Tab 8

In the Court of Appeal of Alberta

Citation: Halliburton Group Canada Inc. v. Alberta, 2010 ABCA 254

Date: 20100909
Docket: 0901-0228-AC
Registry: Calgary

2010 ABCA 254 (CanLII)

Between:

Halliburton Group Canada Inc.

Appellant (Plaintiff)

- and -

Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance and Dennis Gartner, in his capacity as Superintendent of Pensions of the Province of Alberta

Respondents (Defendants)

Corrected judgment: A corrigendum was issued on September 23, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Mr. Justice Carole Conrad
The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Peter Martin

Reasons for Judgment of The Honourable Mr. Justice Berger
Concurred in by The Honourable Madam Justice Conrad
Concurred in by The Honourable Mr. Justice Martin

Appeal from the Judgment by
The Honourable Madam Justice K.M. Horner
Dated the 9th day of July, 2009
Filed on the 5th day of August, 2009

(2009 ABQB 420; Docket: 0801 04742)

Reasons for Judgment of
The Honourable Mr. Justice Berger

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[1] The central issue in this appeal is whether the impugned amendments to a pension plan constitute a retroactive reduction of benefits in contravention of s. 81 of the ***Employment Pension Plans Act***, RSA 2000, c. E-8 ("***EPPA***") and/or in contravention of s. 9.01 of the pension plan itself.

[2] The Appellant, Halliburton, is responsible for a pension plan registered in Alberta under ***EPPA***. The Plan was originally administered by Dresser Canada, but Halliburton assumed sponsorship and administration of the Plan when it acquired Dresser in 1999.

[3] The Respondent, Alberta's Superintendent of Pensions, issued directions relating to certain amendments made to the Plan by the Appellant. Halliburton appealed these directives under the statutory appeal provisions set out in s. 26 of ***EPPA***. It also sought judicial review. A chambers judge dismissed these applications. That decision is reported at 2009 ABQB 420, [2009] A.J No. 864. Halliburton now appeals to this Court.

[4] The Plan was originally a defined benefit plan which provides for a specific benefit upon retirement. A mechanism was set out in the Plan for calculating the benefit to be received upon retirement. Pension benefits were determined, in part, on the basis of five consecutive years out of the last ten years of credited service (the Defined Benefits Plan ("DB")). In 1998, however, Dresser decided to convert the Plan to a Defined Contribution Plan ("DC"). Under such a plan only the contributions are specified and there is no guarantee of a benefit upon retirement.

[5] The Plan permitted amendment provided that it did not "reduce the value of benefits vested in Participants ..." (s. 9.01 of the Plan). Prior to the contested amendments, the Plan had been amended five times without controversy.

[6] Amendment 6, which was filed with Alberta Finance on September 25, 1998, introduced certain "defined contributions" provisions into the Plan. Further steps were taken towards conversion in 2001 when Halliburton (now operating the Plan) adopted Amendment 7 effective April 1, 2001. This amendment was filed with Alberta Finance on May 31, 2001. Its effect was to make the now "defined contribution" Plan applicable to all Plan members effective January 1, 2002.

[7] The conversion was done on a go-forward basis. Thus, benefits accrued under the "defined benefits" structure were preserved, but salary and service were frozen as of January 1, 2002 for the purpose of calculating a final defined benefit amount (the freeze).

[8] These various changes did not excite regulatory concern until 2005 when Halliburton submitted Amendment 9 which purported to make clear that the freeze provisions were designed to affect seventeen former employees of Dresser. The provision in controversy is para. 17 which reads

2010 ABCA 254 (CanLII)

as follow:

> "If the Participant is a Defined Contribution Participating Employee, 'Best Average Compensation' means the annualized average of a Participant's highest thirty-six (36) months of Compensation prior to the date that the Participant elects to become a Defined Contribution Employee."

2010 ABCA 254 (CanLII)

[9] The amendment was rejected by the Superintendent because the freeze, explicit in this provision, was thought to interfere with vested rights (in the case of the Plan) or a person's benefits (in the case of the statute). A series of letters then passed between the Superintendent and counsel for Halliburton debating whether the conversion was contrary to the Plan and/or section 81(1) of ***EPPA***. The amendment was later accepted after this paragraph was removed.

[10] Eventually, the Superintendent issued the directions which became the foundation of the appeal/judicial review application. The initial direction required Halliburton to file revised cost certificates relating to actuarial valuations first filed December 31, 2002 and December 31, 2005, and to file a revised actuarial valuation report and cost certificate of the valuation done as of December 31, 2006. In each case, Halliburton was required to project salaries for the affected members. Finally, Halliburton was told to remit any additional funds required to fund the benefits set out in the cost certificates, and confirm the date and amount in writing to the Superintendent.

[11] The second "revised" direction told Halliburton to rescind item 2 of Amendment 6 which had the effect of freezing earnings for purposes of calculating benefit entitlements. It also required Halliburton to file revised valuation certificates and to make any necessary additional contributions to the Plan fund with interest. Compliance was required by May 11, 2008.

[12] Halliburton appealed these decisions to the Court of Queen's Bench pursuant to the statutory appeal provisions set out in ss. 25 and 26 of ***EPPA***. It also sought judicial review. Sections 25 and 26 read as follows:

> "25(1) If the Superintendent refuses to register a pension plan or a plan amendment filed for registration or cancels a registration under section 24(1), the Superintendent shall forthwith serve on the administrator a written notification of that fact containing the reasons for that decision.
>
> (2) In the case of a cancellation of registration, the notification must specify the date referred to in section 24(1).
>
> 26(1) Where the Superintendent has served a notification under section 25(1), the administrator may, by originating notice supported by an affidavit, appeal to the Court for an order requiring the

2010 ABCA 254 (CanLII)

> Superintendent to register the plan or amendment or reinstate the registration.
>
> (2) A copy of the originating notice and of the affidavit must be filed with the clerk of the Court and served on the Superintendent within 60 days after the service of the notification under section 25(1) or any longer period that the Court allows, and the application shall be made returnable within 90 days after the filing of the originating notice."

THE QUEEN'S BENCH DECISION

[13] The Queen's Bench chambers judge endorsed the agreement of both parties that the statutory appeal would not be an adequate process. She agreed that the application would be conducted as a combination of judicial review and statutory appeal.

[14] Because the issues before her had not been determined by any court in Alberta, the chambers judge concluded that a consideration of the four ***Pushpanathan*** factors favoured a standard of review of reasonableness. She was of the view that, mindful of the Supreme Court of Canada's explanation of "reasonableness" in ***Dunsmuir v. New Brunswick***, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47, the test was met. In her opinion, the decision fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. She held at para. 95:

> "... The question of whether the administration of certain provisions of Amendments 6 and 9 constituted a retroactive reduction in member benefits was one that arose in the course of proceedings properly before the Superintendent. This was a question that falls within the regulatory mandate and expertise of the Commission and was within its competence to answer. The Superintendent's answer was supported by clear reasons and the letters from the Office of the Superintendent."

GROUNDS OF APPEAL

[15] Halliburton submits the chambers judge erred by "failing to consider all of the evidence and the substantive issues on appeal, and further erred in law, and in mixed law and fact, in finding that:

> "(a) the appropriate standard of judicial review was 'reasonableness';
>
> (b) the Direction was reasonable;
>
> (c) the amendments in question together constitute a retroactive

reduction of benefits in contravention of section 81 of EPPA; and

(d) the Superintendent has the authority to retroactively direct that all or a portion of an amendment be rescinded after it has been duly registered by AF [Alberta Finance]."

2010 ABCA 254 (CanLII)

[16] The prayer for relief seeks the following declarations:

(a) An order setting aside the Superintendent's directives.

(b) An order allowing the amendments, and

(c) An order allowing Halliburton to proceed with the Plan as a Defined Contribution Plan.

RIGHT OF APPEAL

[17] Section 8 of ***EPPA*** confers upon the Superintendent the authority to issue directions. It reads as follows:

"8(1) If the Superintendent considers that a pension plan or any of the other plan documents do not comply with this Act or that a pension plan is not being administered in accordance with this Act or the plan, the Superintendent may direct the person responsible, in writing,

(a) to cease or refrain from doing whatever constitutes the non-compliance, or

(b) to do whatever the Superintendent considers necessary to remedy the situation,

or both, within 60 days or any longer period that the Superintendent specifies in the direction.

(2) If the Superintendent considers that an administrator, employer or any other person with responsibilities under this Act is, in respect of a pension plan, doing or about to do anything that is contrary to safe and sound pension practices, the Superintendent may direct that person, in writing,

2010 ABCA 254 (CanLII)

(a) to cease or refrain from doing that thing, or

(b) to do whatever the Superintendent considers necessary to remedy the situation,

or both, within 60 days or any longer period that the Superintendent specifies in the direction.

(3) The Superintendent shall issue a direction under subsection (1) and meet the requirements of this section before cancelling a plan's registration under section 24(1).

(4) Notwithstanding subsection (1) or (2), if the Superintendent considers that the minimum length of time required by that subsection for compliance might prejudice the interests of the members, former members or any other persons entitled to benefits, the direction may provide that the compliance must be effected immediately or before the expiration of any period of less than 60 days that is specified in the direction.

(5) The Superintendent shall, in a direction under subsection (1) or (2), provide the person to whom it is addressed with an opportunity to make written representations to the Superintendent about it within any reasonable period that is specified in it.

(6) On receiving any representations made under subsection (5) and after reviewing them, the Superintendent shall in writing confirm, vary or revoke the direction.

(7) A person served with a direction under subsection (1) or (2) shall comply with it and, where subsection (4) applies, shall do so within the time limit specified, regardless of the person's right to the opportunity referred to in subsection (5)."

[18] A direction is not subject to a statutory right of appeal. Section 26(1) of ***EPPA*** is limited to appealing a decision by the Superintendent in the event that he has refused to register a plan or amendment or has cancelled a plan's registration. In the case at bar, the Superintendent did none of those things.

[19] It follows that the chambers judge erred in proceeding, albeit with the concurrence of

2010 ABCA 254 (CanLII)

counsel, on the premise that a statutory right of appeal was available in respect of the directions of the Superintendent.

STANDARD OF REVIEW

[20] The factors identified in ***Pushpanathan v. Canada (Minister of Citizenship and Immigration***, [1998] 1 S.C.R. 982 and in ***Dunsmuir v. New Brunswick***, [2008] 1 S.C.R. 190 must be reviewed in light of the chambers judge's conclusion that she was entitled to take into account both the absence of a privative clause and the existence of a right of appeal in ***EPPA***. As I have indicated, no statutory right of appeal was available in this case. Accordingly, what is to be made of a the absence of both a privative clause and a statutory right of appeal? It seems to me that the legislative intent was to limit the Court's review of issues that do not fall under the rubric of the conferred statutory appeal: ***Goodine v. New Brunswick (Milk Marketing Board)***, 2003 NBCA 59. This would weigh in favour of a standard of reasonableness.

[21] The legislation here is intended to benefit and protect the interests of members and former members of pension plans. The Superintendent is the administrative decision-maker. He plays a polycentric role in administrating ***EPPA***. That said, the role of the Superintendent is to ensure that pension plans accord with legislative and regulatory requirements. The Superintendent's statutory powers under ***EPPA*** are intended to benefit and protect the interests of members and former members of pension plans and to strike a balance between the interests of employers and employees, while advancing the public interest in retirement income security.

[22] The ultimate question in the judicial review proceedings was whether the amendments to the Plan constituted a retroactive reduction to a vested benefit in contravention of ***EPPA*** and the pension plan. This is a question of mixed fact and law, as it requires interpreting the legislation and applying it to the pension documents. As a general rule, questions of mixed fact and law attract deference unless there is an extricable error of law: ***Canada (Director of Investigation and Research) v. Southam Inc.***, [1997] 1 S.C.R. 748.

[23] The Respondents submit that the office of the Superintendent of Pensions is highly specialized with years of experience in the field of pensions and a close relationship with, and understanding of, the pensions industry. The Superintendent has a role in legislative planning with regard to pensions, which further indicates a special expertise.

[24] The Appellant, by contrast, emphasizes that, while the Superintendent may have expertise relative to the general population, he is not an expert in interpreting pension contracts and legislation compared to the courts.

[25] Cases involving the ***Pension Benefits Standards Act***, R.S.C. 1985, c. 32 have found that a decision of the Superintendent interpreting the Act is reviewable on a standard of reasonableness:

Cousins v. Canada (Attorney General), 2008 FCA 226, [2008] F.C.J. No. 1011 at para. 22; *Buschau v. Canada (Attorney General) (appeal by Rogers Communications Inc.)*, 2009 FCA 258, [2009] F.C.J. No. 1119 at para. 44.

