

**FST File No. P130-2000**  
**Decision No. P0130-2000-1**

**IN THE MATTER OF** the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended (the "Act");

**AND IN THE MATTER OF** Partial Wind Up Reports submitted by Imperial Oil Limited to the Superintendent of Financial Services respecting the Imperial Oil Limited Retirement Plan (1988), Registration Number 347054 (the "IOL Plan") and the Imperial Oil Limited Retirement Plan for Former Employees of McColl-Frontenac Inc., Registration Number 344002 (the "MFI Plan");

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

**BETWEEN:**

**IMPERIAL OIL LIMITED**

**Applicant**

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES**

**Respondent**

**BEFORE:**

Mr. Colin H.H. McNairn, Vice Chair of the Tribunal  
and Chair of the Panel

Mr. Louis Erlichman, Member of the Tribunal  
and of the Panel

Mr. William M. Forbes, Member of the Tribunal  
and of the Panel

**APPEARANCES:**

For Imperial Oil Limited  
Mr. J. Brett Ledger  
Ms. Lindsay P. Hill

For the Superintendent of Financial Services  
Ms. Deborah McPhail  
Ms. Frederica Rotter

**HEARING DATE:** July 25, 2001

## **REASONS FOR ORDER**

### The Background

This proceeding was initiated by the Applicant by filing a Notice of Request for Hearing with the Tribunal. The Request calls into question a Notice of Proposal by the Superintendent to refuse to approve partial wind-up reports filed by the Applicant in connection with the partial wind-up of two of its pension plans, namely its IOL Plan and its MFI Plan (the "Plans"). Those wind-ups had been ordered by the Superintendent because of the reorganization of the Applicant and the closure of one of its refineries, all during the period from February 4, 1992 to June 30, 1995 (the "Partial Wind Up Period").

The stated grounds for the Notice of Proposal include the following;

- the reports do not reflect the liabilities associated with all of the members of the Plans whose employment with the Applicant was terminated during the Partial Wind Up Period; and
- the reports fail to provide "grow-in benefits," pursuant to section 74 of the Act, in respect of all members of the Plans affected by the partial wind ups who earned benefits while working in Ontario and whose combination of age and years of service with the Applicant is at least 55.

By a Notice of Motion dated June 29, 2001, the Applicant moved for an order of the Tribunal directing the Superintendent to answer certain interrogatories that it had posed and to produce the documents requested in those interrogatories.

### The Issues

At a pre-hearing conference held on June 19, 2001, the parties agreed, in anticipation of the motion, that the issues in this proceeding that are relevant to the motion should be framed, for the purposes of the motion, as follows;

### Issue 1

- (a) Did any members or former members of the Plan[s] who ceased to be employed by Imperial Oil Limited during the partial wind up period as set out in the Notice of Proposal cease to be employed as a result of the reorganization or discontinuance of all or part of Imperial Oil Limited's business, if their circumstances fell within one of the following:
- (i) employees whose fixed term contract of employment was complete by its terms (e.g. summer students, co-op students, and employees hired on a contract basis for a specified period of time);
  - (ii) employees who became disabled and received disability benefits;
  - (iii) employees who allegedly voluntarily resigned;
  - (iv) employees who were transferred to an affiliated company that did not participate in the Plans;
  - (v) employees who retired under the terms of the Plans at normal retirement age;
  - (vi) employees who retired under the disability retirement provisions of the Plans;
  - (vii) employees whose employment was terminated as a result of death; and
  - (viii) employees whose employment was allegedly terminated for cause.
- (b) Do the doctrines of legitimate expectation, abuse or improper exercise of discretion or estoppel apply in the circumstances of this case with respect to the issue of which members and former members must be included in the partial wind up group?

### Issue 2

- (a) Does the *Pension Benefits Act* (Ontario) (the "Act") require that "grow-in benefits" under section 74 be granted to members and former members of the partial wind up group who were employed in a province other than Ontario or Nova Scotia on the date that their employment ceased, in relation to any prior periods of employment with Imperial Oil in Ontario or Nova Scotia? If so, on what basis should such benefits be calculated?
- (b) If the answer to issue (a) is "yes", can periods of employment in provinces other than Ontario or Nova Scotia be excluded when calculating the "grow-in benefits" under section 74 of the Act and section 79 of the *Pension Benefits Act* (Nova Scotia) payable to all members and former members whose employment ceased in Ontario or Nova Scotia?
- (c) If the answer to issue (a) is "yes", do the doctrines of legitimate expectation, abuse or improper use of discretion or estoppel apply in the circumstances of this case with respect to the calculation of "grow-in benefits" under section 74 of the Act and section 79 of the *Pension*

*Benefits Act* (Nova Scotia) for members who ceased to be employed in the circumstances set out in issue (a)?

There is a third issue that will have to be addressed at the main hearing in this proceeding, but none of the interrogatories to which the Applicant wants answers relates to that issue.

