

FINANCIAL SERVICES TRIBUNAL

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

AND IN THE MATTER OF the Consent of the Superintendent of Financial Services (the "Superintendent"), pursuant to the PBA, to the transfer of assets from the Amended Pension Plan for Salaried Employees of National Steel Car Limited, Registration No. 0215020, to the Amended Pension Plan for the Hourly-Paid Employees of National Steel Car Limited, Registration No. 0215038;

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

BETWEEN:

**T. STEWART BAXTER, GARY HOTRUM, GEORGE WILBUR and JUNE WILLIAMS,
Representatives of Certain Members and Former Members of the Amended Pension Plan for
Salaried Employees of National Steel Car Limited**

Applicants

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

-and-

NATIONAL STEEL CAR LIMITED

Respondent

-and-

**MAURICE ROZON, CHRIS WINTERBURN and AL REICHERT of the UNITED
STEELWORKERS OF AMERICA, LOCAL 7135 (the "USWA") on their own behalf and on
behalf of the USWA Members of the Amended Pension Plan for Hourly-Paid Employees of
National Steel Car Limited**

Respondents

BEFORE:

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

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

Mr. C.S. Moore
Member of the Tribunal and of the Panel

APPEARANCES;

For the Applicants, Stewart Baxter, Gary Hortum, George Wilbur and June Williams,
Mr. Warren S. Rapoport

For the Respondent Superintendent
Ms. Deborah McPhail

For the Respondent National Steel Car Limited
Mr. Andrew K. Lokan

For the Respondents, Maurice Rozon, Chris Winterburn and Al Reichert,
Ms. Dona Campbell

HEARING DATES:

January 15-17, 2002

MAJORITY REASONS FOR DECISION

Background

National Steel Car Limited ("NSC") applied on February 2, 2000 for the consent of the Superintendent to the transfer of assets in the amount of \$45,188,000 from the Amended Pension Plan for Salaried Employees of National Steel Car Limited (the "Salaried Plan" or the "Plan") to the Amended Pension Plan for the Hourly-Paid Employees of National Steel Car Limited (the "Hourly Plan") to be effective March 1, 1999. The actuarial reports filed in support of the transfer application indicated that, as at

March 1, 1999, the Salaried Plan had a surplus of \$23,681,800 and the Hourly Plan had an unfunded liability of \$3,088,000. Those reports also indicated that immediately after the transfer, the merged plan would have a surplus of \$20,593,800 on a going concern basis and no solvency deficiency.

On March 2, 2001, after receiving submissions from the Applicants, NSC and the USWA, the Superintendent gave consent to the transfer of assets, as requested in NSC's application, pursuant to section 81 of the PBA. The Applicants, who are members of the Salaried Plan, filed a request for a hearing by the Tribunal in respect to that consent in apparent reliance on section 89 of the PBA. Applications were then filed by NSC and by certain USWA members of the Hourly Plan for party status in the hearing before the Tribunal. Those two applications were duly granted.

The Hourly and Salaried Plans were originally established, effective June 30, 1952, as a single plan. In 1966, NSC divided the original plan, effective July 1, 1965, into separate Salaried and Hourly Plans. The 1966 version of the Salaried Plan reserved to NSC the right, in its discretion, to amend, merge or terminate the Plan (section 18.1), subject to the following qualification;

The Company shall have no power to make any change in or amendment to the Plan which would cause or permit any portion of the contributions made prior to that date to be diverted to purposes other than the exclusive benefit of the Members of the Plan ... (section 18.3).

This version of the Plan also provided that should the Plan be terminated, all contributions to the Plan would vest absolutely in the members (section 18.4).

The Plan was, in fact, amended in 1973, effective January 1, 1972, to substitute the following provision for the provision recited above;

No amendment or suspension of this Plan shall operate to reduce the benefits which have accrued to the Members of the Plan in respect of service prior to the date of such amendment or suspension as the case may be, nor shall the Company have the power to make any amendment to the Plan which would cause or permit any portion of the contributions made prior to such date to be diverted to purposes other than the exclusive benefit of Members of the Plan, Pensioners, their estates, designated beneficiaries or joint annuitants until all liabilities of the Plan have been fully met. ... (new section 18.3).

The 1973 amendment also replaced the provision dealing with the vesting of contributions on Plan termination with a provision to the effect that any surplus on termination of the Plan should revert to NSC (new section 18.5).

