

Content on this page has been transferred from the Financial Services Commission of Ontario (FSCO) site as a PDF for reference. Links that appear as related content have also been transferred and can be found at the end of this document.

**McDonnell Douglas Canada Ltd. Salaried Plan, Registration Number 520593**

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

**AND IN THE MATTER OF** the refusal of the Superintendent of Pensions to make an Order requiring the partial wind up of the McDonnell Douglas Canada Ltd. Salaried Plan,

Registration No. 520593

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

**BETWEEN**

**GARY MAYNARD**  
**Applicant**

- and -

**SUPERINTENDENT OF PENSIONS**  
**Respondent**

- and -

**McDONNELL DOUGLAS CANADA LTD.**  
**Respondent**

**BEFORE:** Kathryn M. Bush, Vice Chair  
C.S. (Kit) Moore, Chair  
Donald Collins, Member

**APPEARANCES:** For the Applicant:  
Mr. Murray Gold  
Mr. Roberto Tomassini  
**For the Superintendent of Pensions:**  
Ms. Deborah McPhail  
**For the Respondent:**  
Mr. Mark Freiman  
Mr. Greg Winfield

**Hearing Dates:** November 4, 5 & 6, 1998 and  
February 9 & 10, 1999

**Decision Released:** May 19, 1999

## REASONS FOR DECISION

### NATURE OF THE APPLICATION

The Applicant raised with the Pension Commission of Ontario (the "Commission") whether McDonnell Douglas Canada Limited ("MDCan") ought to partially wind-up the McDonnell Douglas Canada Ltd. Salaried Plan, Registration No. 520593 (the "Plan") as a result of activities which occurred at MDCan between 1990 and 1994. On November 8, 1996, the Superintendent of Pensions for the Province of Ontario (the "Superintendent") responded to the Applicant stating that the Superintendent was unable to conclude that there were grounds to order a wind-up of the Plan:

" PCO staff have recently completed a review of the circumstances surrounding the termination of employees at McDonnell Douglas Canada Ltd. during the period of 1990 to 1994. I have fully and carefully considered the facts and issues from that review. After such consideration, I am unable to conclude that there are grounds to order a partial wind up of the Plan under subsection 69(1) of the Pension Benefits Act during that time period and I do not intend to make such an order "

By letter dated December 3, 1996, the Applicant wrote to the Commission requesting a hearing with respect to the Superintendent's refusal to issue the requested notice of proposal for a partial wind-up of the Plan.

Pursuant to the Commission's Rules of Practice for Proceedings under Section 89 of the Pension Benefits Act ("PBA"), a formal request for a hearing before the Commission was filed on behalf of the Applicant on January 22, 1997. In it, the Applicant requested that the Commission direct the Superintendent to issue an order requiring the Plan to be partially wound-up in respect of those members of the Plan involuntarily terminated by MDCan during the period from January 1, 1990 to December 31, 1994.

At Pre-hearing conferences held with respect to this hearing the Commission ruled that the issues on the merits should be framed as follows:

- a. Did a significant number of members of the Plan cease to be employed by MDCan as a result of a reorganization of MDCan's business at any time between January 1, 1990 and December 31, 1994?
- b. Did a significant number of members of the Plan cease to be employed by MDCan as a result of a discontinuance of all or part of the business of MDCan at any time between January 1, 1990 and December 31, 1994?
- c. Was a significant portion of the business carried on by MDCan at a specific location discontinued between January 1, 1990 and December 31, 1994?
- d. If the answer to (a), (b), or (c) is yes, should the Commission, under subsection 89(9) of the Act, direct the Superintendent to order a partial wind up of the Plan?

- e. If the answer to (d) is yes, what are the appropriate commencement and end dates for the partial wind up order concerning the Plan?
- f. Is the Applicant entitled to have his legal costs incurred in connection with the Hearing paid from the Plan fund or by the Respondent, MDCan?

## FACTS

The following facts are predominantly taken from the Agreed Statement of Facts filed in the Application.

MDCan is a corporation which carries on business of manufacturing various elements of commercial aircraft, primarily wings. MDCan is a wholly-owned subsidiary of the McDonnell Douglas Corporation ("MD US") based in St. Louis, Missouri. Effective the autumn of 1997, MD US became a wholly-owned subsidiary of the Boeing Corporation based in Seattle, Washington.

MD US carries on business relating to the manufacture of military and commercial aircraft and is the primary customer for MDCan's products. MDCan also produces product for "after-market sales" and parts production. MDCan operates primarily out of a single location in Malton, Ontario.

