

FINANCIAL SERVICES TRIBUNAL

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

IN THE MATTER OF a request made by Donna Capaldi, beneficiary of Tony (Antonio) Capaldi to the Superintendent of Financial Services for an order compelling the payment of certain benefits from the **Retirement Income Plan for Union Employees of Dominion Stores Limited (1979), Registration Number 0005188 (the “Plan”)**;

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

BETWEEN

DONNA CAPALDI, BENEFICIARY OF TONY (ANTONIO) CAPALDI

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES and DOMGROUP LTD.

Respondents

BEFORE:

Ms. Florence A. Holden
Member of the Tribunal and Chair of the Panel

Ms. Elizabeth Shilton
Member of the Tribunal and of the Panel

Mr. David Short
Member of the Tribunal and of the Panel

APPEARANCES:

For the Applicant:
Ms. Patti Huck and Mrs. Donna Capaldi

For the Superintendent:
Ms. Deborah McPhail and Ms. Zeenath Zeath

For the Respondent Domgroup Ltd.:
Ms. Marianne Desaulniers

HEARING DATE:

February 6, 2006

REASONS FOR DECISION

PRELIMINARY MATTERS:

Ms. Desaulniers was asked that she confirm that she was in attendance at this hearing as a proper representative of Domgroup Ltd. and she did so confirm.

The Chair of the Panel reiterated her reasons for an interim order issued on January 9, 2006, that denied a request by the Respondent, Domgroup Ltd., to add Industrial Alliance Insurance and Financial Services Inc. (“Industrial Alliance”) as a party to these proceedings.

The reasons were issued on January 9, 2006 by the Chair of the Panel as follows:

- The parties agreed at the pre-hearing conference of October 3, 2005 that they were the correct parties and the Chair believed this to be so.
- Industrial Alliance had not requested party status.
- The Respondent Domgroup Ltd.’s grounds for the motion were that Industrial Alliance was an agent for Domgroup Ltd., the plan administrator, acting as a trustee for the Plan and made a payment consistent with the deceased Plan member’s instructions (Mr. Tony Capaldi). While the relationship may be one of agency, there was no evidence in the submissions made to suggest that Industrial Alliance acted independently. Lack of payment would not relieve Domgroup Ltd. of its obligations.
- While useful for the Panel to hear evidence of any party as to such payment, it is not necessary to add Industrial Alliance as a party to secure such evidence. Any party may call Industrial Alliance as a witness in that regard. The Tribunal is prepared, if requested, to consider an application by any party for Summons to Witness in Form 3 (a) of any person to give testimony or to produce documents at the hearing, by submission of such request to the Registrar under Rule 36.01 of the Rules of Practice and Procedure for Proceedings before the Tribunal (the “Rules”).
- Applications for party status under Rule 38 of the Rules are normally brought by the person who wishes to be added as a party. This is not the case in this matter. The Rules do not provide any procedures for a party to apply to have another person added as a party.

- While it may be possible on a broad reading of Section 2.01 of the Rules that in some limited circumstances the Tribunal may have the power to make such an order, the Chair did not feel it necessary to determine that question of jurisdiction further. Following the reasons in the decision of the Tribunal in the matter of CBS Canada Co. v. Superintendent of Financial Services and National, Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW – Canada) and its local 504, FST Decision No. P0164-2001-1, wherein a similar issue was raised, it is not necessary to add Industrial Alliance as a party, since it is reasonable to assume that information it has in its hands may be easily available to the parties, and the Respondent, Domgoup Ltd., has not suggested otherwise.

FACTS

On the basis of the evidence before us, the Panel finds the following facts:

1. Mr. Tony (Antonio) Capaldi was a former member of the Retirement Income Plan for Union Employees of Dominion Stores Limited (1979) (the “Plan”). Mrs. Donna Capaldi, the Applicant, is the surviving spouse and beneficiary of Mr. Capaldi.
2. Domgroup Ltd. (formerly Dominion Stores Limited) was the administrator of the Plan for purposes of the *Act*. Domgroup Ltd. was accorded party status on consent of all parties at a pre-hearing conference on October 3, 2005.
3. In October of 1989, the Plan administrator wrote to Mr. Capaldi requesting him to make an election with respect to his pension entitlement. The Plan was wholly wound-up. The letter confirmed that the locked-in portion of Mr. Capaldi’s pension entitlement was valued at \$4,236.40 and the non-locked-in portion was valued at \$1,412.13.
4. Mr. Capaldi partially completed an election form, locking-in agreement and TD2 form, each signed November 8, 1989. The parties are agreed that Mr. Capaldi’s intention was to transfer both the locked-in and non-locked-in portions of his pension entitlement, if possible, to his person Registered Retirement Savings Plan with National Trust (now Scotiabank).
5. The Applicant contends that the locked-in portion of Mr. Capaldi’s pension entitlement was not transferred by the Plan administrator into his RRSP account at National Trust.
6. An erroneous letter was sent by Domgroup Ltd. to Mr. Capaldi, dated December 17, 2002, which suggests that his pension would commence in June 2003 at age 65. We accept Ms. Desaulniers’ testimony that the letter was sent in error and that no pension was to commence at age 65, but also note no evidence of any correction sent to Mr. Capaldi was submitted. The Applicant’s claim did indicate that payment of a periodic pension would be an acceptable form of relief.