At the hearing in this matter, the Tribunal heard arguments on two main issues that were identified in advance by the parties. We address those issues in the next two parts of these Reasons.

Issue No. 1 - Does the Tribunal have jurisdiction under the PBA to hear this matter?

Unlike a superior court, this Tribunal has no inherent jurisdiction. It is simply a creature of statute (namely, the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 (the “FSCO Act”), see esp. section 6) and derives its authority from statute, namely the FSCO Act and statutes such as the PBA that govern particular financial service sectors. The scope of that authority is to be determined from the express provisions of any relevant statute or by necessary implication from such a statute (as to the authority of statutory agencies generally, see Macaulay and Sprague, *Practice and Procedure before Administrative Tribunals*, looseleaf, vol. 3, c. 29). In the present case, this means that we have to look to the PBA in order to decide whether the Tribunal is entitled to entertain a request for a hearing from the Applicants in relation to the Superintendent’s consent to the transfer of assets from the Salaried Plan to the Hourly Plan. While we sometimes refer, in these Reasons, to the right to a hearing before the Tribunal, that is really the obverse side of the jurisdiction coin. Consequently, whether we speak of the jurisdiction of the Tribunal to entertain a request for a hearing or the right of a person to a hearing before the Tribunal, the PBA must confer that jurisdiction or that right, either expressly or by necessary implication.

Section 89 (formerly section 90) of the PBA is the source of the Tribunal’s jurisdiction to hold hearings in relation to decisions – or, more precisely, proposed decisions – of the Superintendent under the PBA. The fact that the determination of the Superintendent in this case was framed as an actual consent to the transfer of assets rather than a proposal to consent should not, however, be taken to exclude the possibility of a right to a hearing; it is the nature rather than the form of the determination that should be controlling. Nor should there be an automatic right to a hearing in this case simply because the Superintendent’s consent letter advised recipients - such as the Applicants - that they had a right to request a hearing before the Tribunal. The Superintendent cannot confer jurisdiction on this Tribunal to entertain a request for a hearing; the Tribunal must have that jurisdiction under the PBA.

Various subsections of section 89 deal with proposed decisions of the Superintendent that will take the form of plan registrations, orders, approvals and consents, sometimes but not always referring to the specific provisions of the PBA that contemplate those decisions. There is some jurisprudence, from the Ontario Divisional Court and the Pension Commission of Ontario (the “PCO”), on the extent of the authority to hold a hearing that section 89 formerly conferred on the PCO and now confers on this Tribunal. The arguments before the Tribunal in the present case centered around the question of whether that jurisprudence applies here notwithstanding the difference in the precise subsection of section 89 primarily in question and the subsequent amendments to section 89 that were effected by the FSCO Act.

In this case, we are concerned primarily with subsection (4), as read with subsections (6) and (8), of section 89. To provide the context, however, we set out the first nine subsections of section 89, underlining the changes introduced by the FSCO Act:

89. - (1) Where the Superintendent proposes to refuse to register a pension plan or an amendment to a pension plan or to revoke a registration, the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant or administrator of the plan.

(2) Where the Superintendent proposes to make or to refuse to make an order in relation to,

- (a) subsection 42(9) (repayment of money transferred out of a pension fund);
- (b) subsection 43(5) (repayment of money paid to purchase pension, deferred pension or ancillary benefit);
- (c) subsection 80(6) (return of assets transferred to new pension fund);
- (d) subsection 81(6) (return of assets transferred to new pension fund);
- (d.1) section 83 (the Guarantee Fund applies to a pension plan);
- (e) section 87 (administration of pension plan in contravention of Act or regulations); or
- (f) section 88 (preparation of report).

the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the administrator and any other person to whom the Superintendent proposes to direct the order.

(3) Where the Superintendent proposes to make or to refuse to make an order requiring an administrator to accept an employee as a member of a class of employees for whom a pension plan is established or maintained, the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the administrator, and the Superintendent shall serve or require the administrator to serve a copy of the notice and the written reasons on the employee.

(3.1) Where an application is filed in accordance with subsection 78(2) for the payment of surplus to the employer and the Superintendent proposes to consent or refuse to consent under subsection 78(1), the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant and on any person who made written representations to the Superintendent in accordance with subsection 78(3).

