issue #3: What is the effect of any Canada Revenue Agency ruling, if any?

69. While we have taken many paragraphs to explain our determination on Issue #2, we view our conclusions as relatively straightforward ones, flowing inescapably from the provisions and the intent of the *PBA*. Our conclusions are entirely consistent with the Tribunal's conclusion in *Del Grande No. 2*, to which both Shoppers and the Superintendent were parties.⁷ Both those parties nevertheless argue that Boys' claim should be dismissed. While they do not put it in quite this way, their argument, in effect, is that regardless of what rights Boys may have under the Plan or the *PBA*, those rights cannot be recognized because allowing Boys to choose a pension might place Shoppers in violation of the *Income Tax Act*. They point out that the ultimate consequence of non-compliance with tax rules is de-registration of the Plan, with drastic tax implications for the employer and all plan members. To their credit, neither Shoppers nor the Superintendent sought to exaggerate the consequences of a decision in Boys' favour in this case; it was accepted that CRA does not bring out the 'big stick' of de-registration for every minor deviation from tax rules. Nevertheless, they argue, compliance with tax rules is an important duty of plan administrators. In effect, they argue that this duty is so important that it can excuse what would otherwise be a violation of provincial law.

70. We accept without hesitation that compliance with tax rules is important, and we take very seriously the dilemma in which Shoppers may find itself if it were faced with a conflict between the provincial regulatory regime and federal income tax rules. That is a consequence we would certainly seek to avoid. Indeed, so important is harmony between tax rules and provincial

⁷ Boys also appears to have had a role in *Del Grande No.2*, both as a witness and as the lay representative of Hindman, the employee whose entitlement to grow-in benefits depended on the date at which her continuous service was calculated.

regulatory regimes that where the *PBA* or the provisions of a plan text are ambiguous, an interpretation that harmonizes with income tax rules should normally be preferred over one that does not. However, such an interpretive principle provides no assistance in this case. In our view, the *PBA* is not ambiguous on the key issue; Boys is clearly entitled to the deferred pension he seeks.

71. In addition, it is by no means clear to us that respecting Boys' claim will place Shoppers at odds with the income tax rules. As framed by the parties, Issue #4 asks, by implication, first whether there *is* a CRA ruling affecting the case ("if any"), and only then what its effect might be.⁸ In fact, there is no CRA ruling in Boys' case that would be a direct impediment to an order from this Tribunal in favour of Boys. The simple answer to the question posed by Issue #3 is that no CRA ruling is in effect.

72. That simple answer would, of course, ignore the essence of the problem as Shoppers sees it. Shoppers' argument is that Boys' case is governed by the aftermath of the Groskopf case, addressed by the Tribunal in *Del Grande No.1*. In that case, the Tribunal ordered Shoppers to permit Groskopf to treat his grow-in entitlement as a deferred pension, despite the fact that he had elected to commute his initial benefit entitlement. That order was made conditional on CRA approval, and CRA did not approve this option. Both Shoppers and the Superintendent argue that Boys' case is indistinguishable from Groskopf's case; if CRA did not approve a deferred pension option for Groskopf, they argue, it will not approve this option for Boys, and seeking approval would simply be a futile and expensive exercise.

73. We do not agree. Boys' case is distinguishable from Groskopf's situation in two important respects. First, Groskopf was initially offered the option to leave his benefit in the Plan, and freely chose not to; instead, he chose to commute and transfer it out. Boys, by contrast, was not offered the option of a deferred pension; he was forced to commute, and he signed his election form only when Shoppers advised him that it was proceeding with commutation in any event. Second, the order in Groskopf would have produced an outcome in which part of Groskopf's entitlement would be commuted, and part treated as a pension. Boys, by contrast, wants his entire entitlement treated as a pension.

74. Why are these distinctions important? The first distinction highlights what Boys will lose out on here if Shoppers' position ultimately prevails. For Groskopf, the partial wind up changed the size of his pension, but it did not change his right to a pension. He turned down a pension when it was initially offered, but subsequently sought to divert part of his entitlement into a pension when the numbers changed. Boys was never given that option. For him, the recalculation of his entitlement opens up a new option which had previously not been recognized. For him, the issue is not merely the size of the pension, but whether he gets any pension at all from the Plan.

75. The second distinction goes directly to the heart of the tax policy that dictated the result in the Groskopf case, according to Teichman's evidence. Teichman testified that CRA's refusal to approve the option conditionally ordered by the Tribunal in the Groskopf case was based on its desire to avoid what was euphemistically described in evidence and argument as a "tax

⁸ The issues were framed prior to Shoppers being joined as a party by order dated September 27, 2011.

planning opportunity”: an opportunity for plan members to commute part of their pension entitlement, and direct another part into a deferred pension. Such a strategy would give a plan member access to tax deferral ‘room’ not ordinarily available. Teichman conceded in his evidence that what Boys seeks here – to put all his pension entitlement into a deferred pension – does not engage this policy.⁹ Accordingly, there is no reason to assume that CRA will take the same view on Boys’ case as it did on Groskopf’s.