7. The Applicant has produced the following additional documentation to substantiate her claim that the locked-in portion of the pension entitlement was not transferred to Mr. Capaldi's RRSP:
 - a. a letter from Scotiabank dated August 20, 2003, stating that it appeared that National Trust did not receive a pension transfer in the amount of \$4,236.40 in 1989 for Mr. Capaldi;
 - b. a letter from Scotiabank dated November 29, 2004, confirming that Mr. Capaldi transferred his RRSP to Assante Financial in November of 1999 and the amount was \$1,412.31.
8. Domgroup's records, as provided by Industrial Alliance, indicate that the non-locked-in portion and the locked-in portion of Mr. Capaldi's pension entitlement, in the amount of \$5,979.38, were transferred via a cheque numbered 4691080 dated November 30, 1989. Domgroup's records, as provided by Industrial Alliance, also show this cheque was cashed on December 13, 1989.
9. Due to the passage of time, no one has been able to produce a cancelled cheque.
10. Domgroup has produced the following documentation to substantiate its claim that the locked-in portion of Mr. Capaldi's pension entitlement was transferred to his RRSP:
 - a. a faxed transmission from Industrial Alliance confirming that cheque number 4691080 dated November 30, 1989 in the amount of \$5,979.38 was cashed on December 13, 1989; the fax also confirms that the practice is to issue only one cheque when both locked-in and non-locked-in amounts are transferred to the same institution;
 - b. a list of payments from Industrial Alliance showing a cash entitlement of \$5,648.43 as of May 3, 1989, and an amount paid of \$5,979.38 on the same line as the number "91" and the name "Capaldi, T.";
 - c. a handwritten list from Industrial Alliance showing transaction number 91, Tony Capaldi, November 30, 1989, number 4691080, \$5,979.38;
 - d. a list of cheques issued by Industrial Alliance showing payment of \$5,979.38 on December 13, 1989, transaction number 4691080;
 - e. a letter dated February 9, 2005 from Industrial Alliance.
11. In addition to these agreed facts, Mrs. Capaldi gave oral evidence. She testified that she personally reviewed all the documentation that came from Scotiabank in connection with her husband's RRSPs. She also testified that Scotiabank refused to allow the Capaldis to remove any of the money transferred, taking the position

that it was all locked-in. She indicated that the only statements she ever saw were related to a small RRSP (presumably the one ultimately transferred to Assante in 1999) and that the Capaldi's did not raise any questions about what had happened to the larger amount because they assumed that the rest of the money was still in the pension plan. They began to make inquiries only after Mr. Capaldi received the December 17, 2002 letter from Domgroup inviting him to apply for his pension. Mrs. Capaldi indicated that they were subsequently advised that he would not be getting a pension because all his money had been transferred out of the pension plan in 1989. The Capaldi's then became concerned that not all the money to which he was entitled had in fact been transferred, and commenced this case.

12. A Notice of Proposal was issued by the Superintendent of Financial Services (the "Superintendent") on May 10, 2005, refusing to order the Plan administrator to pay any additional amounts.
13. Domgroup did, however, offer in evidence some additional documentation received the week before the hearing from Industrial Alliance, which was described by Domgroup as simply confirmation of evidence already agreed to, not new evidence. The Superintendent supported the admission of the new documents. While Mrs. Capaldi had not seen these documents prior to the hearing and did not consent to their admission, she declined the panel's invitation to seek an adjournment to review the documents and call additional evidence. We agreed to receive the additional documents, but in the result have not relied on them.

THE ISSUES IN THIS PROCEEDING:

At the pre-hearing conference of October 3, 2005, the Parties agreed to frame the issues as follows:

- (a) Has the Applicant established that part of her pension entitlement as a surviving spouse was not transferred from the Plan to the former member's (Mr. Capaldi's) RRSP pursuant to subsection 42(5) of the *Act*?
- (b) If the answer to issue (a) is yes, what amount is owing to the Applicant?
- (c) If the answer to issue (a) is yes, what is the appropriate remedy?

We will now deal with each issue separately and in the order described above.