(3.2) Where an application is filed in accordance with subsection 78(4) and the Superintendent proposes to consent or refuse to consent under subsection 78(4), the Superintendent shall serve

notice of the proposal, together with written reasons therefor, on the applicant and the Superintendent may require the applicant to transmit a copy of the notice and the written reasons on such other persons or classes of persons or both as the Superintendent specifies in the notice to the applicant.

(4) When the Superintendent proposes to refuse to give an approval or consent or proposes to attach terms and conditions to an approval or consent under this Act or the regulations, other than a consent referred to in subsection (3.1) or (3.2), the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant for the approval or consent.

(5) Where the Superintendent proposes to make an order requiring the wind up of a pension plan or declaring a pension plan wound up, the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the administrator and the employer, and the Superintendent may require the administrator to transmit a copy of the notice and the written reasons on such other persons or classes of persons or both as the Superintendent specifies in the notice to the administrator.

(6) A notice under subsection (1), (2), (3), (3.1), (3.2), (4) or (5) shall state that the person on whom the notice is served is entitled to a hearing by the Tribunal if the person delivers to the Tribunal within thirty days after the notice under that subsection, notice in writing requiring a hearing, and the person may so require such a hearing.

(7) Where the person on whom the notice is served does not require a hearing in accordance with subsection (6), the Superintendent may carry out the proposal stated in the notice.

(8) Where the person requires a hearing by the Tribunal in accordance with subsection (6), the Tribunal shall appoint a time for and hold a hearing.

(9) At or after the hearing, the Tribunal by order may direct the Superintendent to carry out or to refrain from carrying out the proposal and to take such action as the Tribunal considers the Superintendent ought to take in accordance with this Act and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent.

Before the FSCO Act came into effect in 1998, the references to the Tribunal in section 89 of the PBA were references to the PCO and "the Superintendent" meant the Superintendent of Pensions rather than the Superintendent of Financial Services.

In *C.U.P.E. v. Ontario Hospital Association* (1990), PCO Bulletin 1/4 (PCO), and (1992), 91 D.L.R. (4th) 436 (Ont. Div. Ct.) (the "*Ontario Hospitals*" case), the "key issue", as described by the

PCO (Bulletin 1/4, at p. 5), was whether the phrase “proposes to make an order” in subsection (2) of section 89 (then section 90) could be read so as to include “proposes to refuse to make an order”. The PCO said that it could and the Divisional Court agreed, noting that “there is ample authority to support the proposition that a dismissal of an application [for an order] can constitute an order” (91 D.L.R. (4th) 435, at p. 441). At the time of this decision, subsection (2) was limited to situations where there is a proposal to make an order. It was subsequently amended by the FSCO Act so that it also applies to situations where there is a proposal to refuse to make an order. That amendment effectively confirms the result in the *Ontario Hospitals* case and eliminates the need for finding a necessary implication that the subsection covers a proposal to refuse to make an order since the subsection now extends to that situation explicitly.

Subsection (4) of section 89 does not lend itself to the same sort of implication that was drawn from subsection (2) of that section in the *Ontario Hospitals* case. The phrase “proposes to refuse to give ... consent” cannot be read so as to include “proposes to give consent” without stretching the language beyond reason. Moreover, it cannot be said, adapting the words of the Divisional Court in the *Ontario Hospitals* case to the circumstances of this case, that there is ample authority for the proposition that giving consent can constitute refusing to give consent. It was suggested in argument that refusing to give consent includes “refusing to refuse” consent and, therefore, covers the granting of consent. But this unduly strains language and logic. Counsel for the Superintendent argued that the Superintendent’s action in this case was tantamount to a refusal since the giving of consent to the transfer of assets could be construed as an implicit refusal to order the return of assets transferred in violation of subsection (4) of section 81 of the PBA. However, there was no evidence that the assets had actually been transferred at any time before the hearing in this matter and, if they had been transferred after the Superintendent gave unconditional consent, the Superintendent would have had no jurisdiction to order the return of those assets. An order to return assets can only be made where those assets have been transferred without consent or in breach of a prescribed term or condition of a consent to transfer (see subsection (6) of section 81).

