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CWA / ITU Pension Plan, Registration Number 554717

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

AND IN THE MATTER OF the decision of the Superintendent of Pensions for Ontario dated February 13, 1998, with respect to the partial wind-up of the CWA/ITU Pension Plan, Registration Number 554717 (the "Plan");

AND IN THE MATTER OF a hearing in Accordance with section 89(8) of the Act.

BETWEEN:

**COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION
OF CANADA ("CEP")
(Applicant)**

and –

**SUPERINTENDENT OF PENSIONS
(Respondent)**

- and -

**CWA/ITU PENSION PLAN (CANADA) BOARD OF TRUSTEES
(Respondent)**

BEFORE: Mr. David E. Wires, Chair
Mr. Louis Erlichman, Member
Mr. William M. Forbes, Member

APPEARANCES: For CEP:

Mr. Paul J.J. Cavalluzzo
Mr. Bernard A. Hanson

For Superintendent of Pensions:

Ms. Deborah McPhail

**For CWA/ITU Pension Plan
(Canada) Board of Trustees:**

Mr. David Stout

HEARING DATES: February 22, 1999 to February 26, 1999

DECISION RELEASED: June 7, 1999

REASONS FOR DECISION

BACKGROUND

The Plan and Its Administration

The CWA/ITU Pension Plan (Canada) (the "Plan") is a multi-employer pension plan which was established on September 6, 1967. The Plan provides retirement benefits to members employed by employers who agree to pay contributions to the Plan pursuant to collective agreements with local unions affiliated with the International Typographical Union, now known as the Printing, Publishing and Media Workers Sector (the "Sector") of the Communications Workers of America, AFL-CIO, CLC (the "CWA") and pursuant to collective agreements with local unions affiliated with the Communication, Energy & Paperworkers Union of Canada, (the "CEP").

The Plan has been registered in the Province of Ontario since September 25, 1973.

Under Article VIII section 8.01 of the Plan, employers contribute to the Plan in accordance with collective agreements negotiated by local unions.

Article V, section 5.01 of the Plan permits Plan members to accrue a monthly pension at normal retirement age equal to 3.05% of contributions. As of December 31, 1997, the Plan was paying monthly pension benefits to approximately 1,772 retirees and survivors of retirees. As of that date, approximately 113 employers were contributing to the Plan on behalf of approximately 1,790 employees.

The Affiliation of Locals to the CEP

In or around April, 1994, several CWA Locals voted to disaffiliate from the CWA and to affiliate with the CEP. Following the vote, the CEP represented and at all material times thereafter, continued to represent a majority of the active and retired members of the Plan. The status and rights of the members of the Plan, whether active, inactive or retired, in respect of contributions and benefits were not affected by this development. The Plan continued to pay pensions to retirees in accordance with the Plan's provisions; the Collective Agreements that provided for contributions to the Plan remained in effect; the Trustees continued to accept such contributions and the Plan's benefit formula did not distinguish between members represented by the CEP Locals and members represented by the CWA.

In or around March 1996, the Chairman of the Board of the Trustees invited Fred Pomeroy, President of the CEP, to accept a seat on the Board of Trustees. The appointment of Mr. Pomeroy to the Board of Trustees was unanimously approved by the Trustees at the next meeting of the Trustees, in Toronto, in April of 1996. Since that time, the Board of Trustees has consisted of five members, three Trustees affiliated with the CWA, one of whom is the President of the Sector, one Trustee associated with the Contributing Employers and Mr. Pomeroy, President of the CEP.

Issues in the Administration of the Plan

Since approximately 1975, the Plan has, upon the advice of its actuaries (The Segal Company) used the Entry Age Normal method of valuation of the Plan's liabilities. (These methods are

described in more detail on pages 15 and 16.)

At the meeting of the Trustees, in April of 1996, Mr. Pomeroy requested and was given an opportunity to have the firm of MLH + A, actuaries and consultants, make a presentation to the Trustees advocating the adoption of the Unit Credit method of valuing the Plan rather than the Entry Age Normal method.

At the August 14, 1996 meeting of the Plan's Board of Trustees, the Plan's actuaries, in accord with the direction of the Trustees arising from the meeting of the Trustees in April of 1996, provided a report to the Trustees comparing the actuarial status of the Plan as of January 1, 1996, under the Entry Age Normal cost method and the Unit Credit method.