76. In order for Boys to achieve his objective, of course, it will be necessary to effect a reversal of the commutation of his entitlement. In this case, it is fortunate that the amounts involved are so small that they do not pose a practical impediment. Boys advises that the money remains tax-sheltered, and he is quite prepared to return it to the Plan. That may involve, as Teichman testified, some complexity. It may be necessary for the administrator to approach the CRA for approval to unwind the transaction. It may be time-consuming and involve some expense to the Plan in professional fees. It may be, to use Teichman’s term, “messy”. But we are very far from persuaded that it is not possible. We are not prepared to hold that Boys should be denied rights to which we have found that he is entitled, simply because respecting those rights may involve some expense and inconvenience. To permit Boys’ rights to be driven by such considerations would defeat important policy objectives of the *PBA*, including the policy in favour of pension benefits over cash-outs except in very narrow circumstances, and the special rights accorded to plan members caught like Boys in business reorganizations.

77. Even if there turns out to be real conflict between income tax requirements and *PBA* requirements, however, the solution to such conflict would *not* be to ignore the rights conferred by the *PBA*. In our view, in the event of a genuine clash, any federal impediment to implementing provincial regulatory law should be dealt with as a matter of remedy, and not as an excuse to ignore provincial law. We turn now to the issue of remedies.

Issue No. 4: What remedies should flow from the Tribunal’s ruling?

78. At one level, the remedial issue is a straightforward one. Boys has asked us to order that Shoppers provide him with a deferred pension option. We have found that he is entitled to this option. In his NOID, the Superintendent has indicated his intention to refuse to make the order Boys seeks. That NOID should be set aside, and that in its place, the Superintendent should issue an order that Shoppers provide Boys with a deferred pension option. In order to carry out that order, it is likely that Shoppers must reverse Boys’ original payout and offer Boys the deferred pension option on his full entitlement as at the effective date of the partial wind up. There may be other ways of implementing our order, however; it is not our intention to tie the hands of the administrator as to mechanics, provided that Boys’ right to a deferred pension is ultimately respected.

79. The Superintendent and Shoppers submit that if we were to make an order in Boys’ favour we should make that order conditional, as was done in *Del Grande No. 1*, in order to avoid placing Shoppers in a position where it is faced with conflicting legal obligations. We are not disposed to provide open-ended conditionality, for three reasons.

⁹ This would particularly be the case since Boys took his entitlement under the Imasco Plan as a deferred pension.

80. First, based on Mr Teichman’s evidence, CRA approval may not be necessary; whether or not to seek it is a matter of the administrator’s discretion, and the plan administrator may decide in good faith that CRA approval is not required.

81. Second, the manner in which Shoppers implemented the prior order in the Groskopf situation raises some concerns about the impact of open-ended conditionality on the affected member’s rights and interests. The Tribunal made its order conditional on CRA approval, but ordered that Shoppers “make reasonable efforts to seek that approval”. Teichman’s evidence was that CRA initially granted its approval, based on the facts fully set out in his letter. It was Teichman’s subsequent phone call that changed CRA’s opinion. We do not doubt Teichman’s personal good faith in making that phone call; he appears to have been driven by a genuine professional concern that CRA was wrong. His good faith does not alter that fact, however, that an initial CRA approval was converted into a refusal to approve as a direct result of the intervention of Shoppers’ professional representative. We doubt if a process such as this was what the Tribunal in *Del Grande No.1* contemplated when it made its “reasonable efforts” order. With the benefit of hindsight, we think it inappropriate that the ultimate fate of Boys’ pension rights should be determined through a process which does not appear to provide Boys with a reasonable opportunity to defend his interests.

82. Third and most important, we have made an unequivocal finding that Boys has a right under the *PBA* to a deferred pension. The statute does not make that right conditional. We do not anticipate that a real clash between provincial and federal law will emerge here. As we have explained in our reasons, based on the evidence and argument before us, we see the Groskopf case as entirely distinguishable from Boys’ situation. If there is a conflict, however, and CRA will not permit Shoppers to offer Boys a deferred pension, this will not obviate Boys rights under the *PBA*. Some other remedy will have to be found. In our view, the appropriate course of action in these circumstances is for this Tribunal to remain seized on the issue of remedy in the event that Shoppers determines that CRA approval must be sought to permit our order to be carried out, and such approval is not forthcoming. Accordingly, we have framed our order so as to permit the parties to return to us on the issue of remedy should it be necessary to do so.

ORDER

83. Accordingly, we direct the Superintendent:

- a) To set aside the NOID issued on May 25, 2011;
- b) To order Shoppers to offer Boys the option of having his pension entitlement treated as a deferred pension¹⁰;
- c) To order Shoppers to bring the matter back before this Tribunal, in the event that it is unable to carry out the Superintendent’s order under Part b) because it cannot obtain necessary approvals from the Canada Revenue Agency.

¹⁰ See note 1, above ; if Boys’ entitlement is now an entitlement to an immediate pension, he must be offered an immediate pension.

84. We remain seized of this matter for purposes of addressing the question of what remedies should be ordered for Boys in lieu of the deferred pension to which he is entitled under the *PBA*, in the event that the matter is brought back before us pursuant to Part c) of the above direction.

Dated at Toronto, Ontario, this 7th day of December, 2011.

“Elizabeth Shilton”

Elizabeth Shilton, Member of the Tribunal
and Chair of the Panel

“Heather Gavin”

Heather Gavin, Member of the Tribunal
and of the Panel

“Shiraz Bharmal”

Shiraz Bharmal, Member of the Tribunal
and of the Panel