We, therefore, conclude that subsection (4) of section 89 is limited to proposals to refuse to give approvals or consents, or to impose terms and conditions on an approval or consent, and does not admit of an implication that it also covers proposals to give approvals or consents. This interpretation is reinforced by the fact that the subsection says that the relevant notice of proposal is to be served on the applicant for approval or consent, while subsection (6) indicates that the person who is entitled to a hearing is the person on whom the notice is served. The Applicants in the present case, therefore, do not qualify, under subsection (6), as persons who are entitled to a hearing before the Tribunal since they did not apply to the Superintendent for any consent or approval.

In opting for a broad interpretation of the PCO’s jurisdiction to hold hearings in the *Ontario Hospitals* case, the Divisional Court noted the PCO’s “watchdog” role under the PBA and the subordinate role of the Superintendent of Pensions, who was obliged to follow the directions of the PCO as well as the

terms of the PBA. The relationship between this Tribunal and the Superintendent of Financial Services is quite different. The Tribunal does not have general responsibility for the administration of the PBA and its only authority over the Superintendent is to make orders against that official, under subsection (9) of section 89, directing that certain action be taken or not taken, in relation to any of the various kinds of proposals referred to elsewhere in section 89. Such orders can only be made by way of remedy at or after a hearing in a matter that is brought before the Tribunal through a request for hearing made under the PBA. Therefore, the consideration which supported a broad interpretation by the Divisional Court of the PCO's jurisdiction to hold hearings that was in question in the *Ontario Hospitals* case is not at play in relation to the comparable jurisdiction of this Tribunal.

One of the factors that influenced the PCO and the Divisional Court in their decisions in the *Ontario Hospitals* case was the inequity of an interpretation of section 89 that would give a losing party on one side of a contested matter before the Superintendent the right to a formal hearing under the PBA but no similar right to a losing party on the other side (the latter party being remitted to the more limited scope of judicial review through an application to court). The PCO said that it would take very clear language in the PBA to lead to the conclusion that inequitable treatment of this sort was envisaged by the PBA. We think that the language of subsection (4) of section 89 is abundantly clear and forecloses the possibility of any implication that it extends to proposals by the Superintendent to give consent. In determining the scope of the jurisdiction of this Tribunal to hold hearings, we are not entitled to read something into the PBA that cannot be supported by a necessary implication from the language the Legislature has chosen to use. If the result is one-sided, we must respect the unambiguous decision of the Legislature to embrace that lack of symmetry.

The decision in the *Ontario Hospitals* case was followed by the PCO in three other cases where that tribunal assumed jurisdiction to hold a hearing. Those cases were like the *Ontario Hospitals* case in that the PCO concluded that a provision of section 89 of the PBA providing for a hearing where there is proposal to make a certain kind of decision could be taken to relate, as well, to a proposal to refuse to make such a decision (see *Maynard v. Ontario (Superintendent of Pensions) and McDonnell Douglas Canada Ltd*, a decision of the PCO dated May 25, 1998, PCO Index No. XDEC-38 (affirmed by the Divisional Court at [2000] O.J. No. 881), *C.U.P.E. v. Ontario (Superintendent of Pensions) and Sisters of St. Joseph*, a decision of the PCO dated May 29, 1998, PCO Index No. XDEC-39, and *The Entitlement 55 Group v. Ontario (Superintendent of Pensions) and Imperial Oil Limited*, a decision of the PCO dated April 28, 1995, PCO Bulletin 6/2 (Summer 1995)). Therefore, like the *Ontario Hospitals* case, these cases are readily distinguishable since we are concerned, in the present case, with the interpretation of a provision of section 89 that confers jurisdiction to hold a hearing where there is a proposal to refuse to make a certain kind of decision.

The amendments to section 89 of the PBA effected by the FSCO Act in 1997 also militate against the conclusion that subsection (4) of section 89 implicitly covers a proposal to give consent. Through these amendments, the Legislature expressly extended the situations in which there is a right to a hearing

under section 89 so that the right now applies in respect of proposals;

- to refuse to make, as well as to make, orders under specified sections of the PBA (subsection (2)),
- to consent or refuse to consent to the payment of surplus in a pension plan to the employer (new subsection (3.1)),
- to consent or refuse to consent to the return or reimbursement of certain amounts to the employer from a pension plan (new subsection (3.2)).