2010 ABCA 254 (CanLII)

[26] In my opinion, it is not unfair to characterize the Superintendent as an expert in interpreting pensions legislation and applying that legislation to pension plan documents. This indicates that a standard of reasonableness is appropriate.

[27] I conclude that some deference to the Superintendent in the light of the analysis above is appropriate. In my opinion, the chambers judge was correct in concluding that reasonableness was the proper standard of review.

ANALYSIS

[28] There is no question that the Appellant is entitled to amend the Plan. There are, however, limitations. The first is s. 9.01 of the Dresser Retirement Income Plan which states:

> "... [P]rovided that no such amendment shall reduce the value of benefits vested in Participants as of such effective date or cause a reversion of any funds to any Employer prior to satisfaction of or provision for all benefits then accrued ..."
>
> (Extracts, Vol. I, A108)

[29] The second limitation is set out in s. 81(1)(a) of ***EPPA***. It reads as follows:

> "An amendment to a pension plan or, where one plan has been adopted in place of another, the plan so adopted, may not reduce
>
> a) a person's benefits in respect of employment on or after the initial qualification date and before the date of the amendment or the adoption of the other plan,"

[30] Regard must also be had to s. 81(2) of ***EPPA*** which reads as follows:

> "81(2) Unless the plan so provides, subsection (1)(a) does not apply to that portion of the benefits that is based on the earnings of a member projected in relation to a period after the date of the amendment or adoption of the other plan." [emphasis added]

[31] Critical to the analysis are the following definitions:

Section 1.11 of the Plan defines 'continuous service' as follow:

> "'Continuous Service' shall mean continuous, uninterrupted time of employment ... from original date of hire, with an Employer and any Related Entity, or any predecessor thereof, as reflected on Company records. ..."

Section 1.12 defines 'credited service' as follows:

> "'Credited Service' shall mean the Continuous Service of an employee prior to his Normal Retirement Date. ..."

Final average monthly earnings is defined in section 1.17. It reads as follows:

> "'Final Average Monthly Earnings' shall mean the highest total Compensation of a Participant for any consecutive five (5) calendar years out of the last ten (10) complete calendar years of his Credited Service. ..."

2010 ABCA 254 (CanLII)

[32] It is common ground between the parties that the result of the amendments is that at least some of the Dresser members will receive less pension for the period worked before January 1, 2001 than they would had there been no amendments. The real question then is whether the formula for calculating the pension is a vested right, or a Plan element that can be reduced by amendment.

[33] The Superintendent acknowledges that the issue is tied so closely to the specific wording of the Plan that no case law provides guidance on the matter. The Superintendent submits that because the Plan includes no provisions for tying a determination date to the formula in case of an amendment, the formula must be taken as a vested right. Apparently, many, if not most plans, do not include a determination date provision. That is why all the other Halliburton plans could be converted from DB to DC under the amendments. But, the Superintendent argues, this one cannot.

[34] Halliburton, by contrast, argues that a benefit is vested or accrued (the terms are used interchangeably in the case law in accordance with ***Dinney v. Great-West Life Assurance Co.*** (2005) 252 D.L.R. (4th) 660 (Man. C.A.) at paras. 30-32) if the member would be entitled to it if he or she retired today. In this case, the Appellant submits that the amendment did not reduce the benefits that the members would be entitled to if they retired immediately. Rather, it reduced future benefits which are not vested.

[35] Sections 81(1)(a) and 81(2) of ***EPPA*** contemplate a temporal analysis. Section 81(1)(a) speaks of benefits acquired from day one of employment ("the initial qualification date") accruing thereafter to the day of the amendment of the Plan. An amendment may not reduce those benefits. The Appellant argues that the provision should be read to permit reduction of benefits that would otherwise have accrued after the amendment. I disagree. At best the enactment is silent. In any event, the effect of s. 81(2) is that s. 81(1)(a) does not apply to projected benefits. A plain reading of the Plan makes clear that the Plan contemplates that projected earnings are to be taken into

2010 ABCA 254 (CanLII)

account in the determination of employee benefits. The cumulative effect of all of the foregoing is that as at the point that any individual becomes a participant in the Plan, they are entitled to have their defined benefit calculated in accordance with the DB formula. The formula requires that the compensation number used is the one that is the highest for five of their last ten years of employment "prior to [an employee's] normal retirement date."

[36] There are, in fact, seventeen former Dresser employees now employed by Halliburton who are affected by the amendment to the Plan. They did not elect to switch to the DC Plan.

[37] Actuaries engaged by the Appellant set out an arithmetic calculation of the resultant shortfall in monthly payments under the DC Plan as compared with entitlements under the DB Plan. The Appellant proposes to pay to each of the seventeen employees a lump sum based on "present value" of the shortfall as a differential payment.

[38] In my view, such a payment might well attract tax consequences, the effect of which would diminish the value of the acquired benefits of the seventeen employees. It may well be that most of the seventeen employees did not opt for the DC Plan for that very reason. They must have concluded that the monthly pension available under the DB Plan was to be preferred.

[39] The Appellant submits that the seventeen employees lose nothing acquired to the date of amendment pursuant to their DB Plan and accrue further benefits thereafter under their DC Plan. The contention is that the seventeen employees have, in effect, two pension plans. In my view, that argument is without merit if, at the end of the day, the Plan is read to confer upon the seventeen employees an acquired or "vested" entitlement to benefits extending beyond the date of the amendment. Indeed, as I read the Plan, the seventeen employees prior to the effective date of the amendment were entitled to a pension premised upon their projected five years of employment preceding their normal retirement date. Amendments that deprive them of that entitlement contravene the Act and entitle the Superintendent to order deregistration of the amendments.

[40] I cannot accept the Appellant's submission that "prospective rights" in this case must be distinguished from "vested rights". After all, a vested right is capable of measurement and, as I have held, is properly measured in the case at bar, given the language of the Plan, on the basis of "prospective calculations". To repeat, the seventeen employees had acquired a right to measure their pension entitlements on a prospective basis. To deprive them of that entitlement constitutes a contravention of the Act.

[41] I conclude that the directions of the Superintendent must stand. The decision to issue those directions was reasonable. Affected members should have their post-Amendment 6 earnings included in the calculation of their final pension benefits. To do otherwise would constitute a retroactive reduction of benefits.

[42] There is, in my opinion, no merit to the Appellant's contention that the Superintendent is

without jurisdiction to rescind a previously registered amendment. Sections 8(1) and 8(2) of ***EPPA*** reflect on their face the legislative choice to confer upon the Superintendent broad powers to issue the impugned directions revoking amendments to a pension plan that contravene the Act. Prior registration is no constraint.

[43] The appeal is dismissed.

Appeal heard on May 6, 2010

Reasons filed at Calgary, Alberta
this 9th day of September, 2010

Berger J.A.

I concur:
As authorized by: Conrad J.A.

I concur:
As authorized by: Martin J.A.

2010 ABCA 254 (CanLII)

Appearances:

M.E. Killoram
for the Appellant (Plaintiff)

J.H. Mayan
J.B. Currie
for the Respondents (Defendants)

2010 ABCA 254 (CanLII)

Corrigendum of the Reasons for Judgment of
The Honourable Mr. Justice Ronald Berger

In paragraph [33], first line, the word "working" has been changed to read "wording".

2010 ABCA 254 (CanLII)

Tab 9

FST File No. P0335-2008
Decision No. P0335-2008-2

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c.P.8, as amended by the *Financial Services Commission of Ontario Act, 1997,* S.O. 1997, c.28 (the *"PBA"*);

AND IN THE MATTER OF the Registration of By-Law No. 7 of the OMERS Primary Pension Plan, Registration Number 0345983;

AND IN THE MATTER OF a Hearing in accordance with subsection 89(8) of the *PBA*;

B E T W E E N:

SUSAN MCGRATH

APPLICANT

-and-

SUPERINTENDENT OF FINANCIAL SERVICES, OMERS ADMINISTRATION CORPORATION and OMERS SPONSORS CORPORATION

RESPONDENTS

-and-

POLICE PENSIONERS ASSOCIATION OF ONTARIO and IATSE, LOCAL 58

ADDED PARTIES

DATE OF HEARING:
January 18, February 8-9, 2010

BEFORE:
Elizabeth Shilton
Member of the Tribunal and Chair of the Panel

David Short
Member of the Tribunal and of the Panel

Ralph Scane
Member of the Tribunal and of the Panel

APPEARANCES:
Anthony McGrath, for the Applicant Susan McGrath
Mark Bailey for the Superintendent of Financial Services
Freya Kristjanson and Amanda Darrach for OMERS Sponsors Corporation
Jeff Galway and Rahat Godil for OMERS Administration Corporation
Paul Bailey for the Police Pensioners Association of Ontario
Tim Taylor for IATSE Local 58 ("IATSE")

DECISION

A. INTRODUCTION

This case considers the validity of an amendment to the OMERS Primary Pension Plan (the "Plan") changing the method used to calculate inflation indexing. It addresses important issues of first impression before this Tribunal about the meaning of s.14(1) of the *Pension Benefits Act ("PBA")*, and the scope of a plan sponsor's authority to amend pension plans.

In general, the Plan offers full inflation protection, with pensions fully indexed to increases in the Canadian Consumer Price Index ("CPI"). For several years, the Plan provided for inflation adjustments to be calculated according to a formula based on a comparison between the September CPI from one year to the next. We call this approach the Old Method, or the "OM". In October of 2007, the OMERS Sponsors' Corporation (the "SC") amended the Plan to eliminate the OM and adopt the method of indexation used by the Canada Pension Plan ("CPP"), based on a year-over-year comparison of average monthly CPI increases for a 12 month period ending in October of each year. We call this CPP method the New Method, or the "NM". The SC applied in November of 2007 to register the amendment pursuant to the provisions of the *PBA*. Registration was opposed by the Applicant, Susan McGrath, a retired member of the OMERS plan. The Superintendent of Financial Services (the "Superintendent") proceeded to register the amendment. The Applicant requested a hearing before this Tribunal under s.89 of the *PBA*, challenging the Superintendent's decision to register the amendment on the grounds that it reduced her accrued pension benefits within the meaning of s.14(1). She is opposed by the respondents, the SC, the Administration Corporation (the "AC"), and the Superintendent, who all take the position that the amendment does not reduce accrued pension benefits.

Two additional parties, the Police Pensioners Association of Ontario ("PPAO") and IATSE applied for and were granted limited status as intervenors. They took no position on the outcome of the proceeding, and made no submissions.

At a pre-hearing conference, two issues were stated for hearing as follows:

1. Is the Amendment void within the meaning of section 14(1) of the *PBA* because it reduces the amount or the commuted value of a pension or pension benefit accrued under a pension plan?

2. Depending upon the answer to issue 1 above, what, if any, is the appropriate remedy and should it include revocation of the registration of the amendment?

Two additional issues were stated relating to whether the amendment was 'adverse' within the meaning of s.26 of the *PBA*, and whether, if it were 'adverse', proper notice had been provided. These two issues were subsequently abandoned by the Applicant and accordingly we do not address them in our decision.

We have decided that the amendment does not reduce the amount or the commuted value of the Applicant's accrued pension within the meaning of s.14(1), and accordingly is not void.

Below we set out the reasons for our decision.

B. THE EVIDENCE

Much of the evidence in the case was filed by agreement through an Agreed Statement Facts ("ASF") and an Agreed Book of Documents ("ABD"). This agreed-upon evidence was supplemented by sworn witness statements filed by various parties. The Applicant filed her own witness statement. The AC filed a witness statement from Jennifer Brown, Executive Vice-President and Chief Pension Officer of the AC. The SC filed a similar statement from Marianne Love, Co-Chair of the SC since its inception in 2006. All these statements were filed on consent and without cross-examination. Also on consent, the Applicant filed responses to certain interrogatories submitted to both the AC and the SC. At the hearing on January 18, 2010, this documentary evidence was supplemented by *viva voce* evidence from two expert witnesses, both actuaries: K. Paul Duxbury for the Applicant and Jill Wagman for SC. The Superintendent did not call evidence.

The evidence as a whole established the facts set out below. Much of this summary of the evidence is borrowed from the ASF.

1. General Background

The Ontario Municipal Employees Retirement System ("OMERS") was first established under the *Ontario Municipal Employees Retirement System Act, 1961-1962* and is now continued under the *Ontario Municipal Employees Retirement System Act, 2006* (the "*OMERS Act, 2006*"). OMERS administers a number of different pension plans. The plan at issue in this case is the OMERS Primary Pension Plan (the "Plan"), a contributory defined benefit pension plan covering employees in the Ontario municipal sector. Up to 2006, the Plan was set out in Regulation 890; after the new statute came into effect, the plan text ceased to be a matter of regulation.