At all relevant times, MDCan has been the sponsor and administrator of the Plan, a registered pension plan provided for salaried employees of MDCan and its affiliates.

By letter dated August 24, 1992 to Larry Martello of the Commission, the Applicant requested an investigation to be undertaken to determine whether a partial wind-up for the Plan was warranted.

Commission staff conducted an investigation to determine if a partial wind-up of the Plan should be required in this case. The investigation was concluded and culminated in a report prepared by Mark Eagles for the Superintendent dated July 7, 1995 (the "Eagles Report"). Mr. Eagles concluded that:

"Between January 1, 1990 and December 31, 1993, approximately 391 salaried plan members were terminated by the Company and a further 31 were involuntarily retired. During 1994, a further three Plan members were laid off and there were two more involuntary retirements. Of the 427 persons whose employment was involuntarily terminated over that five-year period, 6 have been rehired. Effective January 1, 1990 the plan membership was reported as being 839; thus roughly one half of the plan membership has been involuntarily terminated during the past five years."

## RELEVANT LEGISLATION

The issues to be decided in this matter will be decided on the basis of sections 69(1)(d), 69(1)(e) and 89(9) of the Act. For ease of reference those sections are set out below:

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

- 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.

### **Power of Commission**

89(9) At or after the hearing, the Commission by order may direct the Superintendent to carry out or to refrain from carrying out the proposal and to take such action as the Commission considers the Superintendent ought to take in accordance with this Act and the regulations, and for such purposes, the Commission may substitute its opinion for that of the Superintendent."

## **JURISPRUDENCE**

There are a number of decisions of both the Commission and the Ontario courts, which are relevant to the issues to be decided in this matter and relevant portions of those decisions, are briefly set out below.

The Ontario Court of Appeal in the *Firestone Canada Inc. v. Pension Commission of Ontario, Murray, DiFrancesco and United Rubber, Cork, Linoleum and Plastics Workers of America, Local, 113, (1990) 1 O.R.(3d) 122* at p.127 made the following statement relating to the Act and pension plan wind-ups:

" The Act is clearly intended to benefit employees. It prescribes minimum standards for all pension plans in the Province of Ontario.

In particular, the Act evinces a special solicitude for employees affected by plant closures."

The recognition in the Firestone case of the "special solicitude" for employees in a plan wind-up leads to the heart of the questions in issue in this hearing, i.e., was there a plan wind-up, in this case a partial plan wind-up.

In the Commission decision relating to the Stelco Retirement Plan for Salaried Employees (Commission, July 7, 1993) the Commission made the following statement:

"In enacting Section 69(1)(d) the Legislature was concerned about protecting older employees with appreciable amounts of service who involuntarily lose their employment as a result of a major change in the way in which their employer carries on its business. It is from that

perspective that the term 'reorganization' must be interpreted." (Emphasis Added)

The Divisional Court (1994) 4 C.C.P.B. 108, 115 D.L.R.(4th) 437, 75 O.A.C. 61, approved the Commission's approach to the meaning of "reorganization":

"The commission gave it a broader meaning to include changes in the way in which the different parts of the company related to one another and the size of the company. That meaning has considerable support from the dictionary. One of the meanings of 'organize' in Webster's New World Dictionary (Second College Edition), is 'to make into a whole with unified and coherent relationships'." (Emphasis Added)

The Court of Appeal (1995) 9 C.C.P.B. 126, upheld entirely the decision of the Divisional Court in Stelco.

The Divisional Court in Stelco also approved of the Commission's use of the statements of Stelco as evidence of a reorganization:

"In this case, the commission relied on the company's own statement in its annual report that it was reorganizing plants along business or process lines. In our view, the commission was entitled to rely on that statement as some evidence that the changes that had taken place in the corporation, which resulted in the reduction in the number of employees, were part of a process of reorganization. As we put it in exchanges with Mr. Freiman late in his argument, these steps all constituted the reaction of the company to a number of difficult problems that had arisen from different sources."

The Commission applied the Stelco definition, and evidence, of a reorganization in its decision relating to the Imperial Oil Ltd. v. Ontario (Superintendent of Pensions) (1996), 15 C.C.P.B.31(PCO).

