

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 a Proposal by the Superintendent of
Financial Services (the “Superintendent”) to Make an Order Requiring the
Wind Up in Part of the Imperial Oil Limited Retirement Plan, Registration
Number 347054 (the “IOL Plan”);

AND IN THE MATTER OF a Proposal by the Superintendent to Make
an Order with respect to the Calculation of Pension Benefits pursuant to
section 87 of the Act, relating to the IOL 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. William Forbes
Member of the Tribunal and of the Panel

Ms. Heather Gavin
Member of the Tribunal and of the Panel

APPEARANCES:

For Imperial Oil Limited:
Mr. J. Brett Ledger
Mr. Evan S. Howard

For the Superintendent of Financial Services:
Ms. Deborah McPhail

HEARING DATES:

June 13 and August 1, 2002

REASONS FOR DECISION OF MR. MCNAIRN AND MR. FORBES

Statement of Facts

Imperial Oil Limited (“IOL”) sold its “Esso” branded consumer and small commercial credit card receivables to General Electric Capital Canada Inc. (“GE Capital”) effective April 28, 1995. The purchase and sale agreement provided that GE Capital would establish a credit card program pursuant to which it would issue credit cards bearing the service mark “Esso”. In November of 1995, in connection with the sale, 37 employees of IOL (the “Transferred Employees”) became employees of GE Capital. The Transferred Employees were members of the Imperial Oil Limited Retirement Plan, Registration Number 347054 (the “IOL Plan”) and, upon their transfer, became members of a pension plan sponsored by GE Capital (the “GE Capital Plan”). The pension benefits accrued by the Transferred Employees prior to their transfer to GE Capital remained payable from the IOL Plan.

Upon assuming their new employment, the Transferred Employees changed their place of work from IOL’s office building at 90 Wynford Drive in Don Mills, Ontario (the “Wynford Facility”) to GE Capital’s building at 600 Alden Road in Markham, Ontario, known as the “Toronto Business Centre”. The Wynford Facility also housed other business operations of IOL and continued to do so following the sale of the credit card business to GE Capital.

Some of the employees of IOL who worked in the credit card business at the Wynford Facility and were members of the IOL Plan did not become Transferred Employees but lost their jobs as a result of the sale of the business. They were given severance packages by IOL, but there was no partial wind up of the IOL Plan in respect of those employees.

Around the end of 1997, the credit card business of GE Capital that was carried on at the Toronto Business Centre was transferred to GE Capital Canada Retailer Financial

Services Company, an affiliate of GE Capital, and the employees engaged in the business, including the Transferred Employees who continued in the service of GE Capital, became employees of that affiliate.

The business carried on at the Toronto Business Centre related to both Esso and Petro-Canada credit cards. Commencing about the end of 1998, there was some integration of the business activities relating to the two credit card lines, which involved some of the Transferred Employees doing work in relation to the Petro-Canada card, as well as the Esso card, and some of the other employees doing work in relation to the Esso card, as well as the Petro-Canada card.

At the same time as it operated its Toronto Business Centre, GE Capital maintained a billing and embossing unit for its credit card operations on Alden Road in Markham at a different municipal address from the Toronto Business Centre but in a building that, according to the evidence, “may have been across the parking lot” from that Centre. This facility provided services for the credit card business at the Toronto Business Centre, as well as for other credit card businesses of GE Capital.

Upon the conclusion of its credit card contracts with IOL and Petro-Canada, GE Capital discontinued the credit card business that it carried on at the Toronto Business Centre in July of 2000, resulting in the termination of the employees who worked at that location. The terminated employees included 32 remaining Transferred Employees from IOL. Of these, three employees were re-hired by IOL and their service with GE Capital was recognized for eligibility purposes under the IOL Plan. GE Capital then wound up the GE Capital Plan effective September 7, 2000.

