C.A. No. 106083

NOVA SCOTIA COURT OF APPEAL

Cite as: Imperial Oil Ltd. v. Nova Scotia (Superintendent of Pensions), 1995 NSCA 66

Freeman, Matthews and Roscoe, JJ.A.

BETWEEN:

IMPERIAL OIL LIMITED Appellant - and - SUPERINTENDENT OF PENSIONS, et al Respondent	Ian McSweeney, Brett Ledger for the Appellant Ronald A. Pink, Q.C., Marian Tyson for the Respondent Appeal Heard: April 19, 1995 Judgment Delivered: May 11, 1995

Revised Decision: The text of the original decision has been corrected according to the attached erratorm.

THE COURT: The appeal is dismissed per reasons of Freeman, J.A.; Matthews and Roscoe, JJ.A. concurring.

Freeman, J.A.:

This appeal is from the decision of Justice Saunders of the Supreme Court of Nova Scotia sitting as an appeal court pursuant to s. 89(9) of the **Pension Benefits Act**, R.S.N.S. 1989, c. 340 upholding an order by the Superintendent of Pensions for a partial winding up of the appellant's pension plan.

The plan covered 179 employees of an oil refinery acquired by the appellant when it bought the shares of Texaco Canada Limited in 1989. The appellant changed the name of Texaco Canada to McColl Frontenac Inc., a wholly owned subsidiary, and the employees were covered by the McColl Frontenac pension plan. The appellant subsequently sold the refinery to Ultramar Canada Limited pursuant to a divesting order by the Competition Tribunal.

The employees were formally terminated from their employment by the appellant. Under the Texaco Canada Severance Allowance Program the employees were paid severance pay and the commuted value of their pension plan, enhanced in some cases, which was reinvested in a locked in registered retirement savings plan. By its agreement with the appellant Ultramar rehired them and provided them with a pension plan of its own.

The respondent employees applied to the Superintendent of Pensions to wind up the McColl Frontenac pension plan under s. 79(1) of the **Act**.. When a plan is wound up, former employees whose ages and years of employment or membership in the plan total fifty-five have a right to certain "grow-in" benefits. That is, they would receive the same pension benefits at the same times as if they had remained members of the plan. Seventy-seven of the appellant's former employees would benefit from the "grow-in" provisions of s. 79(1). The wind-up has not been opposed by the other

former employees.

A wind-up is not available under the **Act** when a business or assets are merely sold and continued by a successor who hires the employees and provides a pension plan. The appellant says the present transaction fits that description and a wind-up in these circumstances would be unprecedented.

The main issue is whether the Superintendent of Pensions was justified in concluding that criteria for a wind up had been met. This involves consideration of the circumstances, the statutory provisions and the standard of review to be applied to the Superintendent's decision.

The Superintendent of Pensions is the chief administrative officer under the **Act** with functions, duties and powers which he performs in accordance with the directions of the Minister of Finance. His statutory duties are to promote the establishment, extension and improvement of pension plans throughout the province, to make recommendations to the Minister in respect of pension plans, and to carry out assignments from the cabinet or the Minister.

The position of the Superintendent was carefully considered by Clarke C.J.N.S. In **Hawker Siddeley Canada Inc. v. N.S. (Superintendent of Pensions)** (1994) 113 D.L.R. (4th) 424 at p. 435:

> The **Act** anticipates the Superintendent is one who is skilled in the administration of legislation which calls for a considerable degree of expertise. The Superintendent is appointed by the Government of Nova Scotia on a full time and continuing basis. The Superintendent is charged with the responsibility of administering legislation which by its nature is one of public policy. The interest of the public, in general, and of participating employees, in particular, in the fair, equitable and consistent administration of pension plans is high. Thus the position of the Superintendent cannot be described as *ad hoc*. It is continuing and on-going. In this respect, Mr. Justice Sopinka observed in **Bradco**

[**United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.**, [1993] 2 S.C.R. 316.] (at page 336 (S.C.R.):

> "... a distinction can be drawn between arbitrators, appointed on an *ad hoc* basis to decide a particular dispute arising under a collective agreement, and labour relations boards responsible for overseeing the ongoing interpretation of legislation and development of labour relations policy and precedent within a given labour jurisdiction. To the latter, and other similar specialized tribunals responsible for the regulation of a specific industrial or technological sphere, a greater degree of deference is due their interpretation of the law notwithstanding the absence of a privative clause."

