

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 a proposal of the Superintendent of Financial Services to refuse to make an order under sections 69 and 87 of the Act relating to the Pension Plan for the Employees of Kerry (Canada) Inc., Registration Number 238915 (the “Pension Plan”);

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

BETWEEN:

ELAINE NOLAN, GEORGE PHILLIPS, ELISABETH RUCCIA, KENNETH R. FULLER, PAUL CARTER, R.A. VARNEY and BILL FITZ, being members of the DCA EMPLOYEES PENSION COMMITTEE, representing certain of the members and former members of the Pension Plan for the Employees of Kerry (Canada) Inc.

Applicants

-and-

SUPERINTENDENT OF FINANCIAL SERVICES and KERRY (CANADA) INC.

Respondents

DISPOSITION OF APPLICATIONS FOR COSTS

REASONS OF MESSRS. BHARMAL AND SHORT

1. The Background

In Reasons for Decision in this proceeding dated September 1, 2004, following a hearing on the merits, the Tribunal addressed the issues raised through a request for a hearing made by the Applicants acting in a representative capacity on behalf of certain members

and former members of the Pension Plan for the employees of Kerry (Canada) Inc. (the "Company"). That request called into question certain proposals made by the Superintendent of Financial Services (the "Superintendent") to refuse to take various actions, in respect of the Pension Plan, that the Applicants had asked the Superintendent to initiate. As a result of the decision of the Tribunal, the Applicants were successful in some elements of their challenge to the Superintendent's proposals and the Superintendent and the Company, whose positions largely coincided, were successful in sustaining other elements of the proposals.

The Reasons for Decision indicated that the Tribunal would entertain applications for costs in respect of the proceeding that might be made by any of the parties in writing. Shortly after those Reasons were issued, the Applicants notified the Registrar of the Tribunal of their intention to apply for an order of costs and filed and served written submissions in support of such an order on September 29, 2004. The application is for an order against the Company to pay the costs of the Applicants from the pension fund for the Pension Plan or to pay such costs with an accompanying direction that those costs are an appropriate administrative expense to be borne by the fund. In the alternative, the Applicants ask for an unqualified order of costs against the Company.

On October 1, 2004, the Company served and filed written submissions in support of an order for the payment of its costs by the Applicants.

The Tribunal invited the parties, through a letter from the Registrar dated October 29, 2004, to make oral submissions on the following question:

Does the Tribunal have the authority to make an award for the payment of all or any of the costs incurred by a party in a pension proceeding out of the pension fund and, if so, what factors are relevant in determining whether to make such an award?

The Tribunal heard oral submissions on that question on December 9, 2004. The Applicants argued that the Tribunal had the authority to make such an award, while the Company and the Superintendent argued that the Tribunal did not have that authority. However, the Company maintained that if the Tribunal could make such an award, then the Company's costs, if not payable by the Applicants, ought to be paid from the pension fund for the Pension Plan.

2. The Tribunal's Authority in Respect of Cost Orders

The Tribunal has the authority, under s. 24(1) of the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 (the "FSCO Act") to "order that a party to a proceeding before it pay the costs of another party or the Tribunal's costs of the proceeding".

Section 17.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S-22, as amended (the "SPPA") also addresses orders to pay costs, stating, in subsection (1), that a tribunal

(such as the Financial Services Tribunal) may "order a party to pay all or part of another party's costs in a proceeding". The section also describes the circumstances in which such an order may be made as those set out in rules adopted by the tribunal to govern the practice and procedure before it, subject to the proviso, in subsection (2), that an order to pay costs, under the section, shall not be made unless;

- ◆ the party against which it is directed has engaged in unreasonable, frivolous or vexatious conduct or has acted in bad faith, and
- ◆ the tribunal has adopted rules governing its practice and procedure that deal with cost orders, including the circumstances in which payment of costs may be ordered, the amount of such costs and the manner in which the amount of costs is to be determined.

However, by virtue of subsection (4), these limitations are not to prevent a tribunal from making an order for the payment of costs in other circumstances (and without complying with the rest of the provisions of s. 17.1) where the order is made "in accordance with the provisions of an Act ... in force on the day" s. 17.1 came into effect. Section 24(1) of the FSCO Act is such a provision as it pre-dates s. 17.1 of the SPPA. Therefore, the broad authority of the Tribunal to make an order for costs under s. 24(1) of the FSCO Act is not restricted by s. 17.1 of the SPPA and, in particular, by subsection (2) thereof, which limits a tribunal to ordering costs against a party to situations where that party has acted in bad faith or has exhibited conduct or a course of conduct that is unreasonable, frivolous or vexatious.

