

Hydro One and a "Significant Number"

January 28, 2010



Priscilla H. Healy

Section 69(1)(d) of the *Ontario Pension Benefits Act* authorizes the Superintendent of Financial Services to order a partial plan wind up where a "significant number of members of the pension plan cease to be employed" as a result of the "discontinuance" or "reorganization" of the employer's business. There has been a considerable amount of litigation as to that provision.

There was at one time an understanding that a significant number was 20% of the active membership, although that understanding has long been eroded. In *Hydro One v. Ontario (Financial Services Commission)*, a decision of the Ontario Court of Appeal in January of 2010, the Court agreed with the Financial Services Tribunal ("FST") that a "significant number" can refer to a significant number of a defined subset of plan members, and does not necessarily mean a significant number of the plan members as a whole. In this case 126 out of 3,913 plan members lost their jobs. Of these 73 were part of a subset of 379 salaried plan members. 53 members, who bargained their severance through their union, were part of another subset of 773. Whether a partial wind up was required was a matter of the Superintendent's discretion, subject to overruling by the FST. The FST held, and the Court agreed, that the partial wind up should apply to the 73 but not to the 53.

There are several implications of a partial wind up rather than a simple group termination. First, there is immediate vesting. Secondly, if the plan has generous early retirement benefits, members affected by a partial wind up who have 55 years combined age and years of service will "grow-in" to them. This can be costly. Thirdly, if there is surplus in the plan, the portion of that surplus allocated to the partial wind up will have to be distributed to either members or the employer, with the huge attendant costs of that exercise. Finally, as a matter of plan administration there is a substantial delay (and substantial costs incurred) before the benefits of affected members can be settled. In the Hydro One case the availability of grow-in appeared to have been at issue.

Bill 236, which was introduced into the Ontario Legislature for first reading at the end of 2009, will end partial wind ups with effective dates after 2011 if it is enacted into law. The quid pro quo of the elimination of partial plan wind ups is immediate vesting and the requirement that grow-in will apply to all terminations after that date, except those for cause. It is of note that although the surplus withdrawal regime is much simplified in the case of full wind ups as soon as the Bill is given Royal Assent, the existing regime for the

withdrawal of surplus by the employer in a partial wind up is retained for partial wind ups as long as they exist.

The Hydro One decision is of most lasting value for what the Court says about statutory interpretation, the exercise of discretion by the Superintendent, the role of the FST, and the standard of review of the FST, all of which reinforce previous judicial decisions.

This article is intended for general information purposes only and should not be relied upon as legal advice.

Priscilla H. Healy is a Consultant at Fogler, Rubinoff LLP in the area of Pensions & Benefits. She can be reached at 416.864.7607 or phealy@foglers.com.