

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c.P.8, as amended by the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c.28 (the “*Act*”);

AND IN THE MATTER OF a Proposal by the Superintendent of Financial Services under section 89(5) of the *Act*, to Refuse to Make an Order pursuant to section 69 of the *Act*, respecting the Pension Plan for AIG Assurance Canada Pension Plan for Salaried Employees, Registration Number 0284604 (the “*Plan*”);

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

BETWEEN:

MARY SUTTON

Applicant

-and-

**SUPERINTENDENT OF FINANCIAL SERVICES
And AIG ASSURANCE CANADA**

Respondents

BEFORE:

Mr. Ralph Scane
Member of the Tribunal and Chair of the Panel

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

Mr. Martin Brown
Member of the Tribunal and of the Panel

DATE:

May 31, 2005

APPEARANCES:

For Mary Sutton

Ms. Susan Philpott
Ms. Clio Godkewitsch

For the Superintendent of Financial Services

Ms. Deborah McPhail

For AIG Assurance Canada

Mr. Mahmud Jamal
Mr. Evan Howard

Reasons for Order on Motion for Disclosure

On May 31, 2005, the Tribunal held an oral hearing of an interlocutory motion by the Applicant Mary Sutton to require the Respondent AIG Assurance Canada (AIG) to produce documents, in addition to those already produced by AIG. The Tribunal reserved its decision. On June 1, 2005, the Tribunal issued an order dismissing the application, with reasons to follow.

Background

The motion was brought in aid of a Request for Hearing filed by the Applicant pursuant to s.89(8) of the *Pension Benefits Act, R.S.O. 1990 c.P.8*, (the *PBA*). The Request concerns a Notice of Proposal issued by the Superintendent of Financial Services (the Superintendent) proposing to refuse to make an order for a full winding up of a certain pension plan, pursuant to s. 69(1)(a) of the *PBA*.

The Plan in question is the AIG Assurance Canada Pension Plan for Salaried Employees (the AIG Plan). This was originally the Norwich Union Life Insurance Company (Canada) Pension Plan for Salaried Employees. The Plan name was changed on May 1, 2001 when the corporate name was amended on a change of share control. The Plan is a defined benefit plan. AIG is the Plan sponsor and Administrator. Mary Sutton (the Applicant) is a beneficiary of the AIG Plan. As of May 1, 2001, there was an actuarial surplus in the AIG Plan.

On the same date, May 1, 2001, AIG became a participating employer under the Commerce and Industry Insurance Company of Canada Pension Plan (the Commerce Plan), sponsored by an affiliate of AIG. All members of the AIG Plan ceased to participate in that plan with respect to future services from that date forward. For those future services, they became members of the Commerce Plan, which is a defined contribution plan. AIG has applied to convert the AIG Plan to a defined contribution plan. Members of that plan have been offered certain elections whether to convert their accrued benefits to defined contribution benefits or have them provided for by purchases of annuities. AIG's conversion report was filed with the Superintendent on September 19, 2002. The Tribunal was advised that the Financial Services Commission of Ontario (FSCO) has approved the conversion in principle, but that final approval of the related conversion amendments is being held in abeyance pending resolution of the merger application referred to below.

On October 25, 2002, AIG applied to merge the AIG Plan with the Commerce Plan, and in that application seeks to transfer all assets from the AIG Plan to the Commerce Plan.

It must also be noted that, in the draft Agreed Statement of Facts prepared by Counsel for AIG as agreed in the Pre-Hearing Conference, and circulated to the Parties, it was disclosed that, since May 1, 2001, funds had been transferred periodically from the AIG Plan to the Commerce Plan to fund the defined contribution benefits of the former AIG Plan members participating in the Commerce Plan. Solicitors for AIG apparently communicated this fact to FSCO in June, 2004. FSCO requested the voluntary return of the assets so transferred. Certain correspondence between counsel for AIG or AIG and FSCO was attached to the draft and thus available to the Parties, but was not before the Tribunal on this motion.

The Motion for Disclosure

The Applicant has moved for disclosure by AIG of:

- (1) All reports prepared for Norwich Union Life Insurance Company and/or AIG Assurance Canada, in their capacity as Plan administrator of the AIG Plan, by any of its agents and/or service providers, including but not limited to, any reports prepared by legal and actuarial consultants relating to:
 - a. the proposed conversion of the AIG plan;
 - b. the proposed merger of the AIG Plan; and
 - c. the transfer of assets from the AIG Plan to the Commerce and Industry Company of Canada Plan.

The requested documents are in addition to any documents disclosed by AIG in its List of Documents submitted pursuant to agreements made at the Pre-hearing Conference in this matter. Since submitting this list, AIG has also produced "additional documents in respect of the background of the repatriation of assets from the Commerce Plan to the AIG Plan, as well as reports provided to the administrator with respect to the financial

status of the Plan between 2000 and the present.” (AIG’s Responding Motion Record. p.8, Para. 32). At the hearing, Counsel for the Applicant disclaimed any intention that plan related documents comprised in the documentation of the purchase of the controlling share interest of Norwich Life Insurance Company (Canada) be considered as included in those sought on this motion.

Conclusions of the Tribunal

It is no secret that the Applicant fears that this merger will expose the current actuarial surplus in the AIG Plan to being applied for the benefit of AIG or of members of the Commerce Plan who are not former members of the AIG Plan, to the detriment of present and retired members of the AIG Plan. The substantive application for a full wind up of the AIG Plan, of which this interlocutory motion is a part, is part of the Applicant’s efforts to prevent this result.