After the actuary made the report and following a presentation by Trustee Pomeroy in respect of the Unit Credit method of valuation, Mr. Pomeroy moved that the Trustees adopt the Unit Credit method to value the Plan's assets. The motion failed for lack of a second. Mr. Pomeroy thereafter made a motion that the Plan's assets and liabilities of the CEP and CWA portions of the Plan be equitably divided, with any dispute with respect to the division to be settled by alternative dispute resolution procedures. Upon motion duly made and seconded and adopted, Trustee Pomeroy dissenting, the Trustees voted to table Mr. Pomeroy's motion and to direct the Plan's actuary and legal counsel to study and report to the Trustees at the meeting scheduled for the Spring of 1997.

On or about April 25, 1997, the Trustees were provided with a report prepared by the Plan's legal counsel and actuaries. It proposed a partial wind-up of the Plan on the basis of wind-up liabilities. The report proposed to effect the partial wind-up of the Plan by the adoption of a resolution to discontinue the acceptance of contributions from employers bound by collective agreements with the CEP.

At the May 7, 1997 meeting of the Board of Trustees, the report was presented and Mr. Boarman, the Chairman of the Board of Trustees, solicited questions and input. Mr. Pomeroy moved to "file the report" (i.e. the proposal in the report would not proceed further), stating that it did not address the matter of the equitable division of the Plan as he had proposed at the August, 1997 meeting of the Trustees. The motion to file the report failed for lack of a second. The Trustees, Trustee Pomeroy dissenting, directed the Plan's legal counsel and actuary to prepare an updated report and to distribute it before the next meeting of the Trustees scheduled for October 8, 1997.

The updated report was distributed to the Trustees before the October 8, 1997 meeting and was reviewed at the meeting by Plan's legal counsel and actuary. The Trustees then adopted a resolution to effect a partial wind-up of the Plan effective December 31, 1997, Trustee Pomeroy dissenting, by determining an intent to discontinue receiving employer contributions from CEP affiliated locals.

On or about November 4, 1997, written notice of the proposal to partially wind-up the Plan in accordance with section 68(2) of the Act was issued by the Plan's administrator and directed to all required parties in accord with the Act.

By letter dated November 21, 1997, to the Superintendent of Pensions, the CEP requested that the Superintendent issue certain Orders as follows:

1. An Order to the Trustees and Administrator of the Plan to immediately rescind its resolution adopted October 8, 1997, to realize a partial wind-up of the Plan based upon the termination as of that date of active participation in the Plan by CEP Actives and the refusal to accept contributions on behalf of CEP Actives with respect to work performed after December 31, 1997.
2. An Order requiring the Trustees and Administrator of the Plan to cease and desist from taking any steps to realize a partial wind-up of the Plan pursuant to the resolution adopted October 8, 1997.
3. An Order requiring the Plan to continue to accept contributions on behalf of CEP Actives with respect to work performed after December 31, 1997.
4. An Order requiring the Trustees of the Plan to fully consider a division of the assets and liabilities of the Plan between a CWA Plan and CEP Plan on an equitable basis based on the number of retirees and active participants.
5. An Interim Order prohibiting the Trustees and Administrator of the Plan from taking any further steps to realize a partial wind-up of the Plan pursuant to the resolution adopted October 8, 1997.

On December 19, 1997 Mr. Pomeroy in his capacity as Trustee of the Plan and on behalf of all current and former members of locals of the CEP filed a notice of motion in the Ontario Court (General Division) seeking an interim injunction preserving the status quo and prohibiting the partial wind-up of the Plan until final disposition by that Court. By written decision of the Ontario Court (General Division) this motion was denied with costs. Ultimately, upon the Plan's agreement not to object to the Pension Commission's jurisdiction to hear this matter, the CEP abandoned its proceedings in the Ontario Court (General Division).

On or about February 13, 1998, the Superintendent of Pensions advised the parties in part:

After careful review and consideration of the submissions made, I am unable to conclude that the proposed partial plan wind-up by the Plan administrator is not in compliance with the Pension Benefits Act, R.S.O. 1990 and the Regulations thereunder. Therefore, there are no grounds to issue the Orders requested under section 87(1) and (2) of the Act.