On August 3, 2001, the Superintendent of Financial Services (the “Superintendent”) issued a notice of proposal to make an order to wind up the IOL Plan in part - in relation to those members and former members who were employed by GE Capital at the Toronto Business Centre and who ceased employment with GE Capital between March 2000 and July 2000 as a result of the closure of that Centre (the “First Notice of Proposal”). The Superintendent issued a further notice of proposal, on the same date, proposing to make an order that the administrator of the IOL Plan give credit for both age and years of service, as at the time of the closure of the Toronto Business Centre, to those members and former members of the IOL Plan who ceased employment with GE Capital between March 2000 and July 2000 as a result of the closure of the Toronto Business Centre, when determining entitlement to benefits under the IOL Plan (the “Second Notice of Proposal”).

IOL filed Requests for Hearing by the Tribunal in respect of both Notices of Proposal on August 24, 2001. The hearings before the Tribunal relating to the two Notices of Proposal were heard together.

Consideration of the Issues

There are two principal issues that the Tribunal must address in this case, the first relating to the First Notice of Proposal and the second relating to the Second Notice of Proposal.

1. Whether the Superintendent is entitled in the circumstances of this case to make an order, under clause (e) of subsection 69(1) of the *Pension Benefits Act*, as amended (the “Act”), requiring the partial wind up of the IOL Plan.

Subsection 69(1) of the Act describes the various situations in which the Superintendent may order a wind up, in whole or in part, of a pension plan. They include the following;

(d) a significant number of members of the pension plan cease to be employed by the employer as a result of the discontinuance of all or part of the business of the employer or as a result of the reorganization of the business of the employer;

(e) all or a significant portion of the business carried on by the employer at a specific location is discontinued;

While the Superintendent relied initially on both of these clauses, as indicated in the First Notice of Proposal, reliance was limited to clause (e) at the hearing before this Tribunal. The Superintendent maintained that in this case the discontinuance of the credit card business at GE Capital’s Toronto Business Centre could be attributed to IOL, as well as to GE Capital, with the result that the Superintendent was entitled to order the partial wind up of the IOL Plan in relation to those members who lost their employment due to that discontinuance of business and who were not re-employed by IOL.

The stated basis for the Superintendent’s position in this case is the decision of the Pension Commission of Ontario (the “PCO”) in *GenCorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1994), PCO Bulletin 5/3 (Fall 1994) (Index No. XDEC-25), a case involving the application of clause (d) of subsection 69(1) of the Act. In *GenCorp*, a company was ordered to wind up its pension plan in part - in relation to those of its former employees whose employment was transferred in connection with the sale of the business in which they were engaged - when the successor company discontinued the business by closing the plant it had acquired on the sale, thus terminating the employment of the transferred employees. In that case, as in the present case, the transferred employees ceased to accrue benefits under the plan in question upon the sale but remained entitled to pension benefits under it that had accrued to the date of sale. The PCO concluded that the company that sold the business was deemed to continue as the employer of the transferred employees after the sale by virtue of what was then section 29 of the Act, a conclusion that was consistent with the broad definition of “employer” in section 1 of the Act. Therefore, the discontinuance of the business by the successor company, on the closure of the plant, resulted in the termination of their deemed employment with the predecessor company (as well as their actual employment with the successor company), enabling the Superintendent to order the wind up of the predecessor

company's pension plan, in relation to the transferred employees, under clause (d) of subsection 69(1) of the Act.

Appeals from the decision of the PCO were dismissed by the Divisional Court and the Court of Appeal, both of which found that the PCO's interpretation of the relevant provisions of the Act was reasonable and, therefore, should not be disturbed on review (see (1995), 26 O.R. (3d) 696 (Div. Ct.), and (1998), 39 O.R. (3d) 38 (C.A.)). The Court of Appeal also concluded that if the standard of review were correctness, rather than reasonableness, the PCO's interpretation was indeed correct.

Section 29 of the Act provided, among other things, that an employee is deemed not to have been terminated by reason of a sale of a business by the employer that is accompanied by a transfer of the employee to the acquiror of the business, who then becomes a successor employer (the "deemed continuation-of-employment provision"). This provision has been carried forward (with some modifications that are not material for present purposes) in section 80 of the Act. The latter section currently provides, in subsection (3), as follows;

- (3) Where a transaction described in subsection (1) takes place, the employment of the employee shall be deemed, for the purposes of this Act, not to be terminated by reason of the transaction.