The Tribunal has adopted Rules of Practice and Procedure for Proceedings before the Financial Services Tribunal (effective August 1, 2004) as it is entitled to do by virtue of its authority under s. 22(a) of the FSCO Act and its supplementary authority under s. 25.1 of the SPPA. The Rules address the circumstances in which an order for costs can be made in favour of one party to a proceeding against another party by setting out, in Rule 45, the criteria to be considered by the Tribunal in deciding whether to make such an order. The Tribunal is also authorized, under Rule 47.01, to issue practice directions on costs dealing with "general costs assessment policies and tariffs, hourly rates for representatives and consultants, allowable disbursements, and other matters that the Tribunal may consider appropriate". The Tribunal has made a practice direction, namely its Practice Direction on Cost Awards (revised effective August 1, 2004), that, in our view, fits within this enabling Rule. Among other things, that Practice Direction states the general principle that the Tribunal "need not follow the civil trial practice where the usual rule is that the unsuccessful party pays the successful party's costs" (section 2) and sets out some examples of conduct engaged in by a party against which an order for costs is sought that may make it more or less likely that such an order will be made (clauses a and b of section 2). These Rules and this Practice Direction are relevant to the Tribunal's assessment of whether the circumstances justify the making of either or both of the orders of costs applied for in this proceeding.

We find nothing in the Rules, as they relate to cost orders, that is inconsistent with the FSCO Act and the SPPA and, therefore, in violation of s. 25.1(3) of the latter Act, which requires consistency in this regard. The Applicants maintained that any rules of the Tribunal relating to cost awards could simply address the amount of such awards since s. 24 of the FSCO Act only refers to such rules in subsection (3), where it states that: "The Tribunal shall determine the amount of an order for costs in accordance with the rules of the Tribunal". We think that this statement is only for greater certainty and ought not to be taken, by implication, to detract from the broad authority of the Tribunal to make rules of practice and procedure under s. 22(a) of the FSCO Act and s. 25.1 of the SPPA.

3. The Tribunal's Authority to Make an Order for Costs that are or may be Payable out of the Fund for the Pension Plan

Section 24(1) of the FSCO Act and s. 17.1 of the SPPA - the potential statutory sources of the Tribunal's authority to make an order for costs - refer to orders directed to a party to a proceeding to pay the costs of another party (although s. 24(1) of the FSCO Act goes beyond this to authorize an order compelling a party to pay the costs of the Tribunal and the Superintendent incurred in connection with a proceeding before the Tribunal). We think that it would be stretching the wording of these provisions beyond the meaning they can reasonably bear if we were to read the provisions as authorizing an order for costs payable, or subject to reimbursement, out of the fund for a pension plan. The burden of such an order would fall upon the fund, which would not normally be a party to a proceeding before the Tribunal. The fund for the Pension Plan was not a party to this proceeding. Although it was under the stewardship of one of the parties, that does not make it a *de facto* party.

The Applicants referred us to several pension cases in which the costs of one or more parties were ordered to be paid out of a pension fund. These cases speak to the authority of the courts to make such an order. The courts normally have a good deal of discretion in procedural matters, whereas the jurisdiction of this Tribunal is entirely statute-based. We doubt that this Tribunal is entitled to assume court-like authority with respect to cost orders without clear direction in its governing legislation. We note that none of the cases to which we were referred offered any rationale for ordering a party's costs to be paid out of a pension fund rather than making them payable, in the usual fashion, by another party or parties.

We are of the view, however, that it would be in the public interest if the Tribunal were to have the authority, in an appropriate case, to make an order for costs, in favour of a party to a proceeding before it, that are payable out of a pension fund. The existence of such authority might encourage persons, such as pension plan members, to take advantage of the Tribunal's processes that they might otherwise be deterred from resorting to given the heavy burden of establishing the case for an order of costs against another party that must be paid out of pocket without resort to a pension fund.

The Superintendent suggested that the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended (the "PBA") already provides authority, in s. 87, for an order directing the

payment of legal costs out of a pension fund, which could be made, as appropriate, by the Superintendent after the Tribunal had disposed of a request for a hearing relating in some way to that pension fund. Section 87 of the PBA authorizes the Superintendent to make an order requiring a plan administrator or other person to take any action in respect of a pension plan or a pension fund if he or she is of the opinion, among other things, that the plan or fund is not being administered in accordance with the PBA, the regulations under it or the pension plan. This provision would seem to allow the Superintendent to make an order that would bring a pension plan or fund back into line with the PBA, the regulations or the terms of the plan following a perceived breach of any of those instruments. But the non-assumption of legal costs by a pension plan or fund is not, of itself, a circumstance in which s. 87 allows for a corrective order. While s. 87 might, on occasion, provide a basis for an order of costs, it would be bound to have an uneven application, for that purpose, as its availability would turn on the particular wording of the provisions of the pension plan dealing with the expenses that are required to be borne by the plan out of the pension fund. In any event, the plan text is more likely to indicate what expenses may be charged, rather than those that must be charged, against the plan and fund.