ADDITIONAL BACKGROUND

The Plan was set up in 1967 by the International Typographical Union (ITU) as a multi-employer pension plan (MEPP) for Canadian members of the ITU. The ITU subsequently merged with the Communications Workers of America (CWA).

The Plan is administered by a Board of Trustees including union and management representatives. The Plan is governed by a Trust Agreement.

Employers contribute to the Plan on the basis of rates negotiated as part of collective agreements. Based on actuarial calculations, a benefit formula is developed, converting contribution rates to a defined or "target" benefit, sometimes called "the pension promise". To the extent that positive experience in investment returns or other elements create a funding excess or surplus, the Trustees can improve the benefit formula. If there are negative results,

Trustees may have to reduce the benefit formula or even reduce accrued benefits. Employer obligations are limited to the contribution rates specified in collective agreements.

In March, 1994, shortly after several Locals (with a majority of active members in the Plan) moved from the CWA to the CEP, the Board of Trustees voted to remove three trustees who were members of Locals which had joined the CEP.

Through 1994 and 1995, the CEP began a process to have its Locals negotiate a cessation of contributions to the CWA/ITU plan, in order to promote a partial termination of the Plan and in contemplation of a transfer of assets and members to a new CEP MEPP. This process was stopped when it was realized that a partial termination would not transfer the entire CEP-related group, including retirees from Locals which had joined the CEP, to the new Plan.

THE RELEVANT LEGISLATION

The following subsections of the Act and Regulations are of particular relevance to the proceedings:

1. Administrator

8.--(1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

(e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;

19. (1) The administrator of a pension plan shall ensure that the pension plan and the pension fund are administered in accordance with this Act and the regulations.

22.(1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

22.(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

22.(3) Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

22.(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

70.(5) The Superintendent may refuse to approve a wind up report that does not meet the

requirements of this Act and the regulations or that does not protect the interests of the members and former members of the pension plan.

87.(1) The Superintendent, in the circumstances mentioned in subsection (2) and subject to section 89 (hearing and appeal), by a written order may require an administrator or any other person to take or to refrain from taking any action in respect of a pension plan or a pension fund.

87.(2) The Superintendent may make an order under this section if the Superintendent is of the opinion, upon reasonable and probable grounds,

(a) that the pension plan or pension fund is not being administered in accordance with this Act, the regulations or the pension plan;

(b) that the pension plan does not comply with this Act and the regulations; or

(c) that the administrator of the pension plan, the employer or the other person is contravening a requirement of this Act or the regulations.

89.(2) (e) Where the Superintendent proposes to make an order under section 87, the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the administrator and on any other person to whom the Superintendent proposes to direct the order.

THE ISSUES

Issue 1

Did the Superintendent of Pensions in the decision of February 13, 1998 err in concluding that the proposed partial Plan wind-up by the Plan Administrator was in compliance with the Pension Benefits Act, R.S.O. 1990 and the Regulations thereunder?

Issue 2

Did the Superintendent of Pensions, in the decision of February 13, 1998, err in finding that the Plan was being administered by the Board of Trustees in accordance with the Act the Regulations and the Plan?

One further issue was submitted for consideration subject to the respondents' argument that the tribunal did not have jurisdiction to consider the issue.

Issue 3

Did the Superintendent of Pensions, in its decision of February 13, 1998, err in finding that the Plan Administrator did not fail to comply with its Statutory and common law fiduciary duty, by failing to properly consider the alternative of the division of the Plan before implementing its proposed partial wind-up?

JURISDICTIONAL ISSUE

The respondents asserted that the Commission had no jurisdiction to consider common law fiduciary duties. The Panel heard argument on the respondents' motion to strike the third issue from the hearing. The Panel ruled that it would hear all the evidence, including the evidence on Issue 3 and rule on jurisdiction thereafter. The panel ordered and received particulars of the allegations in Issue 3.