Subsections (1) and (2) of section 80 are to the following effect;

- (1) Where an employer who contributes to a pension plan sells, assigns or otherwise disposes of all or part of the employer's business or all or part of the assets 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 the 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 province 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; and
 - (c) is entitled to credit in the employer's pension plan for the period of employment with the successor employer for the purpose of determining entitlement to benefits under the employer's pension plan.

(2) Clause (1) (a) does not apply if the successor employer assumes responsibility for the accrued pension benefits of the employer's pension plan and the pension plan of the successor employer shall be deemed to be a continuation of the employer's plan with respect to any benefits or assets transferred.

The term "employer", which is used in both clause (d) and (e) of subsection 69(1) of the Act, is defined in section 1 of the Act as follows;

"employer", in relation to a member or former member of a pension plan, means the person or persons from whom or the organization from which the member or former member receives or received remuneration to which the pension plan is related, and "employed" and "employment" have a corresponding meaning;

The term is, thus, capable of covering a former employer of an individual as well as the current employer of the individual where that individual was and is a member of a pension plan in connection with his or her employment.

All but one of the arguments on the first issue in the present case related, essentially, to whether *GenCorp* should be taken to govern the outcome of this case or whether there are distinguishing features in this case that justify a different conclusion.

IOL maintained that the *GenCorp* decision should not dictate the result of the present case for a number of reasons, the first being a policy reason. IOL portrayed the policy objective underlying the decision in *GenCorp* - to order a partial wind up - as being the preservation of benefits (such as the "grow in benefits" mandated on a wind up) that the employees at the plant would have received had the plant simply been closed and not been transferred as a going concern along with those employees (indeed, the PCO placed some emphasis on this element of the case, see (1994), PCO Bulletin 5/3 (Fall 1994), at pp. 60 and 62). In that event, the employer could have been ordered to wind up the plan in relation to those employees, pursuant to clause (e) of subsection 69(1) of the Act, since it would have discontinued the business carried on by it at a particular location, namely the plant site. The partial wind up that was in fact ordered in *GenCorp* could, therefore, be said to be a "deferred wind up" that commended itself because it afforded an equitable result for the transferred employees. The same thing could not be said about any partial wind up that might be ordered in the present case since there would have been no basis for a partial wind up had IOL simply discontinued the credit card business carried on at its Wynford Facility. Thus, any partial wind up of the IOL Plan upon GE Capital's discontinuance of the business was not, in any sense, a "deferred wind up" of the IOL Plan that simply preserved the opportunity for the Transferred Employees to participate in the benefits of a partial wind up (such as "grow in benefits") that they would have had if the business had been discontinued by IOL.

IOL also argued that the Superintendent's proposed partial wind up order in the present case was not only unnecessary to achieve an equitable result, but would create an inequity - as between those employees who lost their jobs on the sale of the business and their fellow employees who were transferred with the business. The former were never entitled

to participate in a partial wind up of the IOL Plan while the latter would be so entitled under the Superintendent's order. But the same inequity may well have arisen in *GenCorp* for the statement of facts in the PCO decision in that case suggests that, as in this case, something short of all the employees were transferred with the business (see (1994), PCO Bulletin 5/3 (Fall 1994), p. 58), although it does not say whether any non-transferred employees simply lost their jobs or were offered alternative employment at another location.

We do not believe that clause (d) or (e) of subsection 69(1) of the Act, as read with subsection 80(3), can be taken to have the effect of authorizing a wind up of a pension plan that amounts to a "deferred wind up," as in *GenCorp*, but as failing to authorize a wind up that could not be characterized as such, as in the present case. There is nothing in the language of those statutory provisions that suggests such a distinction. The determining circumstances that justify the wind up of a pension plan in relation to former employees are essentially post-sale-of-business circumstances; they have nothing to do with the hypothetical benefits that a terminated employee might have had in the absence of continuing employment with a successor employer. Moreover, any inequity that might result from a wind up order – as between those employees who were out of work on the sale of a business and those employees who had the opportunity for continuing employment with a successor - does not have any bearing, under the relevant statutory provisions, on the question of whether the Superintendent is authorized to make such an order. Of course, the Superintendent does not have to make a wind up order whenever the circumstances set out in clause (d), (e), or any other clause of subsection 69(1) are present since the authority in that subsection is discretionary. The Superintendent can properly weigh the equities in the balance in the exercise of that discretion.