The Applicant, Susan McGrath, is a retired member of the Plan. She enrolled in the Plan on July 1, 1969 and remained a member continuously until she retired on September 1, 2000. She has

been in receipt of a monthly pension since that date based on credited service of 34.25 years. The respondent SC is a statutory corporation established under the *OMERS Act, 2006*. The SC is made up of fourteen members of the corporation. Seven members are appointed by employers or employer associations who participate in OMERS, six are appointed by unions or employee associations whose members participate in OMERS and one is appointed by retiree organizations. Pursuant to s.16 of the *OMERS Act, 2006*, the SC determines the terms and conditions of the OMERS pension plans, subject to the restrictions set out in the *OMERS Act, 2006*. The respondent AC is a continuation of the Ontario Municipal Employees Retirement Board established under the original OMERS statute. Under the provisions of the *OMERS Act, 2006*, the AC acts as administrator of OMERS pension plans and trustee of the OMERS pension funds, provides for the actuarial valuation of OMERS pension plans, and advises and assists the SC. The AC is composed of fourteen members of the corporation who also function as the board of directors of the AC. Currently, there are seven employer or employer association representatives, six representatives of unions or employee associations whose members participate in OMERS and one representative of retiree organizations.

Prior to 1992, inflation increases applicable to pension benefits paid under the Plan were granted on a purely *ad hoc* basis. In 1992, the Board implemented guaranteed indexing. The indexation formula adopted by regulation produced 70% of the annual increase in the Consumer Price Index ("CPI") (with a 6% cap and a minimum of 0%). The remaining 30% could be provided through *ad hoc* increases if there were sufficient funds available. From 1992 to 1998 the Board topped up the amount of the annual inflation increase each year to 100% of CPI. In 1999, the Board implemented 100% guaranteed indexing (with a 6% cap and a minimum of 0%) and removed the *ad hoc* payments. The regulation was duly amended from time to time to permit these changes.

From January 1, 1992 until December 31, 2007 the operative pension plan provisions addressing indexation, first set out in Regulation 890 and subsequently in s.31 of the Plan text, were as follows:

> (1) In this section, the inflation increase of any adjustment year means the percentage increase of the Consumer Price Index for Canada for September of the previous year over the Consumer Price Index for Canada for September of the year which is 2 years prior to the adjustment year.
>
> (2) The following is the inflation adjustment for the adjustment year indicated:
> 1. For each adjustment year not otherwise specified in this subsection, 70 per cent of the inflation increase for that year.
> 2. For 1999 and subsequent years, 100 per cent of the inflation increase for the applicable year.
>
> (3) The inflation adjustment in excess of 6 per cent in any adjustment year shall be added to the inflation adjustment of the subsequent adjustment year.
>
> (4) The inflation adjustment in any adjustment year shall never be less than zero.

(5) In this section and for the purposes of subsections 18(8), 18(9), 22(6) and 22(7), "adjustment year" means a year in which pensions are increased by the inflation adjustment.

...

(7) The year 1992 and subsequent years shall be considered adjustment years.

(8) The pension payable to a person during his or her lifetime shall be determined in accordance with this Plan or a predecessor thereof and,

(a) where a pension is payable to a person on the 1st day of December of the year prior to an adjustment year in respect of a pension that was being paid on the 1st day of December of the year which is 2 years prior to that adjustment year, the pension payable to the person on the 1st day of January of that adjustment year shall be increased by the inflation adjustment; ....

Pursuant to this Plan provision, pensions in pay were increased every January 1 by a percentage identified by calculating the difference between the CPI for the September two years prior to the adjustment date, and the September in the year prior to the adjustment date: e.g., on January 1, 2005, pensions were increased by the percentage difference between the CPI for September 2003 and the CPI for September 2004.

While this method of indexing pensions to the CPI is perfectly acceptable from an actuarial perspective and meets requirements under the *Income Tax Act*, it is a volatile method. If the CPI in September of any given year spikes upwards or downwards, it can produce indexation increases which are either unusually high or unusually low as compared with an averaging approach. The Canada Pension Plan and other large public sector plans which provide 100% indexing to CPI typically use a less volatile 'averaging' approach. The evidence is that the differences between the OMERS OM and the averaging approach of other plans created some public relations problems for OMERS; in the years when the OMERS Plan produced lower increases, members complained because they perceived that they were getting less than full inflation protection.

In fact, based on the historical evidence it would appear that the two methods produced very similar results over time. All parties relied on the following comparative table, prepared by OMERS Staff and provided in November of 2008 to OMERS retiree organizations (ABD, Tab 45).

Indexation Start[1] Year	CPP[2] method Rate	OMERS Method[3] Rate	Difference (CPP vs. OMERS)	Cumulative[4] increase from start year to 2007
1992	5.80%	5.47%	0.33%	0.9%
1993	1.80%	1.26%	0.54%	0.6%
1994	1.90%	1.90%	0.00%	0.0%
1995	0.50%	0.20%	0.30%	0.0%
1996	1.80%	2.30%	-0.50%	-0.3%
1997	1.50%	1.50%	0.00%	0.2%
1998	1.90%	1.62%	0.28%	0.2%
1999	0.90%	0.74%	0.16%	-0.1%
2000	1.60%	2.58%	-0.98%	-0.2%
2001	2.50%	2.70%	-0.20%	0.8%
2002	3.00%	2.60%	0.40%	1.0%
2003	1.60%	2.30%	-0.70%	0.6%
2004	3.20%	2.16%	1.04%	1.3%
2005	1.70%	1.79%	-0.09%	0.2%
2006	2.30%	3.36%	-1.06%	0.3%
2007	2.10%	0.70%	1.40%	1.4%

[1] The start year refers to the year the pension received full indexation.
[2] Change in 12 month average October to October CPI figures.
[3] Change in September over September CPI figures.
[4] This column shows the cumulative difference in the inflation adjustment between the CPP method and the OMERS method from the start year to 2007. For example, cumulatively, the inflation adjustment over the period 1992-2007 would be 0.9% higher under the CPP method than the OMERS method.

This table shows that in 6 of the 16 years involved, the OMERS method produced a larger increase than the CPP method would have produced. In 8 of the 16 years, the CPP formula would have produced a larger increase. In 2 years, the increase would have been the same. Overall, the CPP method would have produced slightly better results for pensioners over the 1992-2007 period.

2. OMERS Decision to Change the Method of Indexing

A possible change to the method of calculating indexation had been under consideration by OMERS for some time. In September 2005, in response to a desire expressed by the Board to explore the possibility of changing the plan indexing formula to mirror the model adopted by the Ontario Teachers' Pension Plan, OMERS staff ("Staff") prepared a report which it submitted to the OMERS Pension Committee (a committee of the Board) (ABD, Tab 4). In this report, Staff noted that other major public sector plans to which OMERS compared itself used different measurement periods and methodologies to calculate the plan's annual inflation adjustment. The report argued that while the OM did not necessarily capture highs and lows occurring throughout the year, it tended to keep relative pace with the other plans.

While no change was made at this time, the issue did not go away. The Pension Committee considered the matter on November 23, 2006. In its report to the Committee, Staff recommended an amendment to the Primary Plan effective January 1, 2008 to change the indexing formula from a September-over-September comparison to one based on the average

change in the CPI over a 12 month period from October to October (ABD, Tab 13). The principal basis for Staff's recommendation to change the method was the volatility of the OM. The report noted the historical data showing that over time, regardless of the inflation indexation formula used, pension benefits were similarly indexed. Since a majority of members collecting an OMERS pension were or would be also collecting a CPP pension, Staff saw as a benefit of the change the fact that OMERS and CPP benefits would increase by the same amount and at the same time. Staff's expectation was that this would significantly limit queries and complaints, and would also provide OMERS retirees with smoother, steadier inflation protection. The Pension Committee accepted Staff's recommendation and recommended the change to the AC.

At an AC Board meeting held on November 24, 2006, the AC accepted the Pension Committee recommendation and resolved to recommend to the SC that OMERS adopt the CPP method. When the SC met on July 4, 2007 to consider this recommendation, Staff presented a report (ABD, Tab 24) recommending that the proposed change take effect on January 1, 2008. The reason provided for the recommendation was that "this change will eliminate the volatility that is inherent in the OMERS current formula". The Staff report considered the pros and cons of implementing the change prospectively or retroactively to January 1, 2007. Among the considerations against retroactive application, the Staff Report noted that the actuarial gain to the fund related to indexation as at December 31, 2006 would be "significantly reduced", from the current $371 million down to $110 million. It noted that "[a]pplying the increase retroactively will increase the going concern costs at a time when the Plan is dealing with funding issues". The SC also discussed the proposed amendment at a meeting on September 5, 2007.

At a meeting of the SC on October 3, 2007, the SC passed By-Law No. 7 making a number of changes to the Plan text, including a change from the OM to the NM, the change at issue in this case. The SC's decision resulted in an amendment to the wording of section 31 (1) of the Plan, repealing the old wording and substituting the following:

> In this section, the inflation increase for any adjustment year means the monthly average for the Consumer Price Index (CPI) over the last 12 months of the 24 month period ending in October in the immediately preceding year compared to the monthly average for the CPI over the first 12 months of that period.

The Minutes of the October 3 meeting (ABD, Tab 30) record the reasons for the decision, as follows:

> It had been discussed that this change will reduce the potential for volatility inherent in the current formula (i.e. September of one year compared to September of the previous year vs. averaging a 12-month period) and will bring the OMERS pension indexing in line with the Canada Pension indexing methodology.

Both the Applicant and several OMERS retirees' organizations raised concerns about the impact of implementing the change from the OM to the NM on January 1, 2008. In response to these concerns, the retirees' representative on the SC, Glen Mills, sought to have the SC reconsider the

issue of the effective date of the amendment, bringing forward a motion to have the effective date postponed. On November 1, 2007, the SC met to discuss the issue of whether the effective date of the change should be altered. At that meeting, Staff presented a report which assessed a number of issues in relation to the NM and provided what was described as a "preliminary estimate" of the comparative impact on January 1, 2008 of the OM and the NM (ABD, Tab 33). The report concluded that:

> Based on this preliminary comparison, the new methodology has rendered an increase that is smaller than that rendered by the old methodology. Unless there is a significant shift in October's CPI figure, this result should remain relatively consistent through to next month when the actual calculation under the new methodology will be performed.

With respect to the funding implications of the change, the Staff report commented that:

> There are no actuarial implications as the valuation assumes 100% indexing. However, with a long term inflation assumption of 2.5% there will be a smaller experience gain in the 2007 valuation if the old methodology is still used. (It is estimated that the old methodology will result in an experience gain of 10 million dollars, compared with a gain of 120 million dollars under the new methodology.)

The motion to change the effective date of the amendment failed to receive the 2/3 vote necessary to pass, however, and was accordingly defeated.

3. The Role of the Applicant in the Amendment Process

The Applicant had taken an active interest in the prospective change to the plan indexation since early in 2007. On April 30, 2007, she wrote to the Co-Chairs of the SC (ABD, Tab 20). In that letter, she was very critical of the volatility of the OM, and supported a change to the NM, effective January 1, 2008. She took the position, however, that the existing OMERS indexation methodology had operated to leave OMERS pensioners with less inflation protection than the CPP and the Ontario Teachers' Pension Plan, and provided detailed calculations to back up her contention. She criticized calculations published in the March 2008 newsletter of the Municipal Retirees Organization Ontario showing that over the period from 1999 to 2007, the OMERS indexation formula had done better than the CPP's; she argued the comparison was "misleading", and pointed out that if the period compared was 2000 to 2007, OMERS had done worse. She was particularly concerned about the fact that OMERS pensioners had received a sharply lower increase in 2007, compared to the CPP. She argued that OMERS should pay a "catch up" increase to existing pensioners at the same time as it implemented the NM.

On September 24, 2007 the Applicant wrote again to OMERS (this time to Jennifer Brown of the AC; ABD, Tab 29) because, as she says in her witness statement, she "was beginning to get worried about the possibility that OMERS may make changes in the formula without a catch up." In her letter, she argued once again for a catch up:

> ...if the Sponsors Corporation Board members approve implementation of the CPP method in 2008 without ensuring that there is a catch up to compensate for the low 2007 increase, they will lock in a permanent loss for pensioners. The answer, surely, is to calculate an additional increase for each pensioner to compensate them for the amounts that they have lost so far, before implementation of the CPP method.

