

## Member Entitled to Deferred Pension Notwithstanding Earlier Payment of Small Pension

January 10, 2012 by Ian J.F. McSweeney

Shortly (eight days) after a series of transactions under which Imasco Inc.'s Shoppers Drug Mart business was transferred to Shoppers Drug Mart Inc. (Shoppers) and then sold (share sale) to institutional investors, Mr. Boys' employment with Shoppers was terminated. As part of the transactions, Boys' retained his accrued seventeen year pension under the Imasco pension plan and joined a new successor pension plan established in 2000 for executive employees by Shoppers (the Shoppers Plan). The Shoppers Plan was designed under a "wrap around" arrangement to provide substantially comparable benefits to those provided under the Imasco plan.

Since Mr. Boys had belonged to the Shoppers Plan for such a short period, his basic pension entitlement under that plan qualified as a "small pension". While Mr. Boys elected a deferred pension under the Imasco plan and wanted to make a similar election under the Shoppers Plan, Shoppers insisted that he commute his small Shoppers Plan pension to a lump sum cash payment.

Subsequently, in settlement of proceedings before the Financial Services Tribunal (FST), Shoppers agreed to a partial wind-up of the Shoppers Plan in connection with a broader post-sale restructuring and Boys became entitled to "grow-in" benefits valued at \$89,087. Although this grow-in benefit exceeded the small pension threshold, Shoppers refused Mr. Boys' request for a deferred pension in respect of the grow-in entitlement, arguing that the grow-in must be commuted and cashed out just like the previous cash out of his small basic benefit. As an added complication the FST was advised of the Canada Revenue Agency (the CRA) position that the "Income Tax Act and Regulations do not permit the additional growing-in benefits to be paid as additional lifetime retirement benefits from a registered pension plan (RPP) where the individual has already commuted and transferred the full amount of his or her initial benefits out of the particular RPP."

Mr. Boys sought relief against Shoppers' decision from the Superintendent of Financial Services, but the Superintendent issued a Notice of Intended Decision (NOID) indicating his intention to refuse to make such an order. Mr. Boys then applied to the FST, challenging the Superintendent's NOID, and seeking to have his grow-in entitlement under the Shoppers Plan treated as a deferred pension.

The FST decided in favour of Mr. Boys and found that while Shoppers' treatment of Mr. Boys' "eight-day" basic pension as a small pension did not contravene the Ontario *Pension Benefits Act* (PBA) **at the time** (before declaration of the partial wind up), once the grow-in benefit was added, it clearly no longer qualified as a small pension. The FST stated:

[T]he partial wind up changed the value of his pension benefits on termination, taking his entitlement decisively out of the category of a 'small pension'. Once that became clear, Shoppers was required to offer him the options for his pension that came with his recalculated entitlement, including the option of taking his benefits as a deferred pension.

In particular, the Tribunal rejected Shoppers' and the Superintendent's arguments that the PBA does not provide members affected by a partial wind-up with a right to re-elect pension transfer options in the circumstances where a pre-partial wind up basic benefit commutation has occurred and stated:

The clear purpose and effect of s. 73(1)(a) is to change the date on which pension entitlement is to be determined for affected plan members, from their individual date of termination to the effective date of the partial wind up, in order to ensure that their grow-in benefits and any other partial wind up entitlements are taken into account.

With respect to CRA's position, the FST expressed the view that while there may be difficulties unwinding the initial basic benefit commutation it was not impossible and therefore should not restrict the member's rights under the PBA.

In setting aside the Superintendent's NOID, the FST indicated that it remained seized of the matter should the CRA not provide the necessary approval for the re-payment of the small pension back into the Shoppers Plan.

**Case Comment: With the elimination of partial wind-ups in Ontario the incidents of basic benefit elections being out of sync with grow-in entitlements will soon be minimized, however, this case is also interesting in light of the FST's decision that the member's "eight day" Shoppers Plan pension was to be treated separate and apart from his predecessor plan pension for purposes of the small benefit characterization notwithstanding s. 80 of the PBA. The FST rejected (rightly so in my view) Mr. Boys' contention that his Shoppers Plan pension should be treated seamlessly with his Imasco plan pension for purposes of determining whether the small benefit commutation provisions of the PBA applied. The FST held that while s. 80 preserves the benefits under the predecessor plan and counts the period of predecessor plan membership for eligibility and entitlement purposes under the successor plan, it does not affect the amount of benefits earned under the successor plan for purposes of the small benefit determination.**