In other words, if any of these kinds of decisions were to be proposed, the right to a hearing would apply whether the proposal of the Superintendent was favourable or unfavourable to the person who brought the matter before the Superintendent. At the same time, subsection (4) of section 89 was left to apply, by its express terms, only to proposals to refuse to give an approval or consent, or to attach terms and conditions to an approval or consent, although the exceptions from the operation of the subsection were supplemented by the insertion of cross-references to the new subsections (3.1) and (3.2) of section 89. All of this suggests that subsection (4) was deliberately left to extend only to decisions of the Superintendent going one way, namely against the person making the request to the Superintendent. In these circumstances, we would be reluctant to conclude that the subsection extends, by implication, to decisions in favour of the person making the request.

Although we have concluded, for a number of reasons, that we do not have jurisdiction to entertain the Applicants' request for a hearing in this matter, we proceed, nonetheless, to consider the merits of the Applicants' case in the event that we are wrong in our conclusion as to jurisdiction.

Issue No. 2 - If the Tribunal has jurisdiction, should the Superintendent's consent to the asset transfer under section 81 of the PBA be set aside or varied?

Section 81 of the PBA provides as follows;

81. - (1) Where a pension plan is established by an employer to be a successor to an existing pension plan and the employer ceases to make contributions to the original plan, the original pension plan shall be deemed not to be wound up and the new pension plan shall be deemed to be a continuation of the original pension plan.

(2) the benefits under the original pension plan in respect of employment before the establishment of the new pension plan shall be deemed to be benefits under the new pension plan.

(3) Subsection (2) applies whether or not the assets and liabilities of the original pension plan are consolidated with those of the new pension plan.

(4) No transfer of assets shall be made from the pension fund of the original pension plan to the pension fund of the new pension plan without the prior consent of the Superintendent or contrary to the prescribed terms and conditions.

(5) The Superintendent shall refuse to consent to a transfer that does not protect the pension benefits and any other benefits of the members and former members of the original pension plan or that does not meet the prescribed requirements and qualifications.

(6) The Superintendent by order may require the transferee to return to the pension fund assets, with interest calculated in the prescribed manner, transferred without the prior consent of the Superintendent or transferred contrary to a prescribed term or condition.

(7) Subject to section 89 (hearing and appeal), an order for return of assets under subsection (6), exclusive of the reasons therefor, may be filed in the Ontario Court (General Division) and is thereupon enforceable as an order of that court.

(8) No transfer of assets shall be made from one pension fund to another pension fund in circumstances where subsections (1) to (7) do not apply or where section 42 or 80 does not apply, without the prior written consent of the Superintendent or contrary to the prescribed terms and conditions and for the purpose, subsections (5) to (7) apply with necessary modifications.

The Superintendent concluded in the present case that there were no grounds, under subsection (5) of section 81 of the PBA, for refusing NSC's request for consent to the transfer of assets from the Salaried Plan to the Hourly Plan. Since no requirements and qualifications in respect of such a transfer have been prescribed by regulation, the only circumstance that would require the Superintendent to refuse consent, under subsection (5) of section 81, is if the proposed transfer of assets failed to "protect the pension benefits and any other benefits of the members and former members" (collectively the "members") of the Salaried Plan. The Applicants did not suggest that the "pension benefits" of those members were not protected as the assets in the merged plan were more than sufficient to satisfy the pension benefits (as defined in section 1 of the PBA) of the members of the Salaried Plan. In fact, the actuarial report filed by NSC with the Superintendent, in support of its request for consent to the transfer of assets, indicated that the merged plan would have a surplus of \$20,593,800 on a going concern basis. The Applicants maintained, however, that the transfer of assets in this case did not protect "other benefits" of the members of the Salaried Plan.

The Applicants maintained that the 1966 version of the Salaried Plan had the effect of establishing a trust in respect of the Plan assets, or pension fund, for the benefit of the members of the Plan. We will assume for the purposes of our analysis, but without deciding, that there was such a trust and that the 1973 amendment to the Plan did not effectively revoke it. Assuming the continued existence of a trust,

the members of the Plan might be said to have enjoyed benefits in the form of beneficial interests in the trust to which the Plan assets were subject.

