

FINANCIAL SERVICES TRIBUNAL

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., 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:
Ms. Lindsay P. Hill

For the Superintendent of Financial Services:
Ms. Deborah McPhail

HEARING DATE:

July 24, 2002

REASONS FOR ORDER

The Background

This proceeding was initiated by the Applicant, Imperial Oil Limited, by filing a Notice of Request for Hearing with the Tribunal. The Request calls into question a Notice of Proposal by the Superintendent of Financial Services (the “Superintendent”), dated October 3, 2000, 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 its refineries. The Plans were to be wound up in relation to those members and former members of the Plans who ceased to be employed by the Applicant, as a result of these actions, during the period beginning February 4, 1992 and ending on the later of June 30, 1995 and the date the last member employed at the refinery ceased employment (the “Partial Wind Up Period”). We refer to this group of members and former members as the “Partial Wind Up Group”.

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 with those interrogatories (the “Initial Motion”).

That motion was heard on July 25, 2001. The Tribunal disposed of the Initial Motion by order, dated September 10, 2001, directing the Superintendent to respond to the interrogatories and requests for production within six weeks of the 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. That order was supported by written reasons of the Tribunal (see the Pension Bulletin, vol. 11, issue 1 (Jan., 2002), at pp. 155-160).

Following the order, the Superintendent provided responses to the interrogatories and requests for production by letters to counsel for the Applicant dated October 23, 2001 and November 15, 2001, but the Applicant has taken the position that the responses are deficient. Accordingly, by further notice of motion, dated June 7, 2002, the Applicant moved for an order of the Tribunal directing the Superintendent to provide further and better answers to certain of its interrogatories and to produce the documents referred to therein (the “Current Motion”).

The Issues in the Proceeding

For the purposes of both the Initial Motion and the Current Motion, the parties agreed that the issues in this proceeding that are relevant to the motions should be framed and grouped as follows;

Issue 1

- (a) Did any members or former members of the Plans who ceased to be employed by the Applicant 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 the Applicant’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 or former members must be included in the Partial Wind Up Group?

Issue 2

- (a) Does the Act require the “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 the Applicant 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 employees 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 or requests for production relate to that issue.

The Interrogatories and Requests for Production

Re Issue 1

The first set of interrogatories and requests for production to which the Applicant continues to insist on responses or more complete 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 (the “sample period”) pursuant to,
 - paragraph 69(1)(d) of the Act (significant number of members of a 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;
 - 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?

Re Issue 2

The second set of interrogatories and requests for production to which the Applicant continues to insist on responses or more complete responses can be summarized as follows;

- how many of the partial wind up reports filed with the Superintendent during the sample period provided, and how many did not provide, for “grow-in benefits” for employees who were employed in Ontario or Nova Scotia at some time but were employed elsewhere at the time their employment ceased and how many of the reports providing, and of the reports failing to provide, such benefits were approved and how many refused approval (giving the name and date of the plans in respect of which there was a refusal) and how many eliminated non-Ontario and non-Nova Scotia service from their calculation of “grow-in benefits”?
- how many of the partial wind up reports, filed with the Superintendent during the sample period, included in the partial wind up group employees who were employed in Ontario or Nova Scotia when their employment ceased but were employed elsewhere during some period of their employment, how many of these reports did not provide for “grow-in benefits” to such employees in respect of their non-Ontario and non-Nova Scotia service, and how many of these reports were approved and how many refused approval (giving the name and date of the plans in respect of which there was a refusal)?
- provide copies of all memoranda, meeting notes and other documents prepared by the Superintendent and her staff and any prior practices regarding the provision of “grow-in benefits” to employees in the circumstances described in the first paragraph, including the reduction of benefits for non-Ontario and non-Nova Scotia service, and with respect to the reduction of “grow-in benefits” to employees in the circumstances described in the second paragraph.

The Purpose

On the Initial Motion, the Applicant maintained that the responses to the interrogatories and the requests for production were relevant to the present case in the determination, particularly, of issues 1(b) and 2(c) referred to above. Among other things, they might reveal whether there was a practice on the part of the Superintendent,

- to permit the exclusion of any of the categories of plan members described in issue 1(a) from partial wind up groups,
- to treat final employment by a plan sponsor in Ontario or Nova Scotia, rather than employment by that plan sponsor at some time in Ontario or Nova Scotia, as the criterion for inclusion in partial wind up groups, or
- to reduce “grow-in benefits” on account of service outside Ontario or Nova Scotia.