### The Interrogatories

Some of the interrogatories posed by the Applicant have been answered by the Superintendent to the satisfaction of the Applicant. Other interrogatories do not now require answers in light of certain modifications to the detailed grounds for the Superintendent's Notice of Proposal that were agreed by the Superintendent at the pre-hearing conference.

#### The First Set of Interrogatories

The first set of interrogatories to which the Applicant continues to insist on responses can be summarized as follows;

- how many partial plan wind ups were ordered by the Superintendent during the period January, 1988 to October, 2000 pursuant to,
  - paragraph 69(1)(d) of the Act (significant number of members of the plan ceasing to be employed as a result of discontinuance or reorganization of business),
  - paragraph 69(1)(e) of the Act (discontinuance of a significant portion of the business at a specific location)?
- how many situations were there in respect of such wind ups (ordered under each of the noted paragraphs of the Act) where employees were terminated during the partial wind up period for the following reasons;
  - the expiry of a fixed term contract of employment;
  - disability;
  - voluntary resignation;
  - transfer to an affiliated company that did not participate in the Plans;
  - retirement at normal retirement age under the terms of the Plans;
  - early retirement under the terms of the Plans;
  - retirement due to disability under the terms of the Plans;
  - death; and
  - cause for dismissal?
- how many wind-up reports (in respect of wind ups ordered under each of the noted paragraphs of the Act) included employees in any such category in the partial wind-up group?
- did the Superintendent refuse to approve any partial wind up reports (in respect of wind ups ordered under each of the noted paragraphs of the Act) because the employees in any such category were not included in the relevant partial wind-up group?

The test that we have adopted for ordering answers to interrogatories and the disclosure of documents is that the information sought is arguably relevant to an issue in the proceeding that is not a frivolous issue, that the information is sufficiently particularized to facilitate a response and that the information does not enjoy the benefit of privilege (see *Monsanto Canada Inc. v. Superintendent of Financial Services et al.*, FST File No. P0013, FST Decision # 3, June 2, 1999).

The Applicant maintained, among other things, that the answers to the interrogatories set out above were arguably relevant to the issue of whether the doctrines of legitimate expectation, abuse or improper exercise of discretion or estoppel apply, in the circumstances of this case, so as to affect the determination of which members or former members of the Plans should be included in the partial wind up groups (Issue 1(b) above). The Superintendent responded by saying that none of those doctrines can have any application in this case and that her office does not make inquiries about the individual circumstances of plan members who cease to be employed during a partial wind up period. We note that there is nothing in the Act, the Regulation under the Act or the FSCO Pension Guidelines that would suggest that a partial wind up report is expected to set out the circumstances of members or former members of the pension plan who have ceased employment with the employer during the partial wind up period and are included in or excluded from the partial wind up group. The only guidance offered by any of these sources as to the proper composition of the partial wind up group is very general, namely that the group should include those members "affected by" the partial wind up (see section 1.2.3 of FSCO Pension Guideline W100-101) or should include those members who have ceased employment "as a result of" the event that precipitated the partial wind up (see page 2 of FSCO Pension Guideline W100-301).

What the Applicant hopes to be able to argue, depending on the answers revealed by the interrogatories, is that the Superintendent has not generally taken the position that any of the categories of employees referred to in the interrogatories should be included as part of a partial wind up group and, therefore, cannot now do so (at least without some advance notice of a change of practice), given the doctrines of legitimate expectation, abuse or improper exercise of discretion and estoppel. The Applicant would also argue that in the event of any ambiguity in the provisions of the Act relating to the proper make-up of a partial wind up group, the practice of the Superintendent could be a relevant factor in arriving at a proper interpretation of those provisions.

The first set of interrogatories relates to situations where the Superintendent plays two roles; first, in ordering a partial wind up of a plan and, second, in approving or refusing to approve, the report in respect of such a wind up. In deciding on whether to order a partial wind up under paragraph 69(1)(d) of the Act, the Superintendent must focus on whether a significant number of members of a pension plan have ceased to be employed as a result of the discontinuance of part of the business of the employer or as a result of the reorganization of the business of the employer. It is certainly possible that, in some instances, the inclusion or exclusion of certain of the categories of employees, referred to in the interrogatories, may be determinative of the significance of the number of affected

members of the plan. Indeed, the Superintendent has recently taken the position, in a proceeding before this Tribunal, that some, at least, of those who terminated their employment with an employer voluntarily during a partial wind up period should be included for the purpose of determining whether a significant number of employees are affected by a particular reorganization (see *London Life Insurance Company v. Superintendent of Financial Services et al.*, FST Decision # 23, February 7, 2001). Thus, although the Superintendent may not make inquiries as to the circumstances of employees who cease to be employed during a partial wind up period, she has not always been neutral as to the inclusion or exclusion of some of the categories of employees referred to in the interrogatories.