The particulars provided by the applicant were as follows:

1. . The Respondent Board of Trustees is the administrator of the pension plan.
2. The Plan does not expressly prescribe a process that requires consideration of alternatives to a plan wind-up. The requirement to consider the alternative to a partial wind-up of an equitable division of the assets and liabilities of the Plan as proposed by the CEP representing a majority of the Plan's active and retired members is a necessary implication of the Trustees' acceptance of their Trusteeship and their agreement to act in that capacity in Agreement and Declaration of Trust; and their general powers, duties and obligation under the Plan of Benefits.
3. No steps were taken by the Board of Trustees to complete the prescribed process to consider alternatives to a wind-up to the Applicant's knowledge prior to the hearing.
4. The trustees failed to consider or used extraneous or irrelevant considerations or permitted union affiliations to conflict with the exercise of their duties; breached obligations to exercise their discretion, failed to exercise the level of prudence expected and failed to hold the balance evenly with strict candor between beneficiaries or acted in a manner prejudicial to the interests of a class of beneficiary and failed to act in the best interests of plan members.

The applicant sought, inter alia, an order that the trustees equitably divide the Plan's assets and liabilities.

The Applicant submitted that the Commission is granted broad authority to administer the Act and the regulations entitling it to give effect to the legislative intent and policy considerations underlying the Act. The applicant argued that the principles articulated in case law gave the Commission the power to impose on administrators and enforce common law fiduciary duties.

In any event, the Applicant argued, the Commission has jurisdiction to apply equitable principles of trust law to assist it in determining the scope of administrator's statutory fiduciary obligations pursuant to section 22 of the Act.

Further it was argued that the Commission has a duty to address the obligations which form an inherent part of the Plan whether these arise by way of contract or trust principles. Fiduciary duties are imposed on the administrator pursuant to section 22 of the Act, the Plan's trust document and the very nature of the trust relationship.

In respect of Issue 3, the respondents submitted that the powers of the Commission were defined by the provisions of its enabling legislation and the Commission was not entitled to go outside the scope and ambit of the Act, the regulations and the plan documents. It was submitted that the role of the Commission is to ensure that the Act and Regulations are properly

administered. The role of the Commission is that of a watch dog. A function of the Commission is to hear appeals from decisions of the Superintendent and to act as a fiduciary in order to guard the rights of plan beneficiaries arising from the Act, the regulations and the Plan itself.

In this Panel's view, the provisions of sections 19 and 22 of the Act impose statutory obligations that are enforceable by the Commission independent of causes of action in tort, fiduciary or trust law. The role of the Commission is to apply those sections as the evidence and the facts demand but not to usurp the role of the Courts under other statutes and the common law. Proof of breach of tort, fiduciary or trust law is proof of breach of sections 19 and 22 of the Act but not, in our view, a separate enquiry giving rise to claims outside the scope of the statute. It is not for the panel to speculate on circumstances where the Commission may find that a plan administrator complied with the provisions of the Act, in the face of evidence establishing breach of the administrator's common law fiduciary duties to the Plan and its members. In any event, the evidence in this matter falls short of establishing breach of the Act.

ISSUES 1 & 2

The Applicant, CEP, asks that the Commission deny the application for a partial wind-up on the grounds that the Trustees failed to fully consider a division of assets and accordingly there was a failure to exercise the care and diligence required of a trustee under the Act and the common law.

As a remedy, the Applicant asks the Commission to order the parties to resolve the issue between them, using Alternative Dispute Resolution, if necessary, and to report back to the panel.

The application is denied. Such a remedy is outside the jurisdiction of the Panel to order.

Reasons

Pension plan trustees have broad fiduciary obligations in administering pension plans, and the Pension Commission of Ontario shares the obligation to ensure that all plan members and beneficiaries are treated fairly and without bias.

The Applicant argued that the Trustees breached their common-law fiduciary obligations by not fully considering Mr. Pomeroy's proposal for a division of assets that would have transferred retirees from locals which had joined the CEP as well as CEP actives to a new CEP MEPP.

Evidence was presented that indicated that the Trustees considered the division of plan assets as proposed by Mr. Pomeroy, took professional advice and rejected the proposal. The Applicant argues that consideration is not enough, but rather that there was a failure to agree with Mr. Pomeroy's proposal. Since Mr. Pomeroy is the head of the union which now represents the majority of active Plan members it was argued that the trustees had a duty to acknowledge the rights of his constituency by following his proposal.

There was an admitted failure to make timely disclosure to Mr. Pomeroy of all the professional advice on which the Trustees' decision was made. While this was unfortunate, and certainly is not condoned by the panel, it is unlikely to have had any substantive effect on the decision of

the Board of Trustees, or on the position of Mr. Pomeroy or passage of the resolution to wind-up the plan. Subsequent to the disclosure of this advice, the basic disagreements on funding methods and the future of retirees in the plan remained.