Bradco is a leading case on the extension of curial deference to tribunals on their interpretation of law as well as on matters of fact.

Chief Justice Clarke observed further:

> Underlying this legislation is a significant and important principle of public policy designed to protect and enhance the quality of life to which the subject employees would be entitled in their retirement years after achieving the threshold requirements of continuous employment in the workplace.

It was agreed by the parties that criteria set out in s. 74 (1) of the **Act** must be met before the Superintendent can order a pension plan to be wound up. It was further agreed that of the criteria set out in clauses (a) to (h) of s. 74(1), only the following are relevant to the present circumstances:

> 74 (1) The Superintendent may, by order, require the wind up of a pension plan in whole or in part if . . .
>
> > (d) a significant number of the members 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;
>
> . . .

Under the scheme of the **Act** it is for the Superintendent to determine, in a given set of circumstances, what is a significant number of the members, whether they cease to be employed by the employer; whether such cessation of employment is a result of the discontinuance of part or all of the business of the employer, whether it is the result of the reorganization of the business of the employer, and whether all or a significant portion of the business carried on by the employer at a specific location is discontinued. I would classify the determination of each of these questions as a matter of fact. Such determinations are at the very core of the jurisdiction of the Superintendent and the jurisprudence makes it clear they are entitled to some degree of curial deference.

The central concept under s. 74(1)(d) and (e) is discontinuance of the business of the employer. When s. 74(1)(d) and (e) are considered in isolation, the language is ambiguous. Does it mean discontinuance of business *by* the employer, or discontinuance of the business *formerly carried on by the employer*?

It is necessary to turn to s. 85 for assistance. The appellant argues that ss. 74 and 85 constitute a complete code governing the wind-up of pension plans following the disposition of businesses. Section 85 provides:

> **"successor employer" defined**
>
> 85 (1) In this section, "successor employer" means the person who acquires the business or the assets of an employer.

Disposal of business

(2) Where an employer who contributes to a pension plan sells, assigns or otherwise disposes of all or part of the employer's business or all or part of the assets of the employer's business, a member of the pension plan, who in conjunction with the sale, assignment or disposition becomes an employee of the successor employer and becomes a member of a pension plan provided by the successor employer,

(a) continues to be entitled to the benefits provided under the employer's pension plan in respect of employment in the Province or a designated province to the effective date of the sale, assignment or disposition without further accrual;

(b) is entitled to credit in the pension plan of the successor employer for the period of membership in the employer's pension plan, for the purpose of determining eligibility for membership in or entitlement to benefits under the pension plan of the successor employer; and

(c) is entitled to credit in the employer's pension plan for the period of employment with the successor employer for the purpose of determining entitlement to benefits under the employer's pension plan.

Exception to clause (2)(a)

(3) Clause (a) of subsection (2) does not apply if the successor employer assumes responsibility for the accrued pension benefits of the employer's pension plan and no wind up shall be deemed to have occurred.

Deemed continuity of employment

(4) Where a transaction described in subsection (2) takes place, the employment of the employee shall be deemed, for the purpose of this Act, not to be terminated by reason of the transaction.

Further subsections deal with the transfer of the assets of the employer's pension plan subject to the approval of the Superintendent when a successor employer assumes responsibility for it, which is not the present case, and provide for a wind-up

by the administrator of the employer's plan when the successor employer does not provide a pension plan for the employees. Section 85 thus deals with the transfer of a business when the successor employer has its own pension plan, takes over responsibility for the former employer's pension plan, or has no pension plan. Clauses (b) and (c) of s. 85(2) were written to deal with consequences of the transaction described in that subsection when the successor employer provides a pension plan. They can be adapted to the situation when the successor employer takes over the employer's pension plan, and this appears to be the intention, but assessing the results of such an adaptation invites the exercise of the Superintendent's expertise.