Second, IOL argued that the present case is distinguishable from *GenCorp* because the entity that was the immediate successor employer, namely GE Capital, did not cause the Transferred Employees to lose their jobs. Rather that was the result of the action of another entity, GE Capital Canada Retailer Financial Services Company ("GE Retailer"), an affiliate of GE Capital that acquired the business carried on by GE Capital at the Toronto Business Centre around the end of 1997 and assumed the position of employer of the Transferred Employees, and of the other employees at the Centre, at that time.

After taking on the Transferred Employees, GE Retailer became their "employer" (along with IOL and GE Capital) in the sense of the Act and, therefore, for the purposes of clause (e) of subsection 69(1). It seems clear to us that the deemed continuation-of-employment provision in subsection 80(3) of the Act is capable of applying more than once to a transferred employee so that his or her employment is continued through sequential sales of the business in which the employee is engaged. In any event, we think that clause (e) of subsection 69(1), as read with subsection 80(3), should be taken to trigger the right of the Superintendent to order the wind up, in whole or in part, of an employer's pension plan when a successor corporate organization or group, to which employees are transferred, terminates those employees by discontinuing the acquired business as it is carried on at a particular location. We do not think that it should make any difference if a corporate reorganization happens to have occurred, before the business is discontinued,

with a resulting change in the entity within the organization or group that is the actual employer of the transferred employee. Such an event ought not to affect the potential statutory benefits that the transferred employees might have as a result of their membership in the pension plan of the predecessor employer.

IOL's third argument for distinguishing the present case from *GenCorp* is that the business that was sold in *GenCorp* was carried on at the same location both before and after the sale whereas the location of the business changed with the sale in the present case. However, the location of the business did not assume any particular importance in *GenCorp*. That is not surprising as business location is not a factor in the deemed continuation-of-employment provision of the Act (now in subsection 80(3)) and discontinuance of business at a specific location was not the trigger for the wind up in that case since the PCO ordered it to proceed on the basis of clause (d), rather than clause (e), of subsection 69(1) of the Act. Nonetheless, the approach in *GenCorp* lends itself to application in the present case. If a successor employer's termination of transferred employees as a result of a discontinuance of an acquired business constitutes deemed termination by the predecessor employer, as in *GenCorp*, so too should a successor employer's discontinuance of an acquired business, as carried at a particular location, constitute a deemed discontinuance by the predecessor employer if it results in loss of employment by the transferred employees, as in the present case (the PCO said as much in *obiter* comments in *GenCorp*, (1994), PCO Bulletin 5/3 (Fall 1994), at p. 62). It should make no difference that the predecessor employer never carried on business at that location just as it made no difference in *GenCorp* that the predecessor employer had no hand in the discontinuance of business. There is a similar relationship between the action of the successor employer and the predecessor employer in the two situations – that is the employees originally employed by the predecessor employer lost their jobs as a result of the action of the successor employer. While clause (e) of subsection 69(1) of the Act does not refer explicitly to cessation of employment (although clause (d) does), this must be the necessary result of the discontinuance of business at a specific location before the Superintendent can order a wind up under clause (e). If there is a discontinuance of business without any loss of employment, say where all the employees are transferred to a new location, it seems self-evident that the Superintendent would not be authorized to order a wind up of the pension plan in relation to those employees.

The fourth argument that IOL made for distinguishing the present case from *GenCorp* is that the roles of the Transferred Employees changed in the present case upon the sale of the business. In particular, some of them performed functions thereafter in relation to the Petro-Canada, as well as the IOL, credit card program and other employees were integrated into the credit card operations with the Transferred Employees. But we do not know whether there were comparable changes in the roles of the transferred employees in *GenCorp* following the sale of the business as the reasons for decision, at the various levels in that case, are silent on this point. In fact, the only important business-related consideration under clause (d) or (e) of subsection 69(1) of the Act, as read with subsection 80(3), would seem to be whether the business that was discontinued, or closed at a specific location, by a successor employer was a business in which the transferred employees were working.