For the Superintendent or the Pension Commission of Ontario to intervene in the administration of a registered pension plan, there must be evidence of a failure by trustees to administer the Plan in accordance with the Act the Regulation or the plan documents, or a breach of the trustees' duties. Other statutes, such as the *Trustee Act of Ontario*, grant specific rights, obligations and remedies in respect of the administration of a trust.

The Applicant argued that the Plan's Trust Agreement did not give the Trustees authority to stop accepting contributions from Contributing Employers. The panel disagrees. In the panels' view, this power is implicit to enable the Trustees to perform the duties assigned to them.

The Applicant argued that the majority of Trustees failed to fulfill the requirements of Sections 22(1) and 22(2) because they were biased and guilty of acting in bad faith.

The Applicant did not, however, present concrete evidence of any way in which the Trustees failed to treat all plan members fairly. Surplus has been used, from time to time, to provide increased benefits to both retirees and active members. There was no evidence of differential treatment between plan members who remained in the CWA and those who joined the CEP.

The refusal to convert from Entry Age Normal to Unit Credit funding was based on professional advice and the Trustees' judgement concerning the demographics of plan membership. Both Unit Credit and Entry Age Normal are generally accepted funding methods recognized by the Canadian Institute of Actuaries and the other relevant authorities.

The Entry Age Normal funding method is a level funding method whereas the Unit Credit funding method can result in increasing costs. Unit Credit provides for funding based on the average age of each plan member. Unless the average age of the group remains constant or decreases, funding costs will increase over time. Entry Age Normal funding seeks to provide more level funding over time by averaging funding costs over the full period from entry age to assumed retirement. In the absence of future favourable circumstances (e.g. higher-than-forecast rates of investment return, an influx of younger members) creating substantial actuarial gains, the Trustees would eventually be required to reduce the formula for future benefit accruals.

On the evidence, the Trustees' decision to continue to use the Entry Age Normal funding method in order not to increase the risk of having to reduce the benefit formula in the future is not unreasonable.

The decision to seek a partial wind-up rather than a division which would also transfer out of the Plan retirees from Locals now represented by the CEP can be justified by an understandable desire to maintain the financial viability of the ongoing CWA plan. The Trustees were, it seems, concerned about satisfying the "pension promise".

The Applicant argued that a new CEP MEPP and its members would be disadvantaged by a partial wind-up, since transferring members would be likely to exercise their option, as required by the Act, to transfer the value of their accrued benefits to a locked-in RRSP. It is not the

responsibility of the Trustees of the CWA plan to ensure the viability of another pension plan. There is no evidence that members and retirees will be disadvantaged by a partial plan wind-up.

It was argued that the desire of the CWA Trustees to terminate the participation of CEP members in the plan was evidence of conflict of interest, since it was in their interest to end the problems resulting from inter-union rivalries. This contention is difficult to accept, given that it was the clear intention, supported by active measures, of the CEP, and its representative on the Board of Trustees, to withdraw the CEP-represented group from the Plan. In any case, the evidence does not support a finding that a partial termination, following the terms of the legislation and providing to all members their full share of accrued surplus harms any plan members.

Clearly there has been a strong feeling among some retirees that they have been unfairly treated in the Plan, and that benefit improvements to retirees have been insufficient. This was the brunt of the evidence of Mr. Buller, a retiree who was granted standing before the panel.

There was no evidence presented that indicated that retirees had been relatively disadvantaged by the actions of the Trustees. The Plan provides some credit for service prior to contributory service, and benefit improvements, arising from the use of surpluses, have consistently been provided to both actives and retirees.

Counsel for the Applicant asserted that it was necessary to import "labour relations realities" into the pension context - specifically to require Trustees to represent the majority interests of plan members at the Board in the same way a bargaining agent is required by labour relations statutes to represent its members. Without specifically commenting on the cases supporting this argument, we find the Trustees' overriding duties were to the Plan and the Trust and there was no evidence to support a finding of breach of these duties.

Accordingly, the application is dismissed.

Dated this 7th day of June, 1999 at the City of Toronto, Province of Ontario.

Mr. David E. Wires, Chair

Mr. Louis Erlichman, Member

Mr. William M. Forbes, Member