The Imperial Oil decision of the Commission is interesting to this hearing as it addresses the evidence which establishes a reorganization and the issue of whether cost reduction can result in a reorganization:

"The speeches are replete with restructuring and reorganization phrases. They explain that structural change must take place, which will lead, to work force reductions. They indicated that the changes would involve a centralisation of control of the operating companies; consolidation of the business support functions of each division within the company's headquarters; disengagement from unprofitable lines of business; and rationalisation of divisional and headquarters's operations.

As we noted above, operating companies were consolidated into divisions, support functions were centralized, properties were sold, various operations were divested and closed. The result was that a great many employees lost their jobs. The result also was that costs were cut. But, we cannot accept that if cost reduction is the reason to make major changes in the size, structure and functioning of a company, that it precludes a finding that a reorganization took

place. We find that Imperial Oil implemented an extensive, large scale reorganization of its business between February 4, 1992 and June 30, 1995. We accept that the purpose of the reorganization of the business was to reduce costs and increase profitability but that does not change the fact that a reorganization of the business took place.

*Hawker Siddeley Canada Inc. v. Nova Scotia (Superintendent of Pensions)* (1993), 108 D.L.R. (4th) (N.S. S.C.); aff'd (1994), 113 D.L.R. (4th) 424 (N.S. C.A.) is additional authority for this view of reorganization. It stated that reorganization of a business does not refer solely to a change in the organization of the company but also the way in which a company does business.

The 'business of the employer' includes the structure under which the employer operates and, as well, the employees involved. (*Hawker Siddeley* at p. 119 (N.S. S.C.))

Did a reorganization of the business of Imperial Oil take place? In our view the answer to that is an unequivocal "yes". The *structural changes, divestment activity, consolidation of functions and elimination of non-core business activities* all amounted to a change in the structure in which the business of Imperial Oil operated. We recognize that other words – such as restructuring – could be used to describe what took place but the reality is that the way in Imperial Oil was organized to do business was materially changed and that amounts to a reorganization of its business, within the meaning of clause 69(1)(d).

The purpose of clause 69(1)(d) is to protect plan members in situations where a significant number of terminations occur as a result of a reorganization of the business. The reason that prompts the reorganization may be cost cutting, bench marking or cyclical employment patterns due to price fluctuations but whatever the underlying cause, it is the fact of the reorganization that is of legal significance."

The Divisional Court, 16 C.C.P.B. 93, affirmed the Commission's decision in Imperial Oil and went on to provide guidance with respect to how the causal connection to a reorganization ought to be established:

" In regard to the last point, the way in which the Commission chose to approach it was sensible, practical and fair. It does not take some great leap of faith or presumption to arrive at the conclusion that significant jobs were lost "as a result of" the reorganization found to have taken place, without the need to examine into the minutiae of evidentiary materials that might be involved, both subjectively and objectively, in looking into each of many hundreds of terminations. "

### **ISSUES 1, 2, AND 3**

As noted in the facts as set out above, a significant number of members (427) were terminated or involuntarily retired by MDCan during the period January 1, 1990 and December 31, 1994. These terminations and involuntary retirements also represented a significant percentage, approximately 50%, of total Plan membership as at January 1, 1990.

The issues to be decided are whether those cessations of employment resulted from:

- i. a reorganization of MDCan;
- ii. a discontinuance of all or part of the MDCan business; or
- iii. the discontinuance of a significant portion of the MDCan business at a specific location.

The sheer number of MDCan's employment terminations during the relevant period, more than 50% of the plan membership, suggests that at least a portion of the MDCan business was discontinued. (In the late 1980's MDCan had approximately 5,000 total employees and the number of employees had dropped below 1,500 total employees by the end of 1994.) MDCan argued that other than minor product lines, the same product was produced at the beginning of the time period as at the end and that the only change was that the demand for their product had decreased and therefore their employment needs had also decreased. This argument does not however, address the question of whether the "shrinking" business constituted a discontinuance of part of the business.

As outlined above, the courts have evidenced a desire to interpret the Act broadly in order to protect the interest of plan members, see Firestone, Stelco and Imperial Oil, supra.

In addition, the materials filed with the Commission include many references to "reorganizational" activities relating to two initiatives during the relevant time period. The first, completed during 1990, involved a change from a functional to a product - oriented business, and a flattening of managerial layers from 8 to 4 levels. This initiative was sometimes referred to as the "Palfrey" initiative. The second, approximately two years later included a change back to a functional or a vertical structure from the product-oriented structure. During these periods MDCan discontinued and transferred out certain non-core products and services.