Finally, IOL submitted that all or a significant portion of the business carried on by GE Capital (or GE Retailer) at a specific location was not discontinued with the closure of the Toronto Business Centre because GE Capital had another Alden Road facility across the parking lot that provided card embossing and billing services for the credit card business carried on at the Toronto Business Centre as well as for other credit card businesses of GE Capital. We are not persuaded, on the basis of the evidence we have heard, that there was sufficient physical and operational integration of the two Alden Road facilities that they should be treated as part of a single specific business location for the purposes of clause (e) of subsection 69(1) of the Act nor was there any clear evidence that the credit card embossing facility continued in operation after the closure of the Toronto Business Centre. Therefore, we are not persuaded that the closure of that Centre involved something short of the discontinuance of business at a specific location.

Conclusion

We conclude, therefore, that the Superintendent is authorized to order the partial wind up of the IOL Plan as proposed in the First Notice of Proposal. The Superintendent's exercise, in the circumstances of the present case, of the discretion involved in carrying out that authority was not challenged before us. IOL simply took the position that the Superintendent did not have the authority to make the proposed order, a position that we have rejected for the reasons set out above. Therefore, we order the Superintendent to carry out the proposal contained in the First Notice of Proposal, subject to the qualification that the order of the Superintendent requiring the partial wind up of the IOL Plan should exclude from the partial wind up group the three Transferred Employees who were re-employed by IOL upon the cessation of their employment with GE Capital (or GE Retailer).

2. Are the former members of the IOL Plan who ceased employment with GE Capital between March, 2000 and July, 2000 entitled to credit in that Plan for any increase in age during their period of employment with GE Capital for the purpose of determining entitlement to benefits under the IOL Plan pursuant to clause (c) of subsection 80(1) of the Act?

In the Second Notice of Proposal, the Superintendent proposes to make an order that the administrator of the IOL Plan give credit for both age and years of service, as at the closure of GE Capital's Toronto Business Centre, to those members who ceased employment with GE Capital between March, 2000 and July, 2000, as a result of that closure, when determining entitlement to benefits under the IOL Plan. IOL concedes that where clause (c) of subsection 80(1) of the Act applies, it generally requires a pension plan to take account of a member's service with a successor employer and, consequently, any increase in age during that service. However, IOL disputes that this or any other provision of the Act would enable a member of the IOL Plan to "grow into" the particular age requirements under section 4.3 of that Plan or otherwise satisfy the conditions for the operation of that section.

Section 4.3 of the IOL Plan provides for an enhanced early retirement pension in the circumstances that it prescribes, as follows:

4.3 Pension in Lieu of Termination Annuity

A Member with 10 years or more of Service whose employment is terminated by the Company and who is eligible for a termination annuity ... and who will be eligible to retire ... within five years of terminating employment [i.e. who is terminated when between the ages of 50 and 55] may retire ... and receive a pension ... in lieu of a termination annuity ... if the Member's employment is terminated for reasons deemed by the Company to be for maintaining or improving the efficiency of its operations; provided, however, that the date of retirement for the purpose of receiving payment of such pension shall not be effective until the last day of the month in which the Member attains age 55 ...

For ease of reference, we set out, once again, some of the provisions of section 80 of the Act, a section which also figured into the determination of the first issue in this case:

80. (1) Where an employer who contributes to a pension plan sells, assigns or otherwise disposes of all or part of the employer's business or all or part of the assets 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 the pension plan of the successor employer,

...

(c) is entitled to credit in the employer's pension plan for the period of employment with the successor employer for the purpose of determining entitlement to benefits under the employer's pension plan.

...

(3) Where a transaction described in subsection (1) takes place, the employment of the employee shall be deemed, for the purposes of this Act, not to be terminated by reason of the transaction.

The Superintendent relied on clause (c) of subsection 80(1) as requiring, for the purposes of section 4.3 of the IOL Plan, that IOL give credit for any age progression of the Transferred Employees while they were employed by GE Capital (or GE Retailer), and subsection 80(3) as deeming the circumstances of the termination of those Employees to be circumstances of their termination, at the same time, by IOL, their original employer.