On the face of s. 85, it would appear to be the intention of the legislature that when an employer with a pension plan sells its business to a successor employer with a pension plan who carries on the business, the employment of the employee shall be deemed, in the language of ss. 4, "for the purpose of this Act not to be terminated by reason of the transaction." It does not appear that the s. 74 wind-up criteria are intended to apply to a transaction described in s. 85(2), but s. 85(3) does not exclude a wind-up and appears to leave the door open. It is noteworthy that s. 85(3) specifically deems no wind-up occurs when the successor employer takes over the assets of the pension plan, and that s. 85(4) deals only with the deemed non-termination of employment "by reason of the transaction" and not specifically with a wind-up.

It would not be unreasonable to consider discontinuity and termination as equivalent terms under the act. "Terminated" is used in the text of ss. 4 and "continuity" is used in the subhead, which lacks the force of statute but provides a clue to the intention of the legislature. If they are equivalent, termination of employment may

trigger the Superintendent's discretion to order a wind-up under s. 74. It is noteworthy as well that ss. 4 merely deems the employment "not to be terminated *by reason of the transaction*." A deemed non-termination by reason of the transaction alone would exist by operation of law. It would be a question of fact whether a termination occurred at the same time for some other reason. In his decision the Superintendent noted that the employees received a notice of termination dated October 10, 1990, that they were issued with a record of employment under the **Unemployment Insurance Act** showing that employment was terminated by reason of "sale of company," and that they signed releases waiving all rights against McColl Frontenac and Imperial with respect to their severance from employment.

There can be no doubt that from the viewpoint of the appellant the employment of the respondents was terminated. Otherwise it could not have paid over the commuted value of their pension benefits to their retirement savings arrangements pursuant to s. 50 of the **Act**, which provides:

> 50 (1) A member of a pension plan whose employment with the employer is terminated and who is entitled to a deferred pension is entitled to require the administrator to pay the commuted value of the deferred pension
>
> (a) to the pension fund related to another pension plan, if the administrator of the other pension plan agrees to accept the payment;
>
> (b) into a prescribed retirement savings arrangement; or
>
> (c) for the purchase for the member of a deferred life annuity under which payments will not commence more than ten years before the normal retirement date under the pension plan.

The situation created by a s. 50 transfer of pension funds from one arrangement to another is not a s. 74 criterion for a wind-up, and the "grow in"

entitlement provided by s. 79 is not addressed. It is not dealt with by s. 85 because s. 50 comes into operation only with respect to employees who have been terminated. The appellant cannot be heard to say that the respondent employees were terminated from their employment for purposes of the administrator of the appellant's pension plan but did not suffer termination or discontinuity of employment for purposes of the Superintendent of Pensions.

The Superintendent considered these matters and conducted an analysis of s. 85(2) which he considered to have been "stripped of all its value for the transferring employees" by the s. 50 transfer. He concluded:

> It cannot truly be said that a transaction described in that subsection has taken place. As a result, I find that the continuity of employment deemed by s. 85(4) does not come into play.

In my view the statute is not so clear or free of ambiguity that the Superintendent's decision can be said to be wrong. Nor did he act unreasonably in finding that s. 74(1)(d) had been satisfied, providing him with discretion to order a wind-up. No statutory or other legal principle barred such a finding or excluded his jurisdiction. The subject matter of his decision was squarely within his area of expertise. In my view he arrived at a reasonable result which is entitled to a degree of curial deference. On the other hand, I would not be prepared to say his decision and actions were justified by a standard of correctness without a more thorough analysis. Whether such an analysis is necessary depends upon the standard by which his decision is to be reviewed, that is to say, upon the degree of curial deference it is accorded.