She wrote again on October 29, 2007, this time to the Co-Chairs of the SC by email (ABD, Tab 32). By that time, she was aware that the amendment changing the methodology had been passed, to be effective January 1, 2008, with no catch-up provision for existing pensioners. She was also aware through her retiree organization that a motion to reconsider would be brought forward. By October 29, 2007, it appeared probable that the NM would yield a smaller increase for January 1, 2008 than the OM. In her email of that date, she argued that:

> If the Sponsors Corporation Board changes OMERS methodology for January 2008, not only will the majority of OMERS pensioners lose out initially but, furthermore, the losses will be permanently locked in. With the exception of new OMERS retirees who will see their pensions grow at the same rate as the CPP, OMERS pensions will be outperformed by the plans that have always used the CPP method. (ABD, Tab 32)

She argued for a postponement or suspension of implementation "until it can be accomplished without losses to OMERS pensioners."

4. The Registration of the Impugned Amendment

An application for registration of By-Law Number 7 containing the impugned amendment was filed by the AC with the Superintendent on November 28, 2007. A number of OMERS retirees' organizations wrote to the Superintendent protesting the registration of the amendment. The Applicant likewise protested the registration. Her first letter to the Superintendent dated November 14, 2007 (ABD, Tab 41) pre-dated the registration application. In that letter, she made two main arguments against registration. First, she argued that OMERS had "purposely decided to change methodologies right after the OMERS methodology produced the lowest inflation increase in the history of the plan (0.7% in 2007 compared to the CPP increase of 2.1% in 2007)." Second, she argued that "[t]he SC, in full knowledge of the facts, switched methodologies precisely at the moment when this change would penalize pensioners permanently to the tune of 1.52%." She argued that while maintaining the OM would have permitted OMERS pensioners to make up this shortfall in time, "[c]hanging methodologies at this point means we will never catch up with inflation". As she had done in her correspondence to OMERS, she argued that the switch should not have been implemented without a "catch up" payment to OMERS pensioners "to bring OMERS in line with the CPP".

On January 28, 2008, she wrote again to the Superintendent's office, this time to the Pension Officer, reiterating her arguments against OMERS changing its method without a "catch up" for pensioners disadvantaged by the OM (ABD, Tab 68). Despite her opposition and that of the OMERS retiree organizations, on May 16, 2008 the Superintendent issued a Notice of

Registration in relation to the impugned amendment. The Notice of Registration was re-issued on September 11, 2008 to correct the fact that the some of the amendments to the Primary Plan text contained in By-Law Number 7, other than the amendment to the indexation method, had an effective date of November 29, 2007 rather than January 1, 2008.

The retiree organizations chose not to pursue the matter. The Applicant, however, filed a Notice of Appeal to the Tribunal on October 8, 2008.

5. The Implementation of the New Methodology

As at January 1, 2008, the NM was used for the first time. The inflation adjustment to pensions in pay was 1.99%. Under the OM, the adjustment would have been 2.47%. Again in 2009, the NM yielded a lower increase than the OM would have yielded: 2.51%, as compared to 3.40%. In January of 2010, the NM yielded a higher increase then the OM would have yielded: 0.37% as compared to 0%.

6. The Expert Evidence

As noted above, both the Applicant and the SC called actuarial evidence in support of their positions. Paul Duxbury (called by the Applicant) and Jill Wagman (called by the SC) are both experienced expert witnesses with excellent credentials; their expertise was not challenged by any party and the Tribunal accepted them as expert witnesses. Mr. Duxbury's evidence supported the Applicant's claim that both the amount of the pension and the commuted value had been reduced, whereas Ms Wagman's evidence supported the position of the responding parties that neither the amount nor the commuted value had been reduced.

Mr. Duxbury did not quarrel with OMERS' basic decision to change its indexation formula from the OM to the NM. He testified that the two formulae were considered to be "actuarially equivalent" and that "over time" they would be expected to produce the same results. His critique was directed at the impact on the Applicant and other OMERS pensioners of the decision to implement the change to the NM on a specific date: January 1, 2008. He testified that under the OM, OMERS pensioners would have received indexation increases of 2.47% on January 1, 2008, 3.40% on January 1, 2009, 0.00% on January 1, 2010 and an estimated 1.74% on January 1, 2011.[1] Instead, under the NM, they received 1.99%, 2.51%, 0.37% and an estimated 1.42% respectively, for a cumulative estimated net loss of 1.27%.[2] He produced a table designed to demonstrate that by January 1, 2011, OMERS pensioners would have suffered a 1.27% cumulative loss resulting from the implementation of the NM, and that this projected loss would be "locked in" and carry forward indefinitely.

In his expert report, he stated that:

[1] His 2011 estimate was based on actual CPI data from November and December 2009, 'topped up' based on an estimated 2% overall annual increase in CPI thereafter in 2010.
[2] This is not a straightforward mathematical calculation; it involves comparing the compounded cumulative increases under the two methods.

> The old and the new methods perform differently depending on the year chosen to implement the new method. The worst year for implementation of the new method was 2008, the year chosen by OMERS for implementation....
>
> Implementation in 2008 resulted in significantly smaller increases than the old method would have produced in the years 2008, 2009 and 2010. Implementation in 2008 produced a smaller pension than the old method would have produced that was 1.27% less by ratio in each of the years going forward from 2011.
>
> Implementation in 2007 would have been relatively neutral for OMERS pensioners, as would implementation in 2004 and 2010. On the other hand, implementation in 2005, 2006 and 2009 would have produced smaller pensions than the old formula, though not as small as implementation in 2008 produced. *(Exhibit 8, p.3)*

He appears to have reached the conclusion that 2008 was the "worst" year by measuring the relative difference in increase produced by the OM v. the NM on January 1st of each of the implementation years he considered.

Mr. Duxbury also testified on the significance of the fact that actuarial gains to the Plan varied depending on the date on which the change from the OM to the NM was implemented. He testified if the SC had agreed to implement retroactive to January 1, 2007, the net actuarial gain to the Plan for 2007 would have been reduced by $261 million. The decision to implement in 2008 produced an increase of $110 million in the net actuarial gain to the Plan. In his report, Mr. Duxbury concluded that:

> Clearly the references to actuarial gains to be realized by changing the methods on January 1, 2008 indicate that the effect produced by the new formula in the future is not expected to offset the lower indexation increases granted upon implementation. This would appear to corroborate the finding that the reduction in indexation increases produced by implementing the new formula in 2008 are permanent. The new indexation experience gain of $261 million captured for the Plan by implementing the new formula in 2008 instead of 2007 reduces total pensioners indexation payments over their expected lifetimes by the same amount. *(Exhibit 8, p.6)*

In his view, then, the fact that actuarial gains resulted from implementation of the NM in January 1, 2008 demonstrated two things: first, that the Plan saw the savings from the implementation of the new method as permanent rather than temporary, and second, that these actuarial gains represented losses to the pensioners over their lifetimes.

Ms Wagman's evidence did not focus on a specific time frame. The gist of her evidence can be found on page 9 of her expert report (Exhibit 4):

> It can be demonstrated mathematically that, if the assumed long-term inflation rate is constant, the change to the inflation protection adjustment methodology under By-Law Number 7 has no effect on the projected future adjustment to the pension. In practice, inflation rarely behaves in such a uniform manner from month to month. Therefore, the variation between the current and previous calculations methods generates slightly

> different results. However, over the long term, neither [the OM or the NM] is designed nor expected to result in consistently higher increases, as illustrated in the November 26, 2007 report prepared by the OMERS Administration Corporation. In this report a historical comparison of the two formulas is provided, demonstrating that the current method (CPP) would have resulted in higher increases in 8 out of the 16 years from 1992 to 2007, with the remaining two years as neutral. [This is the table reproduced at p.6, above]. Since then, in 2008 and 2009, the previous (OMERS) method produced a higher result than the current method, but in 2010 the current method will produce an inflation adjustment of 0.37% whereas the previous method would have produced no inflation adjustment due to negative inflation over the period.
>
> This gain/loss analysis will differ among the plan members, depending on their individual date of termination and/or retirement, and does not take into account future gains and losses that will emerge over their future lifetime. Therefore, it is inappropriate to compare or quantify the "promise of 100% inflation protection" at any fixed point in time. As stated above, however, over the long term the expectation is that the current method will produce an inflation adjustment that is not less than what would have resulted under the previous method.

In her report, she clearly acknowledged that at the level of individual plan members, losses and gains will be unevenly distributed. In the long term, however, the result will be equivalent.

Ms Wagman was also asked to comment on Mr. Duxbury's evidence that the quantification of increased actuarial gains as a result of implementation in 2008 of the NM reflected an assumption on the part of the actuary that the gains would be permanent. She disagreed with that conclusion. As she explained it,

> Actuarial gains or losses arise when emerging plan experience over short periods result in liabilities that are lower or higher than expected based on the long-term assumptions. In this case, an actuarial gain will emerge each time a valuation is performed and the inflationary increases granted since the previous valuation were less than assumed in the previous valuation. When setting an actuarial assumption, it is expected that, over the long term, actuarial gains will be offset by actuarial losses, thereby supporting the appropriateness of the underlying assumption over the long term.

With respect to the particular actuarial gains referred to in Mr. Duxbury's evidence, she testified:

> The actuarial gains referenced by Mr. Duxbury are measured at each valuation on a going-concern valuation basis, which assumes the plan is ongoing, and are related to the fact that the actual inflationary increase granted under the plan in 2008 was less than the assumed long-term annual inflationary increases.

In her view, actuarial gains in 2008 for the Plan do not represent permanent losses for pensioners:

> [I]n future years, it is expected that the new formula will result in higher increases in some years and lower increases in others, resulting in lower actuarial gains (or higher

> losses) in others. By virtue of this fact, the larger gain experience in 2008 is not permanent, but rather a measure of the temporary deviation of plan experience from the long-term inflation assumption at a fixed point in time. *(Supplementary Expert Witness Report, Ex. 6, p.8)*

Ms Wagman was asked to comment on Mr. Duxbury's evidence that OMERS pensioners would suffer a permanent 1.27% loss to the value of their pensions as a result of implementation of the NM on January 1, 2008. She was highly critical of the methods used by Mr. Duxbury in his expert report to demonstrate a 1.27% loss, and in particular of this conclusion that any early loss would continue indefinitely. She pointed out that Mr Duxbury did his projections in December of 2009 using *actual* inflation increases for the period during which CPI increases are known, and for which the new method produced losses. When he projected ahead into the future, however, he used the *assumption* that inflation would increase at a flat and uniform rate of 2% per annum, for all years, using both the OM and the NM. That assumption will inevitably lock in any early losses. In the real world, however, she testified that such a scenario would never unfold; indeed, Mr. Duxbury conceded as much in his cross-examination. Even if inflation in fact comes in at 2% per annum for all the years Mr. Duxbury considered (which is in itself improbable in light of earlier patterns), we can be sure that it will not come in at a uniform rate in every month of every year. There will inevitably be variations, and those variations will skew Mr. Duxbury's uniform projections. In Ms Wagman's view, the much more likely future scenario is the one consistent with the actuarial assumption on which both actuaries agree – that 'over time', the two formulae will produce the same total inflation increase. In her expert report she produced a projected scenario (described as "the Wagman Alternative") which she characterized as "just as plausible as Mr. Duxbury's", in which monthly variations in the inflation rate during the year 2010 allow OMERS pensioners to quickly make up early losses imposed under the NM and come out ahead of where they would have been under the OM. While she conceded that the Wagman Alternative involved unusually sharp CPI fluctuations, she pointed out that similar patterns of sharp fluctuations had in fact occurred in recent economically turbulent years.

Mr. Duxbury, in response, did not disagree with the proposition that inflation was unlikely to behave in practice as he had projected it in his tables. He nevertheless defended the methodology behind his projection. He pointed out that his use of uniform projection was consistent with actuarial practice for projecting inflation, whereas the projections in the Wagman Alternative, which posited monthly variations, were not consistent with actuarial practice. In addition, he relied on basic probability theory to support his uniform projection, analogizing the likely pattern of monthly variation to the proverbial toss of a coin. With every new toss, there is an equal likelihood that heads or tails will come up. A run of 'heads' does not make it any more probable that the next toss will produce 'tails'. In comparing the two methods, he testified:

> So at any point in time, you don't know which one is going to produce more, but we do know that one produced less than the other for two or three years, and that going forward

> from this date, we expect them to be the same, so therefore, there has been a loss to the pensioners. *(Transcript of the hearing on January 18, p. 88).*

In his view, if the NM imposes early losses on a pensioner, as had happened to the OMERS pensioners in this case, even if the outcomes over the next twenty years even out, the probability is that they will end up having to live indefinitely with those early losses.