However, the deemed continuation-of-employment provision of subsection 80(3) operates "for the purposes of [the] Act" and not for the purposes of a pension plan subject to the Act. By contrast, the predecessor provision, in what was then subsection 29(2) of the Act, deemed employment to continue "for the purposes of the employer's plan". The

change in wording should be taken to be purposeful and to have some practical effect. The Superintendent argued that the change in wording can be explained by the fact that it coincided with the introduction into the Act of a requirement that the administrator of a pension plan must ensure, under subsection 19(1), that a pension plan is administered in accordance with the Act and of authority on the part of the Superintendent, under subsection 87(2), to make an order against the administrator requiring it to take action or refrain from taking action in respect of a pension plan if of the opinion that the plan is not being administered “in accordance with [the] Act, the regulations or the plan” (emphasis added). The Superintendent suggested that “for the purposes of the Act”, therefore, now embraces “for the purposes of the pension plan” since the Act requires, in effect, that every plan be administered in accordance with the plan. Consequently, it was possible, in the Superintendent’s view, to move to the new statement of purposes in subsection 80(3) without losing the effect of the original statement of purposes in the predecessor subsection 29(2).

We do not think that the use of a particular principle set out in the Act (as in subsection 80(3)), in order to interpret a provision of a pension plan (such as section 4.3 of the IOL Plan), can be said to be “for the purposes of the Act”. It might be so if the Act stated expressly that the principle applied for the purposes of any pension plan, so that use of the principle to interpret the plan was, arguably, a purpose of the Act. But that is not the situation in the present case. We do not think that subsection 87(2) of the Act provides such an express statement for all it says is that the Superintendent has the authority to take enforcement action if there is a breach by the plan administrator of a provision of a pension plan. That does not make the interpretation of any such provision a purpose of the Act. What the Superintendent can enforce is the plan, properly interpreted. Subsection 87(2) does not purport to dictate how the plan should be interpreted by superimposing principles of the Act that do not apply, of their own force, to the plan.

The interpretation of section 4.3 of the IOL Plan, as it applies in the circumstances of this case, is not governed by the *GenCorp* decision nor by the same principles that led us to apply *GenCorp* in resolving the first issue in the present case. *GenCorp* and its application in this case concern the effect of subsection 80(3) of the Act upon the operation of subsection 69(1) of the Act. The latter subsection refers, in clauses (d) and (e), to the action of an “employer”, in the form of a business discontinuance or reorganization, as triggering the right of the Superintendent to order the wind up of a pension plan. The term “employer” is defined in the Act, as noted in *GenCorp*, to include both the original employer and a successor employer, so that it would cover IOL and GE Capital (or GE Retailer) in the present case. By comparison, section 4.3 of the IOL Plan refers to the action of the “Company” and the rationale of the “Company” for that action. In particular, the section takes effect where there is a termination of employment by the Company and such termination is for reasons deemed by the Company to be for maintaining or improving the efficiency of its operations. The term “Company” is defined, for the purposes of the IOL Plan, as meaning IOL and any affiliate designated by IOL for participation in the IOL Plan; the definition does not include a successor employer. Therefore, the termination of employment that is addressed by section 4.3 of the IOL Plan must mean, in the case of the Transferred

Employees, their termination by IOL upon the sale of IOL's credit card business to GE Capital, not their subsequent termination by GE Capital (or GE Retailer). Consequently, their entitlement to receive the benefit provided by section 4.3 must depend on their age at the time of that termination, assuming it to have been "for efficiency reasons". If they were age 50 to 55 at that time, they would qualify for the benefit.

We are then left with the question of whether the latter conclusion is altered by clause (c) of subsection 80(1) of the Act, which says that employees in the position of the Transferred Employees are entitled to credit in their employer's pension plan for the period of their employment with the successor employer for the purpose of determining entitlement to benefits under the employer's plan. Clearly, this provision does not attribute the actions of a successor employer, in relation to any transferred employees, to the original employer. It cannot, therefore, overcome the requirement of section 4.3 of the IOL Plan that there must have been a termination "by the Company" [i.e. IOL] for efficiency purposes before one gets to the question of whether an employee falls within the qualifying age range for a section 4.3 benefit. The only such termination that may have occurred, on the facts we have before us, was in 1995 when the Transferred Employees moved to GE Capital.