The "other benefits" of the members of the Salaried Plan that the Applicants say were unprotected in the transfer of assets, and accompanying plan merger, are really interests in the excess of,

- (i) the contributions to the Plan, taken together with
- (ii) the income generated by those contributions,
over and above
- (iii) what would be required to satisfy pension benefits under the Plan

- in other words, interests in the nature of claims to surplus. However, no member of the Salaried Plan can be said to have anything more than a contingent claim to surplus since an actual claim to surplus pre-supposes a wind up or termination of the Plan; see *Schmidt v. Air Products of Canada* (1994), 115 D.L.R. (4th) 631 (S.C.C.). The PBA says specifically that on a merger of pension plans under section 81, the merging plan is deemed not to be wound up and the merged plan is deemed to be a continuation of the merging plan (see subsection (1)).

The Supreme Court of Canada in *Schmidt* refers to the potential claim of plan members to the surplus remaining upon termination of a pension plan - by virtue of the terms of the plan or any trust in respect of the pension fund - as a "benefit" to which members may be entitled (at p. 665). However, the court also makes it clear that the amount of that benefit is never certain during the continuation of the plan and that the right to any surplus is crystallized only when the surplus becomes ascertainable on termination of the plan (at p. 665). In our view, a member's interest in surplus, which is contingent upon termination of the plan and the existence of an actual surplus at that time, does not fall within the expression "other benefits of members" in subsection (5) of section 81 of the PBA. While the plan continues, the plan sponsor has the benefit of the surplus in the sense that it can use it to justify contribution holidays (see *Schmidt*, at pp. 656-657). That benefit pertains even if the pension fund is subject to a trust in favour of the members. Thus, it would be inaccurate to say that the interest of the members in the surplus of an on-going plan is a benefit of the members, in the sense of subsection (5) of section 81 of the PBA, given that the plan sponsor has the current benefit of that surplus, albeit for the limited purpose of taking contribution holidays.

There is nothing inherently objectionable about a merger of a pension plan that is in a surplus position with one that is not, even if the assets of the former plan are subject to a trust for the benefit of the members; see *Re Heilig and Dominion Securities Pitfield Ltd* (1989), 67 O.R. (2d) 577, at p. 582 (Ont. C.A.). We were referred to the decision of the Divisional Court in *Retirement Income Plan for Salaried Employees of Weavvex Corp. v. Ontario (Superintendent of Pensions)* (2000), 133 O.A.C. 375, as authority for the proposition that on a transfer of assets the Superintendent is required, under subsection (5) of section 81 of the PBA, to protect a notional claim to surplus. However, the

court's decision to set aside a consent of the Superintendent given under that subsection was based entirely on deficiencies in the process through which the Superintendent dealt with the application for consent to the transfer of assets and with objections to it. That is how the Court of Appeal, in an unreported decision dated February 14, 2002 (docket C35896 & C35919), characterized the decision in affirming it on appeal (with a modification to the form of remedy afforded by the Divisional Court). In the present case, the Applicants did not allege that there were any deficiencies in the procedure the Superintendent followed in dealing with NSC's application for consent.

The Applicants relied on *Buschau v. RogersCableSystems Inc.* (2001), 148 B.C.A.C. 263, a decision of the British Columbia Court of Appeal that may appear, at first blush, to be at odds with the decision of the Ontario Court of Appeal in *Heilig*. In fact, *Buschau* simply required an accounting for the benefit of the members of a pension plan (the "merging plan") that had been merged with certain other plans, in order to determine the proportion of the combined assets of the merged plan that were attributable to those members. The assets of the merging plan were subject to a trust in favour of the members and membership in the plan had been closed sometime prior to the merger. The apparent objective of the members of the merging plan, in requesting an accounting, was to preserve the integrity of the trust such that the members would remain entitled to share in the surplus on termination of the trust and be in a position to bring about the termination of the trust and distribution of the trust assets in accordance with the rule in *Saunders v. Vautier* (1814), E.R. 282 (aff'd (1841), 41 E.R. 482). There was no question of the appropriateness of any transfer of assets in connection with the plan merger, which apparently did not require any regulatory approval under the pension legislation to which the merging plan was subject, namely the *Pension Benefit Standards Act, 1985*, S.C. 1986, c. 40. *Buschau* is not, therefore, the same kind of case as the present one.