We have identified above a number of differences of opinion in the evidence of the expert witnesses. On a number of very key points, however, the expert witnesses were in substantial agreement. They both agreed that:

- The OM and the NM are "actuarially equivalent". It is not possible to speculate on whether the OM or the NM will produce higher indexation rates in future years, but it is expected over time that the two methods will produce the same result.
- The change from the OM to the NM did not affect either the amount or the commuted value of pension benefits for active members because both methods would be treated by actuaries as formulae providing 100% indexation to the CPI.
- On October 3, 2007, the date of the SC's decision to change the method effective January 1, 2008, an actuary calculating the commuted value of an OMERS pension in pay would come up with the same value regardless of which method was employed because the formulae are actuarially equivalent and the future impact of the change in method would not be known.
- On January 1, 2008, the actual pension of an OMERS pensioner for 2008 would be lower under the NM than it would have been if the OM had still been in effect.
- On January 1, 2008, an actuary determining the commuted value of an OMERS pension in pay on that date would find that the commuted value was lower under the NM than it would have been under the OM because the impact of the change would now be known for that year.

We turn, now, to the applicable provisions of the statutes.

C. STATUTORY PROVISIONS

As noted above, the Plan at issue here is established under the authority of the *OMERS Act, 2006*. Section 16(1) of that Act sets out the power of the SC to determine the terms of the Plan:

> The Sponsors Corporation shall determine the terms and conditions of the OMERS pension plans, subject to the restrictions set out in this Act.

Section 18 spells out the SC's power to make amendments to the Plan:

> The Sponsors Corporation may amend the OMERS pension plans, including the contribution rates for employees, subject to the restrictions set out in this Act.

Notwithstanding its independent statutory basis, however, the Plan is subject to the terms of the *PBA,* and the SC's powers of amendment under the *OMERS Act* must be exercised in compliance with the *PBA*. Section 14(1) of the *PBA* provides that:

> An amendment to a pension plan is void if the amendment purports to reduce,
>
> a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;
>
> b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or
>
> c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

"Pension" is defined in s.1 the *PBA* as "a 'pension benefit' that is in payment". "Pension benefit" is defined as

> ...the aggregate monthly, annual or other periodic amounts payable to a member or former member during the lifetime of the member or former member, to which the member or former member will become entitled under the pension plan or to which any other person is entitled upon the death of a member or former member.

Section 14(1) protects both the amount and the commuted value of the "pension" from reduction. "Amount" is not a defined term. "Commuted value", however, is defined in s.1 as follows:

> "commuted value" means the value calculated in the prescribed manner and as of a fixed date of a pension, a deferred pension, a pension benefit or an ancillary benefit".

The Applicant argues that the amendment in question reduces both the amount and the commuted value of her pension within the meaning of 14(1) of the *PBA*, and should not have been registered.

It is common ground among the parties that s.14(1)(a) is not applicable to employees who are retired and who are therefore not continuing to accrue pension benefits. There is no issue here with respect to ancillary benefits; therefore s.14(1)(c) is inapplicable. Because the Applicant is already retired, she is in receipt of a "pension"; accordingly, the sub-section that applies to her situation is s.14(1)(b).

D. POSITIONS OF THE PARTIES

The Applicant has summarized her position in her Written Submissions as follows:

> The Applicant takes the position that, by implementing the change to the formula on January 1, 2008, the Amendment in question had the effect of reducing the amount and the commuted value of a pension benefit accrued by pensioners under the pension plan before the effective date of the amendment and the amount and the commuted value of a pension accrued under the pension plan. The "old" formula for calculating changes in the Consumer Price Index (CPI) formed part of the indexation provisions of the Plan. It was vested when pensioners retired. The "new" formula paid cumulatively less in 2008 than what the old formula would have paid, thereby reducing the benefit, the pension and the commuted value. The Superintendent of Financial Services should have declared the Amendment void under section 14(1) of the *Pension Benefits Act* ("*PBA*"). *(Written Submissions of the Applicant, February 1, 2010, para. 1)*

The Applicant emphasized in both her written and oral submissions that she does not challenge the right of the SC to change the indexation formula from the OM to the NM *per se*. In fact, she supports the change in principle. Her objection focuses on the *implementation date* for the change. She argues that the amendment is void because it was implemented on January 1, 2008; it is the *timing*, and not the nature of the amendment that has the effect of reducing accrued benefits.

In her oral submissions, the Applicant pursued three distinct lines of argument in support of her general position that implementation on January 1, 2008 resulted in a reduction of her pension benefits. Her first argument is that we must look at the impact of the amendment on its effective date, January 1, 2008. She points to the incontestable fact that on that date, OMERS pensioners got smaller increases than they would have got if the OM had still been in place. An actuary calculating the commuted value of the Applicant's pension on that date would have produced a figure lower than would have been produced if the OM had still been in effect. Accordingly, she argues, both the "amount" and the "commuted value" of her pension have been reduced by the impugned amendment, and the amendment is therefore void.

Second, she argues that the shortfall she and other OMERS pensioners have experienced to date under the NM has been permanently "locked in" and will never be made up. This argument relies on the expert evidence of Mr Duxbury, who quantified an initial loss to the pensioners of 1.27% as a result of the implementation of the NM, and projected, using standard actuarial methods for projecting inflation, that this loss would be 'carried forward' indefinitely.

Third, the Applicant submits that even if the NM and the OM, looked at individually, may produce equivalent results, changing from one to the other results in what she called a 'hybrid method', a method which will *not* produce the same results as either of the NM or the OM standing alone. She points out that the OM tracked the CPI in a volatile manner: a low September result would likely follow (or be followed by) a relatively high September result. The NM, however, is a smoothing method based on averages and designed to eliminate exactly

the kind of spike that would allow retirees to make up for the unusually low increase they had been awarded in 2007. She argues therefore that the adoption of the "hybrid method" introduced just after a year in which the OM produced a significant shortfall for pensioners will result in an overall reduction of benefits.

We note here that while the Applicant initially took the position that OMERS had deliberately implemented the change in method on January 1, 2008 in order to save money for the Plan at the expense of the pensioners, she withdrew that argument in the absence of any evidence to support it.

The SC, the OMERS body that made the decision to amend the plan, argues that the amendment does not reduce accrued benefits. The position of the SC is summarized in its written submissions as follows:

> The plan continues to provide full inflation indexing to its members. The amendment simply implemented two changes to the method of calculating the annual inflation adjustment: (1) using a 12 month average rather than a September to September ratio, and (2) changing the effective adjustment month from September to October.
>
> It is a methodological change, and does not reduce the amount or commuted value of a pension or pension benefit accrued under the plan. *(Closing Submissions of the Respondent SC, February 1, 2010, para. 4, 9).*

The SC argues that OMERS pensioners continue to enjoy 100% inflation protection, as they did before the change in methodology. It concedes that the amendment may have transitory impacts that result in lower pension benefits and lower commuted values at particular points in time. Over time, however, these effects will even out and OMERS pensioners will be in the same position they would have been in if there had been no change in methodology. The SC argues that for purposes of s.14(1)(b), the relevant date for measuring the impact of the amendment is the date the decision to amend the Plan was made: October 3, 2007. On that date, the evidence established that the change in indexation formula had no impact on the value of the Applicant's pension.

The AC takes essentially the same position. To quote from the AC's written submissions:

> While the January 1, 2008 inflation adjustment was less than what the inflation adjustment would have been under the old OMERS methodology, the evidence is that over time, pension benefits under either formula will be similarly indexed. As a result, it cannot be said that the Amendment has reduced either the amount or the commuted value of a pension or pension benefit accrued under a pension plan. *(Revised Written Submissions of the AC, February 1, 2010, para. 7)*

The AC also argues that the relevant date to assess whether or not the amendment is void is the date the amendment was passed:

> Otherwise, plan sponsors who wish to pass plan amendments one or two years in advance of the amendment's effective date (e.g. where a long lead time may be necessary or desirable from a notice of administration perspective) will have to wait one or two more years before knowing whether the amendment is valid or void. *(Revised Written Submissions of the AC, February 1, 2010, para. 64)*

The Superintendent agrees. He rejects the fundamental premise of the Applicant's attack based on changes in value on the effective date of the amendment. In his initial submissions he argues that:

> ... the analysis of whether or not the Amendment is void cannot depend upon when it is introduced. It is the overall formula that matters, not particular results in an isolated time frame. *(Overview of the Legal Submissions of the Superintendent, January 11, para. 4-5).*

He fleshes this position out more fully in his final written submissions:

> The Superintendent submits that the preferred analysis is that provided by the SC's expert which more fully takes into account the conclusion that both methods will provide the same level of inflation protection over time. Owing to the specific entitlements which are protected under section 14 of the *PBA*, it is the effect of the change of indexation methodology on the lifetime value of the benefits provided under the pension plan which must be assessed rather than evaluating the benefit at a particular point in time. The available historical evidence as well as the accepted approach to valuing indexation benefits adopted by the actuarial profession (as articulated by the SC's expert) demonstrate that the lifetime benefit has not been affected. Accordingly, the Amendment is not void under section 14 of the PBA. *(Final Submissions of the Superintendent, February 1, 2010, para. 6)*

The Superintendent draws our attention to the definition of "pension benefit" which refers to "...the aggregate monthly, annual or other periodic amounts payable to a member or former member during the lifetime of the member or former member". He highlights two aspects of this definition: the word "aggregate", and the phrase "during the lifetime of the member or former member." He argues "that the entitlement that is protected in section 14(1) is not the amount of specific payment but rather the aggregate value of the stream of payments made from the pension plan during the course of the member or former member's lifetime" (*Final Submissions of the Superintendent, para. 31*). He points to the concurrence of the experts that the two formulae will produce the same result over time to support the argument that the Applicant will get the same "aggregate" benefits "over her lifetime" even if she did get reduced benefits on January 1, 2008, and again on January 1, 2009.

The Superintendent acknowledges that s.14(1)(b) protects both the amount and the commuted value of a "pension". He submits, however, that under the *PBA*, the concept of commuted value is an "artificial notion" for pensions in pay. He argues that the *PBA* protects commuted values primarily for the purpose of protecting transfer options under s.42. Once a pension is in pay, the *PBA* does not contemplate any transfer of its commuted value out of the plan. Therefore, he

argues, the concept of commuted value has no relevance under s.14(1) for pensions in pay. He submits that s.14(1)(b) refers to commuted values only to protect transfer values for deferred members on plan termination, and "not to protect some notion of the commuted value of a pension in pay" *(Final Submissions of the Superintendent, para. 49-53).* In the alternative, he submits that the relevant date for calculating any commuted value for pensions in pay is the date on which the SC made the decision to amend the indexation formula; any other date is simply too indeterminate to be meaningful, in view of the purpose of s.14(1)(b) and the rights it is intended to protect.

E. ANALYSIS

Section 14(1) is a very important protection for plan members, standing as a bulwark against plan amendments that deprive plan members or former members of pension benefits already vested or accrued. The language used by the legislative drafters to realize that straightforward purpose is not entirely transparent, however, and no cases have been brought to our attention which raise issues under s.14(1) similar to those which confront us in this case. Accordingly, we must deal with these issues as a matter of first impression.

For ease of reference, we set out again the provisions of the *PBA* most relevant to this case. Section 14(1)(b) provides that:

> An amendment to a pension plan is void if the amendment purports to reduce,
>
> b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan...

"Pension" is defined in the *PBA* as "a 'pension benefit' that is in payment". "Pension benefit" is defined as,

> ...the aggregate monthly, annual or other periodic amounts payable to a member or former member during the lifetime of the member or former member, to which the member or former member will become entitled under the pension plan or to which any other person is entitled upon the death of a member or former member.

Applying this statutory language to the problem before us, we must answer two questions: (1) is the OM part of the Applicant's "accrued" pension within the meaning of s.14(1)(b)? and (2) If so, does the impugned amendment purport to reduce the amount or commuted value of the Applicant's pension? We address these questions below.

1. Is the OM Part of the Applicant's Accrued Pension?

The Applicant asserts that the OM for calculating changes in the CPI formed part of the indexation provisions of the Plan and that the OM "was vested when pensioners retired". All parties appear to agree that the Applicant did have a vested right to a pension with 100% CPI indexation. They do not agree, however, that she had a vested right to indexation in accordance with the formula built into the plan when she retired. We must therefore address the question of whether the OM is part of the Applicant's pension accrued within the meaning of s.14(1)(b).