While we heard a great deal of evidence regarding the changes occurring within MDCan during the 1990-1994 period we will outline only the most illustrative excerpts:

1. The Palfrey initiative was described in the "President's Meeting-Report on MDCan" April 27, 1987:

MDCan's goal of becoming a low-cost manufacturer of quality aircraft components is being accomplished through implementation of an extremely extensive and comprehensive Five-Year Plan, which is made up of specific programs and major systems and process changes to the way we work. As part of a master plan, each component of these changes is inseparable from the other components, and the sequence of changes is critical to success.

At MDCan, it was felt that attempts to change the way people relate to one another and their daily work, while leaving the management structure and systems intact, were doomed to failure. Since attitudes towards work, as well as interpersonal and interdepartmental relationships, are largely determined by a series of motivational factors inherent in the management system and infrastructure itself, changes to the infrastructure are critical to the success of attempts at continuous improvement.

Changing our management and manufacturing methods to facilitate a change to the way all of our people are required to relate to each other and their work required planned change to our management structure, decentralisation and integration of functions into a product orientation, involvement of all of our people, changes in our manufacturing methods and inventory systems, as well as integration of job skills and vertical loading of individual employees.

It was felt that without major changes to the infrastructure surrounding our work by management, early attempts at improvements through participation and involvement processes would not sustain themselves. The Five-Year Plan will result in the emergence of a productive aircraft plant substantially changed in geographic layout, methods of manufacture, management methods and structure, and individual task responsibilities. [Emphasis added]

2. HR Horizontal Team Meeting Records dated February 1, 1990:

" Topic Five: Surplus People  
Presented by: Pat McKenna

Main Points -There will likely be a surplus of CBU and salaried employees as a result of the reorganization efforts and production improvements

-Currently a mechanism exists to deal with surplus people in the CBU's (i.e.: Skills Adjustment Committee, New Technology Committee)

-There is a need to develop a plan, on a global basis, to waylay growing fears about declarations of surplus; it is important to develop meaningful alternatives for affected people.

Decision/ Conclusion:

-Brian Sawyers to head up a committee consisting of Maj Cober, Harry Buchmueller and a representative from Paul Holub's area.

-Labour Relations should develop a presentation on the CBU committees already in existence and present such to the VBU's as well as mentioning that a plan is being developed for salaried personnel " (Emphasis Added)

3. President's Newsletter dated February 6, 1990:

" As your incoming President of MDCan, I've spent the past four weeks getting familiar with what goes on at MDCan, finding a place to reside in Toronto, and looking for opportunities for improvement. I'd like to give you a report of my perceptions so far Near-Term Efforts - My personal near-term effort will be focused on three activities:

1) Becoming more familiar with MDCan, its people and opportunities for improvement.

2) Actively participating in and facilitating the conclusion of the reorganization started in April of 1989 - I feel this reorganization will identify the major players in our effort to create a participative management and a work accomplishment process (our target for completing this activity is within 60 days).

3) Actively working with MDCan personnel in future planning for MDCan's strategic direction..." (Emphasis Added)

## 4. Administrative Bulletin from the President of MDCan to all Employees dated March 1, 1990:

" **SUBJECT:** ALL EMPLOYEES

TO: REORGANIZATION

One of the key issues that I have run across at MDCan is the delayed reorganization or restructuring.

We have done several things to re-start the restructuring effort that began almost a year ago.

The Management Council's first and primary job is to make recommendations about the restructuring. While the Management Council is working on the restructuring, we wanted to publicize:

1. the identity of the Council members,
2. the structure they are working with, and
3. the positions of the Council members.

This information is illustrated on the reverse side, and the people selected will begin the transition into their new roles effective immediately.

The Management Council is currently meeting to define the next tier of the structure, both in terms of function and people. When the Management Council reaches additional conclusions or recommendations, we will let you know." (Emphasis Added)

## 5. Letter from the President's Office dated March 28, 1990:

"The news on organization definition (reorganization ?!) is that progress is being made. Our 4th level selections were announced in A.B. No. 90.006 dated 1 March, 1990. The next levels are being chosen at the present time..." (Emphasis Added)

## 6. Memorandum regarding "Production Horizontal Objectives and Policy" dated April 20, 1990:

**TEAM OBJECTIVES**

1. Identify and define the current Touch Labour and Support matrices for the Production box.  
-See attachment.
2. Following the Reorganization Policy establish the "recommended" Touch Labour and Support Matrices necessary to achieve Production reorganization.
3. Discuss and resolve any proposed changes with the appropriate Horizontal and Vertical Teams.
4. Develop a Span of Support structure to suit the finalized new reporting matrix.
5. Determine the process to be used to select personnel for the new structure.