In **Hawker Siddeley** Chief Justice Clarke considered the standard of review which applies to decisions of the Superintendent of Pensions as follows:

> Section 89(9) gives the court the authority to review the decision of the Superintendent. In doing so, the court may confirm or substitute. The power on appeal is very broad. However, I agree with Justices Nathanson and MacAdam that in the scheme of the Act, the decision of the Superintendent is entitled to deference. If it is found to be 'patently unreasonable or irrational' it can be set aside. If the Superintendent has acted beyond his jurisdiction in the sense that he has made a decision which is outside the jurisdiction conferred upon him by the Legislature, then the court has the authority to set it aside. That the court may not agree with the decision is insufficient cause, standing alone, to substitute the decision for one of the court's liking. The court is otherwise obliged to respect the decision of the Superintendent as falling within the jurisdiction the Legislature has entrusted to his care, expertise and administration and should confirm it. Thus both Justices Nathanson and MacAdam are correct in determining that this decision of the Superintendent is entitled to deference by the court. The scope of review should be the same as a court would review the decision of a statutory tribunal not protected by a privative clause.

That scope of review was considered by the Supreme Court of Canada in **Pezim v. B.C. (Superintendent of Brokers)** (1994) 114 D.L.R. (4th) 385, which was decided by the Supreme Court of Canada after **Hawker Siddeley**. In my view there is no conflict between **Hawker Siddeley** and **Pezim**. In both cases the Superintendents were seen as statutory tribunals whose orders were not protected by a privative clause and which were subject to a statutory right of appeal.

Iacobucci J., writing for the court, in **Pezim** described the standard of review as a spectrum with reasonableness and high deference to the lower court on one end and correctness and low deference on the other end. He described the Superintendent's position as falling between the two extremes:

> On one hand, we are dealing with a statutory right of appeal pursuant to s. 149 of the Securities Act. On the other hand, we are dealing with an appeal from a highly specialized tribunal on an issue which arguably goes to the core of its regulatory mandate and expertise. . . .

> Consequently, even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to the decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise.
> . . .
>
> In my view, the pragmatic or functional approach articulated in **Bibeault** [**U.E.S., Local 298 v. Bibeault,** [1988] 2 S.C.R. 1048; 35 Admin. L.R. 153] is also helpful in determining the standard of review applicable in this case. At p. 1088 of that decision, Beetz J., writing for the court, stated the following:
>
> > . . . the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.
> > . . .
> >
> > In summary, having regard to the nature of the securities industry, the Commission's specialization of duties and policy development role, as well as the nature of the problem before the court, considerable deference is warranted in the present case notwithstanding the fact that there is a statutory right of appeal and there is no privative clause.

The Superintendent of Pensions was confronted with a situation in which it appeared to him that the respondent employees were being deprived of benefits to which the **Act** entitled them, and which could be rectified by a winding-up order. As Chief Justice Clarke pointed out, the purpose of the legislation is the protection of persons whose futures depend on their pensions. The Superintendent's observations were significant, for this was the area not only of his experience and expertise, but of his responsibility to protect the public interest. He made findings of fact which satisfied the criteria for the exercise of his mandate to order a wind up. No provision of law clearly stood in the way of the exercise of his discretion. His decision to act was a reasonable one which this court is obliged to support without resorting to the highest

degree of curial deference. Applying **Pezim**, the Superintendent's decision is entitled to "considerable deference." That degree of deference is sufficient to exclude the standard of correctness and it is sufficient to justify upholding the decision. I would dismiss the grounds of appeal based upon the interpretation of the statute and the standard of review.

There remain two further grounds: whether the Superintendent created a reasonable apprehension that he was biased in favour of the employees and against the appellant, and whether the Superintendent had jurisdiction to make the order pursuant to the terms of a reciprocal agreement with Superintendents in other provinces and in particular the Commission for Pensions of Ontario.

Some apprehension of bias is necessarily built into legislation such as the **Pension Benefits Act** under which the Superintendent performs an administrative investigatory function followed by a quasi-judicial one. Justice Saunders found the Superintendent's quasi-judicial role did not begin until October 17, 1990, the date he issued his proposed order, and that the standard of scrutiny which applied during the investigatory stage was "whether he had a mind so closed as to make submissions futile." It is only during the quasi-judicial stage that the test becomes the reasonable apprehension of bias.