4. The Case for an Order of Costs against the Company or the Applicants

We have considered the written submissions of the Applicants, made in support of their application for an order of costs against the Company, in light of the Rules of Practice and Procedure in Proceedings before the Financial Services Tribunal and the Tribunal's Practice Direction on Cost Awards, keeping in mind the general discretion of the Tribunal to award costs under s. 24(1) of the FSCO Act. We have concluded that the case has not been made out for our making an order for costs against the Company in the circumstances of this proceeding.

We have also considered the written submissions of the Company, made in support of its application for an order of costs against the Applicants, in light of these same factors and have concluded that the case has not been made out for our making an order for costs against the Applicants in the circumstances of this proceeding. In our Disposition of Request for Costs, dated April 28, 2004, relating to an application for costs against the Applicants made by the Company in a related proceeding before this Tribunal (*Kerry (Canada) Inc. v. Superintendent of Financial Services and the Members of the DCA Employees Pension Committee*, FST File No. PO191-2002) we said that:

In assessing the Committee's conduct in the course of the proceeding ... we have given some weight to the fact that the Committee was not represented by counsel and that its representative, a Committee member, was not familiar with all of the procedural niceties of participation in a proceeding of this kind.

In considering the Company's application for costs in this proceeding, we have taken a similar approach to assessing the conduct of the members of the Committee, the Applicants herein, during the time they were unrepresented by legal counsel, that is the period from the filing of a request for a hearing through until late May of 2004, after the

evidence phase but before the argument phase of the hearing in this proceeding, when counsel was retained.

5. Disposition of Applications for Cost Orders

We deny both applications for cost orders.

DATED at Toronto, Ontario this 24th day of December, 2004.

“Shiraz Y.M. Bharmal”
Shiraz Y.M. Bharmal, Member of the
Tribunal and of the Panel

“David A. Short”
David A. Short, Member of the Tribunal
and of the Panel

REASONS OF MR. MCNAIRN

I concur with my fellow panel members, Messrs. Bharmal and Short, in the disposition of the applications for cost orders in this proceeding, *i.e.* the denial of those applications. I also agree with their reasons (the "majority reasons") for disposing of the applications in this way except for the conclusions they arrive at in the first two paragraphs of section 3 of those reasons, headed "The Tribunal's Authority to Make an Order for Costs that are or may be Payable out of the Fund for the Pension Plan". Unlike my colleagues, I have concluded that the Tribunal has that authority. Having found the necessary authority, I then considered whether, if it were up to me, I would make either of the orders for costs applied for in this proceeding with the direction that those costs be paid out of the fund for the Pension Plan, or the surplus thereof, rather than by an opposing party. I have concluded that I would refuse to make such orders in the circumstances of this proceeding. The reasons for these conclusions are set out below.

1. The Tribunal's Authority to Make an Order for Costs that are or may be Payable out of the Fund for the Pension Plan

As noted in the majority reasons, section 24(1) of the FSCO Act and s. 17.1 of the SPPA - the potential statutory sources of the Tribunal's authority to make an order for costs - refer to orders directed to a party to a proceeding to pay the costs of another party. The precise terms of s. 24(1) of the FSCO Act are as follows:

The Tribunal may make an order that a party to a proceeding before it pay the costs of another party or the Tribunal's costs of the proceeding.

By comparison, the statutory authority of the Ontario courts to deal with costs is set forth in the following terms in s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA"):

Subject to the provisions of an Act or rule of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Although there is no specific indication of the kinds of persons who could be required by a court, in its discretion, to bear the costs of a proceeding, the Ontario Court of Appeal has said that the words "by whom" in this provision should be interpreted to mean "by which of the parties to the proceeding before the court ... " (see *Rockwell Developments Ltd. v. Newtownbrook Plaza Ltd.* (1972), 27 D.L.R. (3d) 651, at pp. 659 and 661). Therefore, s. 131(1) of the CJA has the same practical limitation as s. 24(1) of the FSCO Act (and s. 17.1 of the SPPA) in that the persons to whom cost orders may be directed are parties to the proceeding in which the costs are incurred.