While this issue touches upon the wording of the statute, it is primarily a question of interpretation of the pension plan. Under the OMERS Plan as it stood prior to the impugned amendment, members such as the Applicant were entitled to a base pension calculated in accordance with the provisions of the plan. In addition, they were entitled to have that base pension increased on an annual basis in accordance with s.31. Section 31(8)(a) of the Plan makes this clear:

> The pension payable to a person during his or her lifetime shall be determined in accordance with this Plan or a predecessor thereof and,
>
> > (a) where a pension is payable to a person on the 1st day of December of the year prior to an adjustment year in respect of a pension that was being paid on the 1st day of December of the year which is 2 years prior to that adjustment year, the pension payable to the person on the 1st day of January of that adjustment year shall be increased by the inflation adjustment; ....

Each pensioner in the position of the Applicant is therefore entitled to a pension, the amount of which is increased each year by the "inflation adjustment". For years from 1999 on, the "inflation adjustment" is defined in ss.31(2)¶2 as 100% of the "inflation increase". "Inflation increase", in turn, is defined in s.31(1) as "the percentage increase of the Consumer Price Index for Canada for September of the previous year over the Consumer Price Index for Canada for September of the year which is 2 years prior to the adjustment year" [the OM]. It is clear, then, that prior to the impugned amendment, the Applicant was entitled not just to a pension indexed generically to 100% of CPI, but to a pension which included annual adjustments calculated in accordance with the OM.

Does the fact that the right at issue here relates to an annual adjustment to the base pension, rather than to the base pension itself, make any difference to the "accrued" nature of that right? As a matter of actuarial practice, it would appear not. Mr. Duxbury gave evidence on that point. He was asked to comment on a portion of Ms Wagman's report in which she assumed that accrued benefits included indexing. He responded:

> Well, a pensioner, the entire benefit of the pensioner has been accrued to the date they retire basically. Once they're retired, you know, they've accrued all their pension and whatever happens after that is affecting their accrued pension. That's – accrued is usually referred to in the sense of the ongoing employees who continue to accrue service after the

valuation date. So a pensioner or deferred vested member, someone who's terminated membership is considered to have accrued all their benefit up to the date of the, of the termination or retirement, or what have you.

Q: Is there anything in your experience where indexation increases to a pension would not be considered an accrued benefit?

A: Well, I can't think of any off-hand. It's, you know, the CIA Standard, the Canadian Institute of Actuaries' standards require that, for example, if you calculate the commuted value of someone who terminates you, includes the index, if it's a part of the, of the Plan, which it is in this case. There are provisions that allow it to be excluded under the Act for funding purposes, but that doesn't mean that it's not an accrued benefit, that's just that's a special dispensation from the, from the funding rules. (*Transcript of the hearing January 18, 2010, pp.74-5*)

Ms Wagman's report proceeded on the same assumption: the fact that the Plan provided for indexing was an important factor in valuing the benefit.

This common actuarial understanding is supported by the case law. The Applicant relied on the decision of the Manitoba Court of Appeal in *Dinney v. Great-West Life*, 2005 MBCA 36, which involved a class action brought by former members of a Great-West Life Assurance Company pension plan. At the time the plaintiffs ceased to be members of the plan, the plan had provided for annual pension indexing on a formula which, according to the plan text, "shall be as the Company may from time to time determine and will be related to the investment performance of the Great-West Life Assurance Company Canadian Employees' Pension Fund." In the mid-1980s, the pension fund's performance far exceeded both the annual rate of inflation and the rate of annual wage increases, and the plan trustees stopped basing inflation increases on investment performance. A few years later, the employer passed a series of plan amendments which ultimately resulted in pegging benefit indexation to the CPI. The affected former plan members brought action alleging *inter alia* that they had a right to benefits indexed on the basis of the investment-related formula. They argued that this right vested at the time of retirement and could not subsequently be divested.

Great-West Life argued that inflation indexing was merely a "contingent and discretionary entitlement"; it was not vested, and was therefore vulnerable to amendment under the employer's general power to amend the plan. After an extensive review of scholarly authorities, and both American and Canadian case law, including the decision of the Supreme Court of Canada in *Dayco (Canada) Ltd. V. CAW-Canada*, [1993] 2 S.C.R. 230, the Manitoba Court of Appeal rejected that argument, concluding that the provisions of the plan gave the plan members a right "to their entitlements under the then existing plan, including annual pension increments", which "accrued" or "vested"[3] on their retirement. In determining that indexation was a vested right, the

[3] The Manitoba Court of Appeal saw the terms "vested" and "accrued" as interchangeable for purposes of this analysis: see paras. 30-32. With respect, we agree.

Court refused to distinguish between pension amounts already fixed on retirement, and pension amounts which would be fixed later in accordance with a formula:

> I reject the argument of counsel for Great-West that benefits that are not quantified do not meet the definition of a "pension benefit" in the *Act*.[4] The quantum of the annual increment need not be a fixed amount so long as it is calculable in accordance with the provisions of the plan itself. *For example, a provision in a pension plan tying annual increments to the CPI would meet the requirement*. [para. 71, emph. added]

Accordingly, the Court of Appeal upheld the decision of the trial judge that the company had violated the vested/accrued rights of the plaintiff class when it adopted a method of indexing which was unrelated to the investment performance of the pension fund.[5]

In our view, there is no doubt that Ms McGrath has a vested or "accrued" right to pension indexing based on the OM. However, s. 14(1) of the *PBA* does not "carve in stone" all accrued benefits. What it does is protect those benefits from *reduction*. Accordingly, the crucial question before us is whether the impugned amendment *reduces* the amount or commuted value of the Applicant's pension, within the meaning of s.14(1)(b).

2. Does the Impugned Plan Amendment Reduce the Amount or Commuted Value of the Accrued Pension?

a. Purpose or effect?

Before we turn to the substantive question of whether the amendment has reduced the Applicant's accrued pension benefit, it is necessary to dispose of a preliminary interpretive issue which arises on the face of s.14(1). The section nullifies any amendment that "purports to reduce" accrued benefits. As a matter of dictionary definition and grammatical placement in the section, the word "purports" is susceptible of more than one interpretation. One possible approach is to look simply at the amendment *on its face*: what does it "purport" to do? If we were to adopt that approach, this case could then be simply resolved. Both actuaries testified that *on its face*, the amendment did not change the level of CPI protection provided by the plan; an actuary, looking simply at the language of the OM and the NM, would conclude that they were functionally equivalent. If effect is irrelevant, we would need to explore the issues no further. To their credit, however, no party took that position. All parties agreed that s.14(1) protected plan members from amendments which had the *effect* of reducing benefit entitlements, and not just

[4] The Manitoba statute defines "pension benefit" in terms similar but not identical to the *PBA*: see para. 41 of the decision.

[5] The *Dinney* decision discussed here deals solely with liability. The *Dinney* case returned to the Court of Appeal on the issue of damages: [2009] M.J. No. 116. In that subsequent decision, the court held that while the pensioners had a right to a pension indexed in relation to the plan's investment performance, they did *not* have a vested right to the precise formula which the company, in the exercise of its discretion, had previously applied. The plaintiffs' application for leave to appeal to the Supreme Court of Canada was refused on December 17, 2009.

those that appeared to do so on their face. When specifically asked by the Tribunal whether the section would mean the same thing if it read "reduces" such entitlements rather than "purports to reduce" such entitlements, all parties answered that it would.

Why, then, does the phrase "purports to" appear in the section? Counsel for the Superintendent offered the suggestion that the wording was designed, in effect, to signal the fact that amendments which violate the section are void: since they cannot have actual effect, they can merely "purport" to have effect. This suggestion is quite plausible in the overall context of the s.14(1): see also *Joseph v. Joseph*, [1966] 3 All E.R. 186 in which Lord Denning M.R, faced with similar language in the *Landlord and Tenant Act, 1954*, held that in the context of that statute, "the word "purports"... does not mean "professes". It means "has the effect of"." In any event, it is our view that in the overall context and in light of its purpose, s.14(1) requires us to inquire into not only what a plan amendment says on its face, but also into the effect of that amendment, to determine whether or not it reduces vested pension benefits within the meaning of the section.

b. Does the Impugned Amendment have the Effect of Reducing the Pension Benefit?

Section 14(1)(b) is directed towards *reductions* in vested pension rights. Plan amendments which improve benefits, or have a neutral impact on benefits, do not offend s.14(1)(b). We have held that the Applicant has a vested right to inflation adjustments based on the OM. The impugned amendment, which substitutes the NM for the OM, certainly affects that vested right. The respondents argue, however, that because the NM is the actuarial equivalent of the OM, the amendment does not reduce the value of the Applicant's accrued pension rights. It is to that question that we now turn.

There are situations in which the concept of a reduction in benefits is relatively easy to apply. For example, cuts to a fixed formula for calculating a base retirement pension or the elimination of early retirement benefits present situations in which there has been, at least *prima facie*, a clear reduction in either the amount or the commuted value of a pension. With respect to an amendment like the one at issue in this case, however, the matter is not so straightforward. The amendment deals with an 'escalation factor', a formula for increasing the pension on an annual basis *after* retirement. In addition, this escalation factor is based not on a fixed formula (e.g. 3% a year), but on a formula that cannot be quantified in advance. Under the terms of the amendment, the NM was applied for the first time on January 1, 2008. But it was also applied again on January 1, 2009, again on January 1, 2010, and will continue to be applied again every January 1 for the foreseeable future. When and how do we measure the effect of such a provision on the Applicant's benefits to determine whether or not there has been a reduction in their value?

As noted above, the Applicant had made three arguments in support of her position. Her first argument is a "point in time" argument addressed to both the amount and the commuted value of

her pension; she argues that the assessment of the impact of the impugned amendment should be made on its effective date, January 1, 2008. Second, she argues that the shortfall she and other OMERS pensioners have experienced to date under the NM has been permanently "locked in" and will never be made up. Third, the Applicant submits that even if the NM and the OM, looked at individually, may produce equivalent outcomes, changing from one to the other results in what she called a 'hybrid method', a method which will *not* produce the same results as either of the NM or the OM standing alone.

Before we deal with the Applicant's first argument, let us address her second and third arguments, which can be disposed of solely on the evidence. The Applicant's "lock in" argument, that shortfalls experienced in the first two years will continue in perpetuity, rests entirely on Mr. Duxbury's expert evidence with respect to the "locked in" nature of the results in the first two years. The "lock in" argument is an empirical proposition. To succeed on this argument, the Applicant would have to persuade us that after two years of shortfalls under the NM, the NM will not produce results that will even out over time with the OM. While Mr. Duxbury's evidence may be sound as an actuarial exercise in projection, in our view it does not stand up to scrutiny as a reliable prediction of what will actually happen in the real world for individual OMERS pensioners. Mr. Duxbury's extrapolation of the current impact of the NM into the future depends entirely on an assumption about the behaviour of inflation in the future: an assumption that inflation will progress at a completely uniform rate not just from year to year, but also from month to month, over time. If that assumption is made, it is obvious that any initial loss will be 'locked in'; simple mathematics can produce no other result. Both actuaries agree, however, that while the pace and behaviour of future inflation is unpredictable, it *can* be predicted with confidence that it will *not* behave in the uniform fashion postulated by Mr. Duxbury. As evidence of the comparative impact of the OM and the NM 'in real life', therefore, Mr. Duxbury's projection has little probative value.

The Applicant attempted to bolster the "lock in" argument by pointing to the actuarial gains in the Plan resulting from the implementation of the NM. Mr. Duxbury testified that if the SC had agreed to make the NM retroactive to January 1, 2007, it would have cost the Plan some $261 million in reduced actuarial gains. He characterized the decision *not* to implement retroactively as a decision to "capture" that actuarial gain for the Plan. He likewise testified that implementation in 2008 produced an actuarial gain of $110 million, which he also characterized as a gain "captured" by the Plan. The gist of his evidence, and the Applicant's argument on this point, is that these actuarial gains represented quantified and permanent gains to the Plan and losses to the pensioners arising out of the change to the NM. We are not persuaded by this argument. On this point, we prefer the evidence of Ms Wagman that actuarial gains (or losses) represent nothing more than temporary deviations from actuarial projections, and tell us nothing about the future impact of the amendment. Their presence or absence does not alter the fundamental proposition that over time we can expect the impact of the NM to be the same as the OM. Furthermore, we note that the largest of the "captured" actuarial gains referred to in Mr Duxbury's evidence relates to 2007, prior to the implementation of the NM. In our view, losses

or gains incurred prior to the implementation of the NM can have no relevance to the issue before us of whether the NM reduced the Applicant's accrued pension. Accordingly, the Applicant has failed to prove that the short-term shortfalls experienced in the first two years as a result of the NM will be permanently "locked in".