Therefore, while there may not be a conscious and consistent practice on the part of the Superintendent as to the treatment of all or some of the categories of employees, referred to in the interrogatories, we think that the Applicant should have the opportunity of exploring the possibility that there is such a practice of a kind that would assist in making its proposed arguments. Although the existence of such a practice might be elicited through the evidence of actuaries and others who have dealt with the Superintendent's office in this regard, that would be a much less efficient way of demonstrating the practice than obtaining answers to the interrogatories and would likely prolong the hearing in this matter. This is a relevant consideration for us; see Rule 19.01(d) of the Interim Rules of Practice and Procedure of the Financial Services Tribunal.

The Superintendent also maintained that the answers to these interrogatories were not arguably relevant to any of the issues in this proceeding because none of the potential arguments of the Applicant, to which the interrogatories relate, was available to it in the circumstances of this case. With respect to the argument based on the doctrines of legitimate expectation and estoppel, the Superintendent said that this argument was foreclosed by the decision of the Ontario Divisional Court in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (2001), 198 D.L.R. (4<sup>th</sup>) 109, and by other judicial decisions.

We do not think that the settled law in Ontario on either of these doctrines is such as to preclude all realistic possibility of the Applicant successfully relying on such a doctrine as against the Superintendent in a proceeding, such as this, involving an application of the Act. Although *Monsanto* also arose under the Act, the issues and circumstances were quite different from those in this proceeding. Therefore, we conclude that the answers to the first set of interrogatories are arguably relevant to Issue 1(b) and that Issue 1(b) is not frivolous.

### The Second Set of Interrogatories

The second set of interrogatories to which the Applicant continues to insist on answers involve questions about the practices, policies and internal documents of the Superintendent with respect to the acceptance or refusal of partial wind up reports in which grow-in benefits are provided (and the method of calculation of the relevant

benefits), and reports in which such benefits are not provided, in either case for employees who were;

- employed by the employer in Ontario or Nova Scotia at some time but were employed elsewhere at the time their employment with the employer ceased;
- employed by the employer in Ontario or Nova Scotia when their employment with the employer ceased but had been employed elsewhere during their term of service with the employer.

These interrogatories also ask about the practices, policies and internal documents of the Superintendent concerning the reduction of grow-in benefits, in either of the above situations, on account of service outside of Ontario and Nova Scotia. In the event that there are policies and internal documents on the subject, the Applicant asks for copies.

The Applicant maintained that the answers to these interrogatories are arguably relevant to the issue of whether the doctrines of legitimate expectation, abuse or improper exercise of discretion or estoppel apply, in the circumstances of this case, to affect the calculation of grow-in benefits for members of the Plans who were working outside Ontario and Nova Scotia at the time their employment with the Applicant ceased but who worked in Ontario or Nova Scotia at some time during their term of service with the Applicant (Issue 2(c)). The Applicant also says that the answers are potentially relevant should we find that there is any ambiguity in the provisions of the Act that determine the entitlement to grow in benefits of those working outside Ontario and Nova Scotia at the time of a partial wind up but who previously worked in either of those provinces.

The Superintendent maintained, among other things, that the answers to these interrogatories are not arguably relevant to the issue relating to the effect of the doctrines of legitimate expectation and estoppel because the decision of the Ontario Divisional Court in *Monsanto* and other judicial decisions precluded the Applicant's potential argument on that issue. The Superintendent also claimed privilege and confidentiality for internal documents prepared for the Minister of Finance and the Superintendent containing advice and discussion with respect to Issue 2 matters, arguing that those documents were of tenuous relevance in any event.

We come to the same conclusion on the first of these positions of the Superintendent as we did in respect of her comparable position on the first set of interrogatories. We do not think that the settled law in Ontario on legitimate expectation or estoppel is such as to preclude any realistic possibility of an argument based on either of those doctrines succeeding against the Superintendent in a case, such as this, involving the application of the Act. Therefore, we conclude that the answers to the second set of interrogatories are arguably relevant to Issue 2(c) and that Issue 2(c) is not frivolous.

As to the second position of the Superintendent, we conclude that she is not entitled to object to the disclosure of documents in proceedings before this Tribunal on the basis that they constitute confidential material prepared for a Minister or other government official. If the law of privilege were to apply to any of those documents, say because they

represent confidential communications to the Crown from its counsel, the Superintendent would be entitled to resist disclosure.

**ORDER**

We order the Superintendent to respond to the first and second sets of the Applicant's interrogatories in this matter within six weeks of the date of this order, subject only to the qualification that the Superintendent need not produce any documents or reveal any communications to which the law of privilege applies.

DATED at Toronto, Ontario this 10th day of September, 2001.

“Colin H.H. McNairn”  
Colin H.H. McNairn, Vice Chair of the  
Tribunal and Chair of the Panel

“Louis Erlichman”  
Louis Erlichman, Member of the Tribunal  
and of the Panel

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