The sample period of January, 1988 to October, 2000, to which a number of the interrogatories relate, was apparently chosen by the Applicant on the basis that “grow-in benefits” on a wind up were first added to the Act at the beginning of the period and the Notice of Proposal in this matter was issued at the end of the period.

Analysis

The Superintendent filed an affidavit of Ms. Lynda Ellis, Manager, Technical Consulting of the Pension Plans Branch of the Financial Services Commission of Ontario, in response to the Current Motion, on which she was subject to cross-examination by the Applicant. In her affidavit, Ms. Ellis attests to the fact that, following the Tribunal’s decision on the Initial Motion, she went through the records of the Pension Plans Branch to determine how many partial wind ups were processed during the sample period and the state of the records with respect to those partial wind ups. As a result of that exercise, she determined that the records (which are partly paper and partly electronic) do not differentiate between partial wind ups that were ordered by the Superintendent and those that were not and do not disclose the paragraph of the Act that may have provided the basis for wind ups ordered by the Superintendent. She estimated that there were 1047 partial wind up cases, including both voluntary and directed wind ups, that were processed during the sample period. On cross-examination, Ms. Ellis said that the electronic database of the Pension Plans Branch only reached back to the end of 1992 so that the figure of 1047 partial wind up cases included a “best guess” for that part of the sample period that preceded the electronic database.

To break down the partial wind up cases in order to determine those that are relevant to the interrogatories and to uncover any evidence of the Superintendent’s practices that the Applicant was after, it appears that all of the estimated 1047 files would have to be examined. Given the size of the files, ranging between a minimum of 75 pages and a maximum of several bankers’ boxes, Ms. Ellis estimated that it would take an experienced and trained employee of the Pension Plans Branch approximately 13 weeks (523 hours) to 26 weeks (1047 hours) of work to go through the files. She also noted that

approximately 40% of the files were stored offsite in various locations and that, for this and other reasons, it would take about three weeks to assemble the files for review.

Of course, the Superintendent should have obtained all of the information that is now disclosed by Ms. Ellis' affidavit before the hearing on the Initial Motion and put it into evidence on that occasion. That was not done and the only excuse that was offered at the hearing on the Current Motion was that the Superintendent was confident that the Initial Motion would not be successful. Had the information in the affidavit been available on the hearing of the Initial Motion, we might have been persuaded to limit the number of files to be reviewed for the purpose of answering the interrogatories and even if we had not imposed such a limit, the interrogatories could have been answered by now on the basis of a full review of the files on Ms. Ellis' estimate of the time that would be involved in that review.

As we indicated in our reasons for decision on the Initial Motion, a threefold test is to be applied in determining whether answers to interrogatories and the disclosure of documents should be ordered, in particular;

- is the information sought arguably relevant to an issue in the proceeding that is not a frivolous issue,
- is the information sufficiently particularized to facilitate a response, and
- is the information of a kind that does not enjoy the benefit of privilege?

As this Tribunal said in its reasons for orders made in response to a motion to require the disclosure of documents and responses to interrogatories in *Monsanto Canada Inc, v. Superintendent of Financial Services* (see Pension Bulletin, vol. 8, issue 2 (Sept. 1999), at p. 79), the Tribunal “should, generally, be prepared to make a disclosure order against a party to a proceeding before it, requiring the production of documents or answers to interrogatories” if the above noted test is satisfied (emphasis added).

On the Current Motion, the Superintendent maintained that there had been substantial disclosure, particularly in response to the Applicant's second set of interrogatories (relating to issue 2), and that further disclosure was unnecessary to assist the Applicant in its expected arguments at the main hearing in this proceeding, that the information still being sought was irrelevant, and that any limited value of such information was outweighed by the onerous nature of the requests. The Applicant maintained that the Superintendent was, in effect, attempting to re-argue the Initial Motion which, it said, should not be permitted at this stage.