- (a) **Has the Applicant established that part of her pension entitlement as a surviving spouse was not transferred from the Plan to the former member's (Mr. Capaldi's) RRSP pursuant to subsection 42 (5) of the Act?**

For clarity, the panel will restate the issue: the Applicant is required to establish whether Mr. Capaldi's full pension entitlement was paid from the Plan to his RRSP as per his

election. We are satisfied that the Applicant, Mrs. Donna Capaldi, is the proper surviving spouse and beneficiary of any remaining pension entitlement.

We accept the Respondent, Domgroup Ltd.'s evidence, provided by its funding agent, Industrial Alliance, included in the Agreed Book of Documents, that there was a transfer of funds by Industrial Alliance, as the funding agent of the Plan administrator, to Mr. Capaldi's RRSP in November 1989. The Applicant does not dispute that there was a transfer of funds. The only item in dispute is the amount of transfer. The best evidence before us as to amount are those documents provided by the Plan's funding agent, Industrial Alliance, whose cheque records indicate a payment was made by cheque numbered 4691080, dated November 30, 1989 in the amount of \$5,979.38 and cashed on December 13, 1989.

There is no evidence before the panel as to how that amount was subsequently allocated to Mr. Capaldi's RRSP by National Trust. It is possible that Mr. Capaldi had more than one RRSP or that an error was made in the allocation of the transferred monies. Neither Industrial Alliance nor Scotiabank were called as witnesses to provide insight as to the payment and allocation of funds, despite offers by the panel to permit an adjournment for such purpose.

Mrs. Capaldi's own evidence indicated that the TD2 transfer form submitted at the hearing by Domgroup, which had not formed part of the Agreed Book of Documents, was a document that she had not seen previously and she did not believe that the "Details of Transfer" information indicating the full transfer amount of \$5648.53 was completed by Mr. Capaldi. She did not, however, dispute the information appearing on the form. Mrs. Capaldi refused the panel's offer of an adjournment to satisfy herself as to the authenticity of the documents. As noted above, the panel in rendering this decision has decided to give no weight to the documents.

We do not find the letters from Scotiabank, dated August 20, 2003 and November 29, 2004 of any assistance in dealing with the issue in this case. The August 20, 2003 letter simply indicates that Scotiabank did not receive a transfer in the amount of \$4,236.40. In the documents provided by the Respondent from Industrial Alliance, Industrial Alliance indicated that it was their practice to issue one cheque for both locked-in and non-locked in pension entitlements, which would have been in the amount of \$5,648.53 with interest to date of transfer. The Applicant's own testimony was that no enquiries were made by her of Scotiabank after 2002 and she provided no other documentation, and in particular no related tax records.

The November 29, 2004 Scotiabank letter addressed to the Mr. Dillon De Coteau of the Financial Services Commission of Ontario, Pension Plan Branch, refers to a subsequent transfer from Mr. Capaldi's RRSP to Assante Financial in November 1999, but that letter fails to reference the RRSP account number and the dollar amount referred to in the transfer does not match the other Scotiabank records submitted with respect to the transfer. As well we find it curious that the dollar amount transferred ten years later would have no accrued earnings to increase the amount indicated. In any event that

subsequent transfer is immaterial to the issue at hand and we give that document no weight.

No party called witnesses from either Industrial Alliance or Scotiabank. No other documentary evidence as to the amount transferred other than documents in the Agreed Book of Documents were tendered to the panel. The Applicant did not dispute that the transfer forms signed by Mr. Capaldi were intended to transfer his full entitlement under Section 42 of the Act to his personal RRSP, and she did understand that all or a portion of those monies would be locked-in. The panel has found that the transfer cheque in the amount of \$5,979.38 was paid and cashed. The Applicant offered no evidence to contradict or challenge that evidence. The panel accepts Ms. Desaulniers' testimony that Domgroup Ltd. did not have any other files in its possession. Based on the evidence before us, the 17-year lapse since events began, and with no additional evidence available, we find that the answer to question (a) is No.

As a result of this finding the panel does not find it necessary to answer questions (b) or (c). We recognize that our finding leaves no remedy for the Applicant under the *Act*. She may have other remedies in civil court, and in view of our finding that the full sum of \$5,979.38 was sent by Industrial Alliance to Scotiabank for deposit in Mr. Capaldi's RRSP and received by Scotiabank, she may wish to take this up with the bank ombudsman.

The panel hereby orders that the Applicant's request be dismissed and the Superintendent's Notice of Proposal be affirmed.

COSTS

As no party made a request as to costs, the panel makes no order as to costs.

Dated at Toronto this 13th day of March, 2006.

"Florence Holden"
Florence A. Holden
Chair of the Panel and Member of the Tribunal

"Elizabeth Shilton"
Elizabeth Shilton
Member of the Panel and Member of the Tribunal

"David Short"
David Short
Member of the Panel and Member of the Tribunal