The Superintendent has adopted Policy A700-251 (the "Policy"), being an administrative policy with respect to the giving of consent to a transfer of assets under section 81 of the PBA. The Policy anticipates (in section 11) that if the assets of the plan to which the transfer is to be made would be less than the liabilities of that plan (and certain other conditions pertain), the Superintendent may decide that member benefits of a kind referred to in subsection (5) of section 81 of the PBA would not be protected on the proposed transfer. Assuming there were member benefits of that kind here, that is not the situation we have to consider since the merged plan, following the transfer, would have a surplus of \$20,593,800. The Policy does not say that if there is a surplus, the proposed transfer ought to be approved. Therefore, the Policy is not helpful in this case.

Disposition

It follows that the decision of the Superintendent granting consent to the transfer of assets from the Salaried Plan to the Hourly Plan should stand. In the event that the Tribunal has the jurisdiction to entertain the Applicants' request for a hearing in this matter, we confirm the Superintendent's consent.

DATED at Toronto, Ontario this 31st day of May, 2002.

“Colin H.H. McNairn”
Colin H.H. McNairn
Chair of the Panel

“William Forbes”
William Forbes
Member of the Panel

MINORITY REASONS FOR DECISION

Background

As background for these minority reasons, I agree with and adopt the Background section of the Majority Reasons for Decision. The two main issues identified in advance by the parties were expressed as follows:

1. Does the Tribunal have jurisdiction under the PBA to hear this matter?
2. If the Tribunal has jurisdiction, should the Superintendent's consent to the asset transfer under section 81 of the PBA be set aside or varied?

At the request of NSC, and with the approval of all parties, the Panel agreed to deal with both issues at the same hearing, with the result that we were able to decide Issue No. 2 without first determining that we had jurisdiction under the PBA to hear that matter.

Issue No. 2 - If the Tribunal has jurisdiction, should the Superintendent's consent to the asset transfer under section 81 of the PBA, be set aside or varied?

I concur with my fellow Panel members regarding the decision reached on Issue No. 2; that is, that the Superintendent's consent to the asset transfer at issue in this hearing should stand. I also agree with the reasons expressed in that section of the Majority Reasons for Decision regarding Issue No. 2.

Issue No. 1 - Does the Tribunal have jurisdiction under the PBA to hear this matter?

I do not agree with the decision reached by the majority of the Panel, that the Tribunal does not have jurisdiction to hear this matter, nor do I agree fully with the section of the Majority Reasons for Decision regarding Issue No. 1. My view is that the Tribunal should have jurisdiction, and my reasons follow.

I agree with the arguments presented by the Superintendent, and supported by the Applicants and the USWA Respondents, that the Tribunal has an implied jurisdiction to conduct a hearing of this matter under section 89 of the PBA. In making these arguments, the Superintendent relied on the authority of *Hospitals of Ontario Pension Plan, No. C-001500*, November 22, 1990, PCO Index No. XDEC-05, PCO Bulletin 1/4 (December 1990), affirmed at *C.U.P.E. v. Ontario Hospital Association* (1992), 91 D.L.R. (4th) 436 (Ont. Div. Ct.), and decisions that have followed it, namely *Imperial Oil Limited Plan and the Entitlement 55 Group, PN 0347054 and PN 0344002*, April 28, 1995, PCO Index No. XDEC-28, *Pension Plan for Salaried Employees of McDonnell Douglas Canada Ltd., No. 520593*, May 25, 1998, PCO Index No. XDEC-38, *Maynard v. Ontario (Superintendent of*

Pensions), [2000] O.J. No. 881 (Div. Ct.), and *Pension Plan for Hospital Employees of the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada*, PN 302851, May 29, 1998, PCO Index No. XDEC-39.

In my view, these decisions are relevant for the present hearing, as they highlight the importance of interpreting the PBA, wherever possible, to give equitable treatment of hearing rights to both sides in a pension dispute. In the *Hospitals of Ontario (CUPE)* case, the PCO and Divisional Court both held that there was a right to a hearing under the PBA where the Superintendent had refused to make an order, even though the PBA only expressly provided a right to a hearing where the Superintendent had proposed to make an order.

The PCO's reasons included the following statements regarding the PBA (referred to as the Act):

...the legislature would have intended fair play for both sides and, where possible, the Act should be construed to provide fair and equitable treatment for all concerned. It would take very clear language indeed to persuade the Commission that inequitable treatment of the sort envisaged by the OHA and the Superintendent was intended.