We do not think that substantial compliance with an order to respond to interrogatories or to produce documents is sufficient and we are not prepared to re-open the question of the relevance of the information that is being sought by the Applicant. In our reasons on the Initial Motion, we concluded that the information sought by the Applicant, through the interrogatories and requests for production, was arguably relevant. However, we are prepared to consider, albeit it at this late stage of the process, the hardship involved in obtaining the information sought by the Applicant when set against the potential value of

the information to the Applicant for the purpose for which it may be used in this proceeding. While that hardship was considered on the Initial Motion, it was on the basis of a general allegation of hardship, without the benefit of any precise evidence of that hardship, which has now been brought forward through Ms. Ellis' affidavit.

We note that disclosure need not be "all or nothing" and should there be particular hardship in producing all the information that is arguably relevant, a practical solution may be to narrow the scope of the disclosure order (as in *First Choice Capital Fund Ltd. v. First Canadian Capital Corp.*, [2000] S.J. No. 574, at p. 5 (Sask. Q.B.)).

Having regard to the detailed evidence that we have now received, through Ms. Ellis' affidavit, as to what would likely be involved in responding to the interrogatories about partial wind ups during the sample period, we think that the Superintendent should be entitled to respond on the basis of a review of one-half of the files on partial wind up cases that were processed during the period from January 1, 1993, the approximate date from which the electronic database was implemented, to October, 2000. The files to be reviewed should be selected on an arbitrary basis – in essence, every second file in the chronological, alphabetical or other neutral order in which the files are recorded on the database so that the files reviewed will be a representative sample. If there is any dispute between the parties as to the appropriate method of selecting the files for review, the matter may be spoken to before the chair of the panel that has heard the Current Motion. We believe that this modified direction will provide information about the practices of the Superintendent with a sufficient degree of precision to enable the Applicant to use the information, depending on what it reveals, for the intended purpose.

Given the delays in this proceeding that have already occurred as a result of disputes by the Superintendent over the interrogatories and productions that are the subject of the Current Motion, we believe that the time for response to any new order that we make on this Motion should not extend beyond six weeks, which was the time for response to our order on the Initial Motion, even though this may impose some hardship on the Superintendent by requiring the diversion of considerable resources to providing a response in a timely manner.

We have yet to consider the third outstanding interrogatory with respect to Issue 2 – more accurately a request for production of documents, specifically memoranda, meeting notes and other documents relating to the Superintendent's position on the provision of "grow-in benefits" to employees who worked in Ontario or Nova Scotia at some time and outside those provinces at another time. The Superintendent has provided some material to the Applicant in response to this request, as enclosures with letters to counsel for the Applicant dated April 18, 2001 and October 23, 2001. In the second of these letters, the Superintendent's counsel has expressed a willingness to provide additional material in response to this request that consists of documentation indicating the approach taken by the Superintendent on two particular partial wind up cases, provided that the confidentiality of this material is maintained. We think that a reasonable assurance of confidentiality can be secured through an undertaking of confidentiality by the Applicant. Failing agreement on the terms of such an undertaking, the chair of this panel is prepared

to entertain a motion for an order of confidentiality that is brought forward by either of the parties. Subject to the disclosure of this additional material, the Superintendent appears to have responded to our order on the Initial Motion as it relates to the disclosure of memoranda, meeting notes and other documents. However, the Applicant is entitled to persist in its request for the disclosure of this material so that the Superintendent continues the search for any additional material of this nature with a view to its disclosure before the deadline for responding to interrogatories and making productions that we impose in our order on the Current Motion.

Finally, the Applicant requested an order for the recovery of its costs on the Current Motion. We will deal with that request at the conclusion of the main hearing in this proceeding.

Disposition

We order the Superintendent to respond to the interrogatories and requests for production to which the Applicant continues to insist on responses, as more particularly set out in Appendix "A" to the Applicant's notice of motion, within six weeks of the date of this order, subject only to the qualifications that the Superintendent need not produce any documents or reveal any communications to which the law of privilege applies and that the responses to the interrogatories may be based on a review of one half of the files on partial wind ups that were processed during the period January, 1993 to October, 2000.

Dated at Toronto, Ontario this 11th day of September, 2002.

"Colin H.H. McNair"
Colin H.H. McNair, Vice Chair of the
Tribunal and Chair of the Panel

"Louis Erlichman"
Louis Erlichman, Member of the
Tribunal and of the Panel

"William M. Forbes"
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