Unfortunately, from the Tribunal’s point of view at least, consideration by the Superintendent or the Tribunal of the entire series of completed and proposed transactions with respect to what is really at stake between the Applicant and the Respondent AIG must be done piecemeal. Counsel for the Superintendent advised the Tribunal that the Superintendent felt constrained by the decision of the Ontario Court of Appeal in *Huus et al. v. Superintendent of Pensions et al.*, (2002) 58 O.R.(3d) 380 to deal with the present substantive application for a full winding up before turning to a consideration of the pending application for plan merger and transfer of assets under s.81 of the *PBA*. Whether it is necessary to separate the winding up application from the succeeding issues as thoroughly as was done here in order to comply with the letter and spirit of the Court’s comments may invite review on some other occasion, but this motion is not the appropriate place.

At the Pre-Hearing Conference in this matter, held on March 22, 2005, the matters in issue in the Application were framed, by agreement of the Parties, as follows:

(a) Should the Tribunal direct the Superintendent to order a full wind up of the Plan under clause 69(1)(a) of the *Act*?

(b) If the answer to (a) is yes, what is the appropriate time for the full wind up?

It is tempting, from at least the Tribunal’s point of view, to treat this motion as if it were a motion for discovery covering all the issues which might arise between the Parties out of the past or proposed steps taken or sought to be taken by AIG with respect to the Plan and the funds in it. However, the Tribunal considers that this is not the proper approach. Anything ordered to be disclosed must be relevant to the agreed issues in this application, as set out above.

Section 69(1)(a) of the *PBA* reads:

69. (1) The Superintendent by order may require the wind up of a pension plan in whole or in part if,

(a) there is a cessation or suspension of employer contributions to the pension fund;

On the face of things, whether the conditions set out in subsection (a) exist appears to be a question of fact, which is separate and apart from the transactions concerning which the notice of motion seeks information, namely the proposed conversion of the AIG Plan to a defined contribution plan, the proposed merger of the AIG and Commerce Plans, and the transfer of funds from the AIG Plan to the Commerce Plan as described in the draft Statement of Facts circulated by Counsel for AIG. There will also apparently be a question of law argued at the hearing of the substantive motion, namely whether, in view of s.81(1) of the *PBA*, s.69(1)(a) has any application at all in the circumstances which exist here. Documentation surrounding the matters described in the Notice of Motion is not relevant to this argument.

Counsel for the Applicant argued that the types of documentation she was requesting were relevant to the application under s.69(1)(a) because the Section, by the use of the word *may* in its opening words, confers a discretion upon the Superintendent to refrain from ordering a wind up of a pension plan even if the conditions stipulated in the various subsections are found to exist. Admittedly, the discretion is only to “refrain”. It was not suggested that the Section conferred any discretion to order a wind up if the statutory requirements were not met. Counsel argued that the disclosure of the transfer of funds from the AIG to the Commerce Plans indicated that the funds of the AIG Plan were in danger of some wrongful manipulation, and it was possible that other documentation surrounding the transactions to which she referred in her Notice of Motion would reveal something which would strengthen that appearance of danger. This information might cause the Superintendent, or the Tribunal, not to exercise a discretion which might otherwise have been exercised against ordering the winding up.

For the purposes of the above argument, the Applicant is entitled to the benefit of the assumption that s.69(1)(a) remains operative in the circumstances of this case, notwithstanding the presence of s.81(1) in the *PBA*.

The Tribunal, since its decision in an interlocutory motion for disclosure in the matter *Monsanto Canada Inc. v. Superintendent of Financial Services, Decision No. P0013-1998-1*, has applied the test that, *inter alia*, “the information is arguably relevant to an issue in the proceedings”. Counsel for the Superintendent submitted to the Tribunal that “arguably relevant” meant that the applicant for disclosure must show a “pretty good case” for relevance. The Tribunal does not think it necessary in this case to examine whether the threshold is really that high. We think that at the very least, the Tribunal must be persuaded that there is some possibility that the disclosure sought could assist it in resolving the issues before it in the substantive application. The Tribunal is not so

persuaded in this case. The matters around which disclosure is sought, while they may be arguably relevant to the underlying issue which is concerning the Applicant, that is, whether the funds of the AIG Plan can or must be preserved for the exclusive benefit of members and retired members of that Plan notwithstanding the proposed plan merger and asset transfer described above, are too remote from the much narrower issue with which the Tribunal can deal on this application. Furthermore, a winding up application is not the preferred place to investigate these worries. Under s.81(4) of the *PBA*, “[n]o transfer of assets may 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...”. By s. 81(5), “[t]he Superintendent shall refuse to consent to a transfer of assets that does not protect the pension benefits and any other benefits of the members and former members and former members of the original pension plan...”. These sections indicate that it is at the stage where the transfer of assets is being considered for approval that there is the widest scope for enquiry into the principal concerns of the Applicant. That is where such enquiry should take place.

For these reasons, the Tribunal has dismissed the application for disclosure.

Dated the 6th day of June, 2005

“Ralph Scane”

Ralph E. Scane, Member of the Tribunal
and Chair of the Panel

“Martin Brown”

Martin Brown, Member of the Tribunal
and of the Panel

“Louis Erlichman”

Louis Erlichman, Member of the Tribunal
and of the Panel