Conclusion

We conclude, therefore, that none of the Transferred Employees could become entitled to the benefit under section 4.3 of the IOL Plan by virtue of the achievement of the age qualification for that benefit while in the employment of GE Capital (or GE Retailer). Accordingly, we order the Superintendent to refrain from carrying out the proposal contained in the Second Notice of Proposal as it relates to determining entitlement to the benefit under section 4.3 of the IOL Plan.

DATED at Toronto, Ontario, this 21st day of October, 2002.

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

"Bill Forbes"
William Forbes, Member of the
Tribunal and of the Panel

REASONS FOR DECISION OF MS. GAVIN

For the purposes of these Reasons, I adopt the Statement of Facts set out in the separate Reasons for Decision of the other members of the panel that heard this case. The defined terms in those Reasons for Decision are used in the same sense in these Reasons.

The panel was asked to consider two principal issues. The first issue is whether the Superintendent was entitled in the circumstances of this case to make an order, under clause (e) of subsection 69(1) of the Act, requiring a partial wind up of the IOL Plan. On this issue, I agree with my colleagues that a partial plan wind up was appropriate in the circumstances and I concur in the order that they make as a result of their conclusion on this issue.

The second issue is whether the former members of the IOL Plan who ceased employment with GE Capital between March 2, 2000 and July, 2000 are entitled to credit in that Plan for any increase in age during their period of employment with GE Capital for the purpose of determining entitlement to benefits under the IOL Plan pursuant to clause (c) of subsection 80(1) of the Act. On this issue, I disagree with the reasoning of my colleagues.

IOL and the Superintendent agree that in November of 1995, as a result of IOL selling its “Esso” branded consumer and small commercial credit card receivables to GE Capital, the Transferred Employees became entitled to the benefit of section 80 of the Act. They became, in effect, a distinct group within the IOL Plan. They continued their membership in that Plan and their subsequent service with GE Capital (and GE Retailer) would be used to determine entitlement to benefits under the Plan, in accordance with subsection 80(1) of the Act, and their subsequent termination by GE Retailer would be deemed to be termination by IOL, principally as a result of the operation of subsection 80(3) of the Act.

My colleagues conclude that subsection 80(3) cannot influence the resolution of the second issue because it operates “for the purposes of [the] Act” and not for the purposes of a pension plan subject to the Act. They rely on the fact that the Act was amended to substitute the former phrase for the phrase “for the purposes of the employer’s plan”, which appeared in a predecessor provision to subsection 80(3) of the Act. As a result, they believe that the Transferred Employees have not had their employment continued for the purposes of determining entitlement to the benefit of any of the provisions of the IOL Plan. I disagree.

The Superintendent’s position is that the Act must be read in its entirety, in which case this amendment does not represent a significant change since it was accompanied by further amendments requiring, in subsection 19(1), that a pension plan be administered in accordance with the Act and conferring authority on the Superintendent, under subsection 87(2), to order the administrator of a plan to take or refrain from taking any action when

he or she believes that the plan is not being administered in accordance with the Act, the regulations or *the pension plan*. I believe this to be the correct approach.

However, in order to determine if an employee or former employee is entitled to the benefit of a particular section of a pension plan, one must look at the plan for the determination of eligibility. Under section 4.3 of the IOL Plan, a member must have 10 or more years of service, have their employment terminated by the Company for reasons deemed by the Company to be for maintaining or improving the efficiency of its operations, be eligible for a termination annuity, and be eligible to retire within five years of terminating employment.

For the purposes of the IOL Plan, the term “Company” is defined as being IOL. Therefore, a member of the Plan must have their employment terminated by IOL to be eligible for a benefit under section 4.3 of the Plan since that provision relates to situations where there is a termination by the “Company”. Therefore, I agree with my colleagues that section 4.3 of the IOL Plan does not entitle the Transferred Employees to its benefit upon their termination by GE Retailer.

Since the order that my colleagues make in respect of the second issue is limited to entitlement to the benefit under section 4.3 of the IOL Plan, I agree with that order even though I do not agree with all of the reasoning that led to it.

DATED at Toronto, Ontario this 21st day of October, 2002.

“Heather Gavin”
Heather Gavin, Member of the
Tribunal and of the Panel