The Applicant's "hybrid" argument, that the introduction of a smoothing method after using a volatile method will make permanent the losses experienced under the volatile method, has some superficial plausibility. It cannot be accepted, however, for two reasons. First, we are simply not in a position to evaluate this type of argument without the assistance of expert testimony. The Applicant's expert did not testify with respect to inflation protection gaps created by "hybrid methods". Instead, his evidence focused on the "lock in" argument, discussed above, the argument that early initial shortfalls imposed by the NM will continue into the future (based on an assumption as to the pattern of future inflation which both experts agreed is not realistic). As noted above, the evidence of both actuaries was that the OM and the NM were actuarially equivalent. Neither was asked to address the proposition now put forward by the Applicant, that a hybrid of these two methods produces a result that is *not* actuarially equivalent. Accordingly, the Applicant has not met the burden of proof with respect to this argument.

Second, the key factual underpinning of the "hybrid" argument is the shortfall produced by the OM *in 2007*. It is obvious from her 2007 correspondence with OMERS and the representations she made to the Superintendent that the Applicant has had difficulty accepting the very small increase the OM produced in the OMERS plan for 2007, compared with what the CPP method would have produced (.70%, compared to 2.1%). She argued vigorously to OMERS (and again to the Superintendent) that there should have been a "catch up" payment to pensioners to avoid locking in this "loss". The "hybrid" argument depends for both its emotive and its logical force on the proposition that OMERS pensioners were unfairly treated *under the OM* in the years *prior* to the implementation of the NM. We cannot remedy any such perceived unfairness arising from the prior impact of the OM; our task requires us to focus only on the effect of the NM on the Applicant's accrued pension.

We have rejected the "lock in" and the "hybrid" arguments based on the evidence before us. Had the Applicant succeeded in persuading us to her point of view, the practical consequences for plan administrators would have been decidedly unfortunate. Both the "lock in" and the "hybrid" arguments are based on outcomes that could not be determined at the time the plan amendment was adopted; indeed, in some circumstances they could not be determined for years to come. In his written submissions, the Superintendent argued that the Applicant's analysis would give plan administrators no guideposts for determining in advance whether a plan amendment which was *prima facie* valid might subsequently become invalid. He highlighted the policy problems that would flow from that approach:

> The approach adopted by the Applicant implies that the answer to the question of whether or not the Amendment is void will depend upon when the question is asked. If the question is asked at a point where the cumulative level of inflation protection under the

> new formula is lower than under the old method then the Amendment is void. In a following year, if the reverse is true, then the Amendment will not be void. Accordingly, the Amendment could be perfectly acceptable one year but contrary to the *PBA* the next only to be acceptable in the third year. *(Final Submissions of the Superintendent, para. 40)*

Who wins and who loses, he argues, would depend entirely on when the matter is litigated.

The Applicant's response to this argument underscores the arbitrary nature of what she is asking us to do. Although she urged us in her initial written submissions to focus on the outcome on January 1, 2008, the date the NM was first used, in her final written submissions she sought to focus on the evidence as of the date the report of her expert witness was completed (December 2009). She argued:

> While it is true that, as in all actuarial calculations, future CPI values may deviate from the present assumptions, a point in time must be chosen to calculate an actuarial value. For the purpose of the present case before the Tribunal, *that time would appear to be the time the expert witness reports were written.* Any party might suggest a later date hoping for a better outcome by random chance. The Applicant submits that this would potentially prejudice the results. *(Written Submissions of the Applicant Incorporating the Evidence Led at the Hearing, para. 35; emph added)*

To select the date at which expert witness reports were prepared for litigation would, in our view, be an equally random choice, unrelated to the purpose of s.14(1)(b) and to the benefits protected by that section.

Let us return, then, to the Applicant's first argument, that we should evaluate the effect of the amendment on its effective date, January 1, 2008. On this argument, the amendment stands or falls depending on its impact on its effective date. In approaching this argument, we are mindful that s.14(1) protects two types of pension value: the "amount" of the accrued pension, and the commuted value of the accrued pension. As we have already pointed out, "pension" and its included term, "pension benefit" are defined terms in the *PBA*. While the "amount" of the pension is not separately defined, the *PBA* defines "pension benefit" in terms which refer to the "amount" of that benefit, as follows:

> ...the aggregate monthly, annual or other periodic amounts payable to a member or former member during the lifetime of the member or former member, to which the member or former member will become entitled under the pension plan or to which any other person is entitled upon the death of a member or former member.

In other words, a "pension" or "pension benefit" is not the amount of a particular pension payment; it is an "aggregate" of the amounts of all the payments to which the Applicant is entitled. This is comprehensive language, directing us towards a comprehensive assessment of the nature and value of the Applicant's pension as payable to her during her retirement. The question of whether a plan amendment reduces the "aggregate" amount of a pension is a very

different question from whether it reduces a specific periodic payment. In responding to the question of whether the impugned amendment has reduced the "aggregate" value of the amount of the Applicant's pension, we must make a practical and comprehensive assessment, on the basis of the evidence before us, as to the overall effect of the substitute method (the NM), compared to the effect of the original method (OM), on the amount of the Applicant's pension.

In our view, the legislative intent is that the assessment of the longer-term impact of such an amendment on aggregate pension payments be made on the basis of information available at the time the amendment was adopted. A "wait and see" approach under which the assessment might be made as of a later date is simply not practicable, for three reasons. First, the result of that assessment could change over time, and it would be unreasonable and impractical to require that compliance with the requirements of s 14.1 of the Act be determined periodically for an indefinite period. Second, in the event that an amendment which initially appeared to be valid (and which initially might have increased pension payments) were found some time later to have had the effect of reducing aggregate pension payments and were therefore found to be void, the amendment could not practically be reversed, since pension payments including those to pensioners subsequently deceased would already have been made on the basis of the amendment. Finally, it is important that plan sponsors and the Superintendant be able to determine promptly and with finality whether or not an amendment is valid, taking the requirements of s. 14(1) into account – otherwise plan sponsors would be precluded from making amendments of the type whose impact could not be determined with certainty at the time of adoption, however desirable those amendments might be. Accordingly, our vantage point for assessing the longer-term impact of the amendment on the amount of the pension must be the date the decision is made, taking into account the information reasonably available to the plan sponsor at that time.

It would not be appropriate, however, to consider the longer-term impact of the amendment with respect to the commuted value of the Applicant's pension. Although it is the commuted value of the overall aggregate "pension benefit" that must be assessed, the *PBA* mandates that the commuted value be calculated as at a fixed date. We must therefore determine the appropriate date on which to perform that calculation, in order to determine whether or not the commuted value has been reduced by the impugned amendment within the meaning of s.14(1)(b).

Focusing first on the issue of the *amount* of the Applicant's pension, what does the evidence show? All parties agree that as of January 1, 2008 the Applicant's pension was smaller by some .47% than it would have been if the OM had still been in effect, a minor but measurable reduction in the amount she would otherwise have received in 2008 if the OM had still been in place. Set against that "point in time" evidence, however, is the evidence of both expert witnesses that over time, the OM and the NM would be expected to have similar effects on the amount of the pension. The historical evidence about the relative impact of the two methods bears this out. Over any particular time frame, the two methods yield only minor differences. Over the entire period between 1992 and 2007 during which OMERS fully indexed its pensions to the CPI using the OM, the CPP method (i.e. the NM) would have yielded marginally better

results. The snapshot taken by the Municipal Retirees Organization Ontario for the period from 1999-2007, a snapshot described as "misleading" by the Applicant in her April 2007 letter to OMERS, showed the OM ahead, whereas the Applicant's own snapshot from 2000-2007 showed the NM ahead. The variable outcome of these different snapshots highlights the arbitrary impact of assessing the effect of either the OM or the NM at any specific date or over any randomly-selected period of time. It also highlights the fact that both the OM and the NM will have different effects on individual pensioners depending on their specific circumstances. Those who were OMERS pensioners from 1992 to 2007 would have been slightly better off if OMERS had used the NM instead of the OM over that period of time. For 2008 and 2009, OMERS pensioners would have preferred that the OM had stayed in place. But if we expand the lens a little, the picture is very likely to change. Already, in 2010, the NM has yielded a better result than the OM. It is conceivable that even as early as January 1, 2011 the Wagman Alternative will have kicked in and the Applicant will be ahead of the game under the NM. With the NM as with the OM, we simply do not know who will come out ahead in the longer run.

The Applicant is asking us to decide the case based solely on a single narrow snapshot that is unlikely, based on all the evidence, to be representative. In our view, s.14(1) does not dictate so arbitrary a result. We are persuaded that for amendments such as the one before us, the statute does not gauge whether or not the amount of a pension has been reduced based only on its immediate impact on the first periodic payment after it comes into effect (or indeed, only on its impact on periodic payments during the period between the date of implementation and the date of hearing). It instructs us to take a longer view. From that perspective, what does the evidence show us? As we have already noted, we do not accept the expert evidence of Mr. Duxbury that the short-term impact of the NM will be "locked in" in perpetuity. Indeed, it appears quite probable that the relatively minor deviations between the OM and the NM will be ironed out very soon. Likewise the evidence before us (both expert and non-expert) does not support the Applicant's argument that shifting from one method to the other leads to a benefit reduction over the longer term. The persuasive evidence on the long-term (i.e. "aggregate") impact of the amendment is the evidence of both actuaries, that the OM and the NM, are actuarially equivalent, and that "over time" they are expected to produce the same level of protection, 100% inflation protection as indexed to the CPI. On the basis of the overall evidence, then, the Applicant has failed to persuade us that the amendment has the effect of reducing the amount of her accrued pension within the meaning of s.14(1)(b).

However, we must still address the question of whether the impugned amendment reduces the *commuted value* of that pension within the meaning of s.14(1)(b). As noted above, this question raises somewhat different issues. The Superintendent has submitted that because the Applicant's pension is in pay, we need not concern ourselves with the issue of commuted value. He argues, in essence, that the concept of commuted value has application under the *PBA* only with respect to active and deferred members whose seek to transfer their benefits out of a pension plan under s.42; since pensions in pay cannot be so transferred, they have no commuted value under the statute. While this argument has some force, we do not ultimately find it persuasive. The

Applicant may have no right under the *PBA* to commute her pension; it is nevertheless clear that from an actuarial perspective, a pension in pay *has* a commuted value. The definition of "commuted value" in the PBA definitely contemplates the calculation of such values for pensions in pay. Neither expert witness had any difficulty with the concept of calculating a commuted valued for a pension in pay. We hold that s.14(1)(b) requires us to address the question of whether the commuted value of the Applicant's pension has been reduced.

While the *PBA's* definition of "pension benefit" supports an approach to calculating the *amount* of a pension within a flexible time frame, a *commuted value* cannot be calculated "at large"; it requires the identification of a specific date upon which the calculation should be made. The Applicant has submitted that the appropriate date upon which to make the calculation of commuted value is January 1, 2008, or alternatively on the date her expert prepared his report, both dates on which the expert witnesses agreed that the commuted value of the Applicant's pension was lower as a result of the implementation of the NM than it would have been if the OM had still been in place. The responding parties have argued that the appropriate date is October 3, 2007, the date the amendment was adopted by the SC. On that date, the expert witnesses agreed that the commuted value of the Applicant's pension was the same under both the OM and the NM. The choice of date upon which the effect of the amendment is measured is therefore critical to the outcome.

We have decided that the appropriate date upon which to measure the effect of the amendment on the commuted value of the Applicant's pension is October 3, 2007, the date the amendment was passed. In making this determination, we have taken account of the nature of the amendment. As discussed above, the amendment will be applied not *just* on January 1, 2008, its 'official' effective date, but also on a series of dates thereafter. Furthermore, its impact on any January 1 cannot be quantified in advance. For the same reasons that it would be arbitrary to judge the impact of this amendment on the *amount* of the pension only on the first of the series of dates on which it will be applied, it would be arbitrary for purposes of s.14(1)(b) to measure the impact of the amendment on the *commuted value* of the pension on the first of that series of dates.

Commuted value, by its very nature, is a forward-looking measurement requiring an actuary, at a fixed point in time, to make predictions and judgments about a series of future events. The impact of the impugned amendment on commuted value can be meaningfully measured as of the date of decision. Neither expert suggested that any problems were posed for that exercise by the fact that the amendment was not yet governing the calculation of the CPI adjustment. On that date, it was possible to measure the "pure" effect of the amendment, untainted by the random impact of any particular application of the amendment on any particular January 1. On that date, the two formulae were actuarial equivalents. On that date, the plan administrator could make a reasoned assessment of the impact of the amendment on the commuted value of pensions in pay. We are persuaded, therefore, that the impugned amendment did not have the effect of reducing the commuted value of the Applicant's accrued pension within the meaning of s.14(1)(b).