**REORGANIZATION POLICY**

When a jurisdictional or decentralization issue cannot be readily resolved, and it can be demonstrated that Process or Product integrity are not or will not be compromised by maintaining the Status Quo, then, for the purposes of completing the next level of reorganization;

1. Reporting structure for the function or functions in question will remain as is i.e. within its current Vertical Business Unit and Horizontal Box.
  2. The Issues in question will be recorded as "open issues" to be resolved by the Team following completion of the next level of reorganization.
  3. These open issues must be addressed by the members of the Production Horizontal Team, and resolution must be reached at this level. Consultation and discussion with other Verticals and Horizontals may be required to reach these resolutions.
  4. The open issues will be prioritized by consensus and a "Plan Of Attack" will be developed for each item..." (Emphasis Added)
7. Letter from the President's Office dated May 30, 1990:

#### " REORGANIZATION TIMETABLE

- Level 2 organizational assignments have been recently announced. As stated in that announcement, we are continuing to select Level 1 candidates and to complete the transition to the new organization. It should be noted that the objective of our organizational changes is not to have a different organizational chart but to improve the performance of the enterprise.

It is our view that how our organization chart looks is not nearly as important as how our people accomplish work and achieve results. As in all management changes, performance achievement is accomplished by people, not by charts or strategy. Our view of MDCan after completion of this phase of the reorganization is that it should continue to be an exciting place to work with ample opportunity for individual and group achievement.

We do not feel that the organization will be rigidly set for a long period of time but will be a dynamic, every-changing structure. These dynamics should provide ample opportunity for individual achievement and recognition "(Emphasis Added)

8. Administrative Bulletin from the President of MDCan to "All Supervision Mailing List A-H" dated June 27, 1990:

" MDCan has now selected most of the company's level one leaders who will begin their transition into the more than 238 positions outlined in the attached list.

Organizations and levels not shown remain unchanged As MDCan begins to function under the new structure, changes may take place over the transitional period of the next few months.

New positions could be added and those outlined today may be restructured or moved to other vertical units. To be considered for future opportunities, employees should speak with the relevant leaders." (Emphasis Added)

9. Letter from the President's Office dated July 17, 1990:

" Much has been written about 17,000 employees being released by MDCan worldwide. At

MDCan, we are planning to reduce our work force in certain areas, primarily in indirect support functions which are no longer necessary to produce the product for today's market, and we intend to hold down indirect hiring while applying direct people to staff the needs of the MD-11 increased production rate..." (Emphasis Added)

- .0. Sample termination letter dated July 20, 1990.

**"HAND DELIVERED  
PRIVATE & CONFIDENTIAL  
WITHOUT PREJUDICE  
IMANTS ANKURS, 55538/2X61 "**

Dear Sir:

As you are aware, McDonnell Douglas' economic performance has been below all our expectations for some time. Because of this, we are required to undertake severe cost cutting measures as well as restructure our operations. (Emphasis Added)

- .1. Memorandum dated October 15, 1990 from Gene Racicot, HR CORE describing the decentralization of Human Resources services:

"Effective immediately, Human Resources services previously provided on a centralized basis with regard to Employee Benefits; Personnel System (Employee Records); Requests for 807's (Employee Biography) and approvals for special pay adjustments concerning Bereavement, Statutory Holidays and Jury Duty, will be directly handled by the respective Human Resource Administrative Assistant for each Vertical Business Unit as shown in the following chart: ..." (Emphasis Added)

- .2. Memorandum from Gene Siddall, MD Can's President, dated December 17, 1990:

"1. GOAL: EVALUATE THE MANAGEMENT PERSONNEL AND COMPLETE THE REORGANIZATION STARTED IN 1989

STATUS: The initial evaluation and organizational changes were completed as a first priority of my new assignment. This action removed the atmosphere of uncertainty of responsibilities and has permitted MDCan to focus on product commitments. Based upon follow on performance evaluations and business needs, further organizational changes have been implemented to strengthen areas critical to our continued success. This process will continue in order to maximise our ability to deliver quality products, when needed, at a competitive cost.