The Applicants referred in argument to several pension cases in which court costs were awarded in favour of one or more parties payable, in whole or in part, out of the pension fund for a pension plan or, specifically, the plan surplus in that fund. A number of these

cases were before Ontario courts, including; *Re Reeve and Montreal Trust Co. of Canada* (1986), 25 D.L.R. (4th) 312, see esp. at p. 319 (Ont. C.A.); *C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd.* (1989), 31 E.T.R. 252, see esp. at p. 253 (H.C.J.) (these reasons relate to costs issues and are supplementary to reasons reported at (1988), 32 E.T.R. 202 (H.C.J.)); an appeal from the decision in this case was dismissed at (1990), 39 E.T.R. 1 (Ont. C.A.), *Ontario Teachers' Pension Plan Board v. Ontario (Superintendent of Financial Services) and Anne Stairs* (2003), 36 C.C.P.B. 154, see esp. at pp. 157-160 (the award of costs in this case was affirmed at (2004), 236 D.L.R. (4th) 514, at pp. 544-545 (Ont. C.A.)), *Crownx Inc. v. Edwards* (1994), 120 D.L.R. (4th) 270, see esp. at p. 283 (Ont. C.A.), *Re Sara Lee Corp. of Canada Pension Plan*, [1989] O.J. 2597, see esp. at p. 5 (H.C.J.), *Re Knechtel Furniture Ltd.* (1985), 20 E.T.R. 217, see esp. at p. 224 (H.C.J.), and *Nu-Kote Canada Inc. v. Royal Trust Corp. of Canada* (1991), 4 O.R. (3d) 336, see esp. at p. 343 (Gen. Div.). While none of the decisions in these cases recites the authority of the court for making an order for costs payable out of a pension fund, it can be fairly assumed that the authority comes from s. 131(1) of the CJA even though that provision, as interpreted by the Court of Appeal in *Rockwell*, is to the effect that cost orders must be directed to parties to a proceeding before the court.

Although, historically, the Ontario courts may have had some inherent equitable jurisdiction to make cost awards, the contemporary view is that the jurisdiction of the courts to award costs is not inherent but is dependent on statutory authority. This latter view was expressed by the Ontario Court of Appeal in *Poulton v. Ontario Racing Commission* (1999), 177 D.L.R. (4th) 507, see at p. 510. The court referred to s. 131(1) of the CJA as the source of the relevant statutory authority.

It follows from this analysis that I find sufficient precedent in the cases referred to above for the Tribunal making cost awards payable out of a pension fund, given that the authority of the Ontario courts for making such cost orders should now be taken to be derived from statute and given that the statutory authority of the courts and the statutory authority of this Tribunal to make cost orders are not materially different.

2. The Case for an Order of Costs in Favour of the Applicants or the Company Payable out of the Fund for the Pension Plan

As noted in the majority reasons, the availability of an order of costs payable out of the pension fund for a pension plan will, generally, have the beneficial effect of encouraging plan members to take advantage of the Tribunal's processes in situations where they might otherwise be deterred by the prospect of having to assume all or most of their own costs of doing so. Notwithstanding that beneficial effect, which would support the making of such an order of costs in favour of the Applicants in this proceeding, I do not believe that the appropriate threshold for making such an order has been met due to the following circumstances;

- ♦ the Tribunal did not receive any precise evidence of the level of support that the Applicants had from the Pension Plan membership,

- ◆ the Applicants success before the Tribunal was relatively limited in relation to the issues and broad arguments that they put to the Tribunal at various stages of the proceeding; the Applicants were not successful in persuading the Tribunal to order the Superintendent to direct a partial wind up of the Pension Plan which, of all the relief requested by the Applicants, would apparently have generated the most benefit for a significant number of the members of the Pension Plan,
- ◆ there had not been any particular confusion or uncertainty in the pension world about how most of the issues raised by the Applicants in this proceeding should be resolved,
- ◆ the Applicants were responsible for some significant delays in the proceeding that could have been reasonably avoided, such as (but not limited to) a duplicative discovery motion, although I have discounted, to some extent, the significance to be attached to the delays that occurred in the preliminary stages of this proceeding since;
 - ◆ they occurred before the Applicants were represented by counsel and, therefore, before the legal costs that they seek to recover were incurred, and
 - ◆ at the relevant time, the Applicants were represented by one of their number who was not familiar with all the procedural niceties of participation in a proceeding of this kind.

Since a plan sponsor and administrator, such as the Company, is likely to be able to absorb the costs of its participation in a proceeding before the Tribunal more easily than plan members, the Tribunal should be less inclined to make an order for costs in favour of such a party payable out of a pension fund. In some cases, of course, the pension plan text may authorize the charging of such costs against the fund without any direction to that effect from the Tribunal. The arguments of the Company in support of its application for costs in this proceeding fall short of persuading me that the Tribunal should make the requested order for payment of those costs out of the fund for the Pension Plan, if it had the authority to make such an order.

In conclusion, therefore, I would not be prepared to make an order of costs in favour of the Applicants or the Company payable out of the fund for the Pension Plan. I recognize that Messrs. Bharmal and Short have not addressed the question, in their majority reasons, of whether the Tribunal should, in the circumstances of this proceeding, award

costs to either or both of the parties payable from that fund. They did not have to do so, and did not in fact do so, given their view that the Tribunal does not have the authority to make such an award.

DATED at Toronto, Ontario, this 24th day of December, 2004

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