... the Act is remedial in nature with one of its basic objectives to protect and enhance the rights of plan members.

The Divisional Court, in affirming this decision on appeal, stated:

It is not reasonable, in our opinion, to think that a decision to refuse to issue an order requested under s. 88 [now s. 87] should be treated any differently, for the purpose of s. 90(6) [now s. 89(6)], than one to make such an order. In the first case, those interested and in disagreement with the decision would have to live with it, while in the second, they would have access to the Commission by way of an appeal and the power it possesses under s. 90(9) [now s. 89(9)].

In the present case, we are dealing with the Superintendent's consent regarding an asset transfer under section 81 of the PBA. This consent was given in a letter dated March 2, 2001, from David Gordon by delegated authority from the Superintendent, sent to representatives of NSC, the USWA and the Applicants. This letter included a statement that "the recipients of this letter may request a hearing before the Financial Services Tribunal with respect to the approval of the asset transfer." As a result, the Superintendent's consent may alternatively be viewed as a proposed consent to the transfer, subject to the holding of a hearing before the Tribunal if requested. The letter also included the following paragraph:

I am transmitting copies of this letter to all individuals who made submissions concerning this application in order to ensure that they are informed of my decision. The recipients of this letter may request a hearing before the Financial Services Tribunal with respect to the

approval of the asset transfer. The Financial Services Tribunal is an independent adjudicative body that reviews decisions made by the Superintendent of Financial Services.

NSC had received the consent they had requested, or at least had received a proposed consent, and so had no reason to request a hearing before the Tribunal. However, the Superintendent had not consented, or proposed to consent, to the request of the Applicants - that the Superintendent deny or attach conditions to the transfer of assets - with the result that the Applicants had reason to request a hearing before the Tribunal, and did so. As a party to NSC's request for consent to a transfer of assets, the Applicants had made submissions to the Superintendent, who refused to consent to the Applicants' request, and gave them notice of the Superintendent's proposed action on this matter, in accordance with subsection 89(4). The Superintendent's letter also included an invitation for any recipients of the letter to request a hearing, in accordance with subsection 89(6), which includes the following direction:

A notice under subsection ...(4)...shall state that the person on whom the notice is served is entitled to a hearing by the Tribunal...

In my view, the Superintendent acted correctly in informing the Applicants and other parties of their right to a hearing in these circumstances, by interpreting subsection 89(4) in this manner. This view provided equitable treatment to the Applicants, for whom the Superintendent's consent or proposed consent was really a refusal to consent to the Applicants' requests. Had the Superintendent refused to consent to NSC's application for transfer of assets, NSC would have had an express right to a hearing under subsection 89(4).

In this case, the Applicants were heard by the Tribunal, even though a majority of the Panel later found that the Tribunal did not have jurisdiction. If this hearing had not been held, the Applicants could still have applied for a judicial review. In that case, the judicial review would have proceeded without the Tribunal's views, as no determination would have been made by the Tribunal. In addition, a judicial review could involve quite different costs and time constraints, and more limited grounds for overturning the Superintendent's decision, compared with a hearing before the Tribunal.

Subsection 89(4) of the PBA can be interpreted in a reasonable way that will avoid this inequitable treatment of parties. NSC argued that to do so would stretch the PBA language beyond reason, and the majority of the Panel agrees. I disagree. The Superintendent's consent to one party's request can reasonably be interpreted as a refusal to consent to an opposing party's request, as discussed earlier in my reasons.

When the PBA was amended in 1997 under the FSCO Act, section 89 was amended to extend the situations providing for a right to a hearing before the Tribunal, reflecting the prevailing view that a right to a hearing should be given whether the Superintendent's proposal or decision was favourable or unfavourable to the party bringing the matter to the Superintendent. These amendments reflected recent

jurisprudence in this area, and also an increased focus on certain decisions now made in the first instance by the Superintendent (and formerly first instance decisions of the PCO tribunal). I have no reason to believe that similar amendments to subsection 89(4) were intentionally omitted, as was suggested in NSC's argument, or that such an amendment is necessary in order to give that subsection the broader interpretation.

For these reasons, I would conclude that the Tribunal does have jurisdiction to entertain the Applicants' request for a hearing in this matter.

DATED at Toronto, Ontario this 31st day of May, 2002.

"C.S. Moore"
C.S. Moore
Member of the Panel