Bias was considered by the Supreme Court of Canada in **Newfoundland Telephone v. Newfoundland (Public Utilities Board)** [1992] S.C.R. 623 in which Cory J., writing for the Court, made the following statements:

> Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and function of the particular tribunal. (Authority deleted.) The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply

> cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of a reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of the adjudicator. . . .
>
> It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a prejudgment of the matter to such an extent that any representations to the contrary would be futile. . . .
>
> Further, a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing. This does not of course mean that there are no limits to the conduct of board members. It is simply a confirmation of the principle that the courts must take a flexible approach to the problem so that the standard which is applied varies with the role and function of the Board which is being considered. In the end, however, commissioners must base their decision on the evidence which is before them. Although they may draw upon their relevant expertise and their background of knowledge and understanding, this must be applied to the evidence which has been adduced before the board.

The appellant argued that the Superintendent's bias consisted in "wanting to provide additional benefits to a specific group of employees and working from there was determined to find a way to do so," seizing upon the s. 50 arguments and his conclusion that s. 85 had no application. In support of that view the appellant points to remarks the Superintendent made in correspondence with his Minister and with the

solicitor for the respondents. On the same day as the proposed order, October 17, 1990, well in advance of the hearing he was to hold to reconsider the order, he wrote the Minister predicting that the appellant would take the matter to the Supreme Court. The appellant suggests that was a prediction of the outcome of the reconsideration hearing. The Superintendent also expressed his commitment to the windup in a letter to the respondent's solicitor prior to issuing the order in the first instance.

The remarks were obviously based on evidence which the Superintendent had acquired during the investigatory stage and indicate he was inclined to the view that in the circumstances the employees were entitled to the "grow in" benefits that would result from a winding-up. If he had not held that view he would not have issued the proposed order.

The legislature knew that Superintendents of pensions would be required to review their own orders when it enacted the reconsideration provisions in s. 89 of the **Act**. It must have assumed that a Superintendent would not issue an order initially if he did not believe he was right in doing so. The underlying presumption of s. 89 therefore must be that a Superintendent is capable of making a decision fairly based on evidence even though this involves overcoming his initial favourable predisposition respecting his own order.

While the controversial correspondence indicates the Superintendent believed in the order when he initially made it, there is nothing to suggest that his mind was closed on the matter even at that stage, or that there was any basis for an apprehension that he could not discharge his duty of fairness at the reconsideration hearing. In short, I am not satisfied that the appellant has met the onus of showing

an apprehension of bias in the context of s. 89.

The remaining ground relates to the "reciprocal agreement" entered into by the Nova Scotia Superintendent pursuant to s. 7 of the **Pension Benefits Act** which gives the Commission of Pensions for Ontario carriage of pension proceedings when the majority of members of a pension plan, as in the present case, are in Ontario. Justice Saunders' decision that there is no proof of the required approval by the Governor in Council of Nova Scotia would dispose of the matter on a narrow ground, although the appellant argues persuasively that the respondents did not satisfy the burden of proof respecting ministerial approval. Justice Saunders goes on to find that the agreement is merely an "administrative arrangement" incapable of depriving Nova Scotia of jurisdiction over the pensions of a group of employees entirely within this province. The Minister, who is not a party to the agreement, retains powers over all pension plans in the province and, in any event, the Superintendent in Ontario exempted himself from the agreement with respect to present issues and invited the Nova Scotia Superintendent to proceed. While other authorities under the reciprocal agreement may have a basis for complaints about the procedures followed, I am not satisfied that, in view of the position of the Ontario Superintendent, there is anything in the agreement itself or in the Superintendent's handling of the present matter to nullify his decision for want of jurisdiction.

Having reviewed Justice Saunders' reasons for judgment in light of the evidence and the able submissions of counsel I am satisfied that he did not commit reversible error in upholding the Superintendent's decision confirming his wind up order following reconsideration under s. 89 of the Act. Justice Saunders applied the

appropriate tests and standards of review to the decision of the Superintendent and interference by this court would not be justified. I would dismiss the appeal. The parties have agreed there should be no order for costs. .

Freeman, J.A.

Concurred in:

Matthews, J.A.

Roscoe, J.A.

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) Appeal Heard:
) April 19, 1995
)
) Judgment Delivered:
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)
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ERRATUM

On the cover page the date the appeal was heard should be April 19, 1995 instead of April 20, 1995.