This progress met our expectations in the selection of the right people and exceeded our expectations in management buy-in and timeliness of implementation..."(Emphasis Added)

- .3. Mission Statement, which appears to have been written in 1991:

" The philosophical basis of the MDCan organizational change is to intensify the focus on product and place as much responsibility, authority and accountability in the product programs as possible and minimize separate MDCan-wide support functions. As time moves on, more support functions should move into the product programs as it becomes feasible and economical to do so."(Emphasis Added)

- .4. Letter from the President's Office dated January 27, 1992:

" The market forces, both demand for our products and selling prices we can get from our customers, continue to put pressure on us to improve operating performance in the three critical areas: cost, quality, and schedule. Because our business will be smaller in 1992 than we forecasted one year ago, we must also significantly realign our management structure, which will cause layoffs in this group. While this process is often called many things, the

simple fact is that we find ourselves with too many people for the work we have to do. We will be working to change that situation..."(Emphasis Added)

.5. Administrative Bulletin from the President to all employees dated June 5, 1992:

"SUBJECT: REORGANIZATION

TO: All Employees

Over the last number of months, MDCan has been experiencing a number of economic setbacks in its business. We are all painfully aware of the staff reductions that are being made to try and offset the reduced production levels facing us now and in the future.

As we went through the early stages of the reduction process, it became apparent that the matrix organization that was in place contained numerous examples of parallel effort, that is, people in different verticals doing similar work. In our environment, that is unacceptable.

.6. Memorandum from Canadian President dated June 5, 1992:

" MDCan has been planning a reorganization for some period of weeks. Attachment (1) shows the existing organization. Attachment (2) shows the new organization effective 6/5/92..." (Emphasis Added)

.7. Letter from the President dated December 2, 1993

" In the 24 months from November 1991 until now, we have gone through one of the most difficult periods in MDCan's history. We have seen a reduction from 4800 employees to just under 1500. Throughout the downsizing, many people have been required to move to jobs that they have never done before or at best not done for several years..." (Emphasis Added)

Accordingly, the number of Plan members who ceased to be employed by MDCan during the 1990-1994 period together with the restructuring initiatives described in the material cited above lead us to the conclusion that the conditions which would support the Superintendent ordering a partial wind-up of the Plan under section 69(1)(d) and/or 69(1)(e) of the Act have been satisfied.

#### ISSUE 4

No evidence was raised by any party with respect to how, if a finding was made that the conditions of 69(1)(d) and/or 69(1)(e) of the Act were satisfied the discretion under Section 69 ought to be exercised. Accordingly, we refer this matter back to the Superintendent for consideration.

#### ISSUE 5

No evidence was raised regarding commencement and end dates for the partial wind-up order regarding the Plan and accordingly we will also refer this matter to the Superintendent for consideration.

#### ISSUE 6

Neither the Act nor the Commission's Rules of Practice for Proceedings under Section 89 of the Act contain an express right permitting the Commission to award legal costs. In its decision in Re TIE/communications Canada Inc. Pension Plan (1994), 7 C.C.P.B. 120 (PCO) the Commission concluded that in accordance with general administrative law principles the power to award costs must be expressly conferred by legislation.

The Act has now been amended with respect to hearings before the Financial Services Tribunal to award costs. This change to the Act would appear to be in response to the conclusion in the TIE decision that the authority to award costs was lacking.

The Applicant has sought the costs in reliance upon the Nova Scotia Supreme Court decision in Central Guaranty Trust Co. (Liquidator of) v. Spectrum Pension Plan (S) (Administrator of), [1993] N.S.J. 14 (N.S.S.C.). In that case the Court found that the Superintendent under the Nova Scotia Pension Benefits Act had the power to award legal fees to be paid from surplus as an incidental power included in subsection 84(b) which allowed the Superintendent to "attach such conditions and limitations" to the consent as the Superintendent considered "necessary in the circumstances".

The Spectrum decision precedes the changes to the Act to permit the Financial Services Commission to award costs. The language in the Nova Scotia Act was also different as it permitted "necessary" conditions in contrast to the Act permitting "proper" conditions.

We have concluded that in the circumstances of the Act the reasoning in TIE is persuasive and we do not have the ability to award costs in this matter.

## ORDER

The conditions of one or more of sections 69(1)(d) and (e) of the Act have been satisfied with respect to the Plan during the period 1990 - 1994 and the matter is referred back to the Superintendent to determine (i) whether to exercise her discretion and order a partial wind-up of the Plan, and (ii) if a partial wind-up is ordered, whether to amend, either or both, of the commencement and end dates of the partial wind-up period.

Dated the 19th day of May, 1999 at the City of Toronto, Province of Ontario.

Kathryn M. Bush, Vice Chair  
C.S. (Kit) Moore, Chair  
Donald Collins, Member