The Applicant's interpretive approach to calculating both the amount and the commuted value of pension for purposes of s.14(1) would leave plan administrators in the untenable position of being unable to pass an amendment like this one – making a change that all parties agree is desirable – with any degree of confidence that the amendment is valid. The Applicant has made a number of suggestions about how, in her view, OMERS should have proceeded in implementing the impugned amendment. If her short-term approach to this amendment were to be adopted, however, none of her proposed alternatives for implementation would have truly insulated the Plan from potential attack under s.14(1)(b) of the *PBA*. The Applicant's initial proposal was a special "catch up" increase for pensioners which would have put them in the same position they would have been in if the NM had been in place all along. As a practical matter, such a benefit enhancement might have avoided this litigation. But it would not have changed the fact that on January 1, 2008, the NM yielded less than the OM. Pensioners might simply have pocketed the enhancement and come forward to make the same argument the Applicant is now making: that the amendment was void based on its impact on its effective date. Similar problems arise with the Applicant's proposal to implement the NM retroactive to January 1, 2007. Like the "catch up" payment, such a retroactive benefit enhancement might have avoided the litigation. But once again, if the Applicant's approach were correct, it would not have guaranteed the validity of the amendment; pensioners might still have come forward in *subsequent* years to argue that the impact of the NM had the effect of reducing vested benefits. Her final proposal, that OMERS defer implementation "until it can be accomplished without losses to OMERS pensioners", is clearly impracticable; on the Applicant's theory of the case, how would OMERS ever be able to recognize that moment, except retrospectively after the passage of time?

We recognize that our decision leaves individual pensioners like the Applicant in a position in which they received indexation increases for 2008 and 2009 which were smaller than they would have received if OMERS had not decided to change the indexation formula. We also recognize that for some individual pensioners, events may unfold in a way in which the differences will not be made up to them over time. This is, however, the inevitable result of any change in the mechanics of an indexation formula. Furthermore, a DB pension plan cannot and does not produce identical results for all members. The value of DB benefits may well depend on individual lifespan. For example, members who die without a surviving spouse shortly after retirement will not get as good a 'return' on their contributions as members who live longer. The *PBA* recognizes that pension plans are collective instruments. It should not and does not force us to nullify an amendment of this type, designed to apply over time and passed in good faith for the benefit of all plan members, simply because it may have a modest negative impact in the short term.

The amendment at issue has left the Applicant and other OMERS pensioners where it found them: with a pension which is indexed 100% to increases in the CPI. We find that the Applicant has failed to meet the onus of proving that such an amendment reduces either the amount or the commuted value of her pension.

F. ORDER

For all these reasons, we dismiss the Application.

DATED at Toronto, Ontario, this 26th day of March, 2010

"Elizabeth Shilton"

Elizabeth Shilton
Member of the Tribunal and Chair of the Panel

"David Short"

David Short
Member of the Tribunal and of the Panel

"Ralph Scane"

Ralph Scane
Member of the Tribunal and of the Panel

Tab 10

FINANCIAL SERVICES TRIBUNAL

Citation: PPG Canada Inc. v. Ontario (Superintendent Financial Services), 2007 ONFST 16
Decision No. P0290-2007-1
Date: 2007/11/26

2007 ONFST 16 (CanLII)

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended by the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 (the "Act");

AND IN THE MATTER OF a proposal by the Superintendent of Financial Services to make an Order under Section 87 of the Act in relation to the **PPG Canada Inc. Non-Contributory Retirement Plan for Salaried Employees,** Registration No. 0337048;

AND IN THE MATTER OF a hearing in Accordance with subsection 89(6) of the Act;

B E T W E E N:

PPG CANADA INC.

Applicant

- and –

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:
Ms. Florence Holden
Member of the Tribunal and Chair of the Panel

Mr. Shiraz Bharmal
Member of the Tribunal and of the Panel

Mr. John Solursh
Chair of the Tribunal and Member of the Panel

APPEARANCES:
For the Applicant:
Mr. Clifton P. Prophet and Ms. Leila Burden-Nixon

For the Superintendent of Financial Services:
Ms Deborah McPhail
HEARING DATES:
September 19 and 20, 2007

2007 ONFST 16 (CanLII)

REASONS FOR DECISION

NATURE OF THE APPLICATION

The Applicant seeks an Order that the Respondent Superintendent of Financial Services (the "Superintendent") set aside the Proposal to Make an Order dated December 18, 2006, a) revoking the registration of Amendment 8 to the PPG Canada Inc. Non-Contributory Retirement Plan for Salaried Employees (the "PPG Plan"), Registration Number 0337048; and b) directing the Applicant to credit service for periods of employment of certain specific employees of Duplate Canada Inc. (the "Restored Service Members"), which occurred prior to a break in service, as "Credited Service" under the PPG Plan.

ISSUES

As agreed between the parties, the issues to be resolved by the Tribunal in this matter are:

1) How was the Duplate Restored Service to be recognized when the Duplate Canada Inc. Salaried Employees Pension Plan (the "Duplate Plan") was incorporated into the PPG Plan in 1982?

2) Is Amendment 8 to the PPG Plan void pursuant to Section 14 of the *Pension Benefits Act, Ontario*?

FACTS

Both the Applicant and the Superintendent appeared before the Tribunal and filed written submissions, together with an Agreed Statement of Facts and an Agreed Book of Documents. The hearing proceeded on the basis of the Agreed Statement of Facts and the Agreed Book of Documents, and additional Exhibits, which the Tribunal fully reviewed, the salient portions of which are summarized below. In addition the Tribunal also heard oral testimony from a number of witnesses which was considered and whose evidence is also referred to below.

1. Prior to July 1982, Restored Service Members were covered under the Duplate Canada Inc. Salaried Employees Pension Plan (the "Duplate Plan") which provided two defined benefit formulae. In the Duplate Plan text listed as at April, 1972, provided in evidence and not disputed, and which was

effective as of January 1, 1969 and appears to consolidate the effect of Amendments 1 to 12 through 1981, we note the following key provisions:

a) Section II, Definitions, contains the following key definitions:

"Company, Duplate Canada Inc."

"Contributory Earnings, for years subsequent to 1972, means monthly Earnings of a Member at a rate in excess of 1/12 of the Year's Maximum Pensionable Earnings as defined by the Canada Pension Plan. Prior to 1973, Contributory Earnings meant monthly Earnings of a Member at a rate in excess of $450."

"Earnings, the basic salary a Salaried Employee receives for a stated period of normal full-time employment. Extra remuneration for over-time worked, incentive, Christmas or cost of living bonuses are excluded."

"Final Average Earnings, the average monthly earnings of a Member for the five best years out of the ten-year period immediately preceding his Normal Retirement Date or the date of his actual retirement which ever is earlier. For Members with less than five years of service with the Company at retirement, Final Average Earnings are the average monthly earnings over all his Company service."

"Final Average Contributory Earnings, means the average monthly Contributory Earnings of a Member for that five year period, out of the ten-year period immediately preceding his Normal Retirement Date or the date of his actual retirement whichever is earlier, in which the Member's Earnings were higher than in any other such five-year period. For Members with less than five Years of Service with the Company at retirement, Final Average Contributory Earnings are the average monthly Contributory Earnings over all his Company service."

"Member, an eligible Salaried Employee enrolled in the Plan on and after January 1, 1969, including a Salaried Employee who was a member of the Predecessor Plan as of December 31, 1968."

"Pension, a pension payable monthly to the recipient throughout his lifetime."

"Predecessor Plan, the pension plan for Salaried Employees, established July 1, 1966."

"Salaried Employee, any person in regular, full-time employ of the Company, whose normal Earnings are in the form of salary and who is not represented by a bargaining agent certified under the Ontario Labour Relations Act."

2007 ONFST 16 (CanLII)

"Statutory Benefit Age, the age at which any benefit becomes payable under the provision of the Old Age Security Act."

"Years of Service, the period of years, taken to the nearest month, of an employee's continuous employment by the Company for which he receives salary. In the case of Salaried Employees who were members of the Predecessor Plan on July 1, 1966, periods of employment before July 1, 1966 by a predecessor company or by an associated company the employees of which had coverage with Duplate employees in a predecessor pension plan shall be included in Years of Service as if they had been periods of employment by the Company except where such periods of employment are credited under the terms of another employee pension plan.

For purposes of Non Contributory Pension Benefits, only, the following periods of service (which occurred prior to a break in service) will be included as Years of Service:

Employee	*Previous Employment*	*Restored Service*
Boswell, L.B.	*May 16, 1966 to August 22, 1969*	*3.3 years*
Clements, J. D.	*August 3, 1965 to May 1, 1970*	*4.8 years*
Crooks, L.	*September 17, 1973 to June 27, 1975*	*1.8 years*
Linton, K.M.	*March 23, 1970 to November 13, 1970*	*0.6 years*
McAllister, L.M.	*March 3, 1969 to February 6, 1970 and April 27, 1970 to March 28, 1975*	*5.8 years*
Mailey, E.D.	*April 12, 1955 to March 23, 1964*	*8.9 years*
Marshall, J.J.	*June 11, 1951 to January 14, 1958*	*6.5 years*
Milne, S.D.	*February 11, 1952 to November 15, 1956*	*6.8 years*
Porteous, C.C.	*March 9, 1964 to March 4, 1966*	*2.0 years*
Ross, W.H.	*April 14, 1965 to September 27, 1974*	*9.4 years*
Martyn, A.M.	*Excess over Plax Deferred Non-Contributory Benefits for the period July 21, 1958 to December 31, 1973*	*15.4 years*
Taylor, E.W.	*Excess over Fiberglas Deferred Non-Contributory Benefits for the period November 14, 1945 to July 19, 1957*	*10.7 years*

2007 ONFST 16 (CanLII)

In the case of A.M. Martyn and E.W. Taylor the Non Contributory Pension Benefits payable hereunder shall be reduced by the amount of any pension payable from another employer sponsored pension plan in respect of such period of service." (emphasis ours)

The parties agreed that the special period of Restored Service described above for the listed individuals was the "Duplate Restored Service" that forms the basis of Issue 1 and that the Duplate Plan did not define the term "pensionable service" or contain the term "Credited Service", but based pension benefits on Years of Service. The term "pensionable service" appears only to exist in Article XXIV – Maximum Pension.

b) Section VII - Member's Contributions reads:

"Prior to January 1, 1973, a Member who had attained the age of 30 years was required to contribute 6% of his Contributory Earnings. Subsequent to December 31, 1972, a Member who has attained the age of 30 years is required to contribute 5% of his Contributory Earnings. No Member shall contribute to the Plan in any year an amount in excess of $1,500."

c) Section X – Non-Contributory Benefits reads:

"As of Normal Retirement Date each Member of the Plan shall be entitled to non-contributory benefits as follows:

1. Basic Non-Contributory Pension

A basic non-contributory Pension for life based on the Member's Years of Service and date of retirement. The rate of benefit for Members in the service of the Company on and after January 1, 1980 will be:

$10.50 per month per Year of Service for retirements effective on or after January 1, 1980.

2. Supplementary Benefit:

A month supplementary pension benefit based on the Member's Years of Service and date of retirement. The rate of benefit for Members in the service of the Company on or after January 1, 1980 will be:

a) For retirements effective on or after January 1, 1980, $10.50 per month for each Year of Service, subject to a maximum of $262.50 and payable only until Statutory Benefit Age.

b) For retirements effective on or after January 1, 1980, $8.75 per month for each Year of Service, subject to a maximum of

2007 ONFST 16 (CanLII)

$218.75 and payable only after Statutory Benefit Age, reduced by the Estimated Statutory Benefit.

3. Use of Actual Statutory Benefit

If the Pensioner makes application for use of actual Statutory Benefit within twelve months of his first date of eligibility for such Statutory Benefit and furnished evidence, satisfactory to the Company, that the amount of his Statutory Benefit differs by at least $1.00 per month from the Estimated Statutory Benefit, then in determining the benefit payable under Section X-2, the amount of his Statutory Benefit shall be applied in place of such Estimated Statutory Benefit effective as of the date of his retirement."

2007 ONFST 16 (CanLII)

d) Section XI – Basic Contributory Pension reads:

"A basic contributory Pension will be paid to a retired Member who has complied with the requirements under the present Plan and predecessor plans as follows:

a) One per cent of his Final Average Contributory Earnings multiplied by his Years of Service as a Salaried Employee between his 30th and 45th birthdays, plus,

b) Two per cent of his Final Average Contributory Earnings multiplied by his Years of Service as a Salaried Employee between his 45th and 65th birthdays."

e) Section XXIV – Maximum Pension reads:

"Pension benefits payable out of or under the Plan (whether at retirement, termination of employment, or termination of the plan), shall not exceed an amount that is at an annual rate that is the lesser of 1) and 2):

1. $1,715 times the number of years of pensionable service not exceeding 35 years;

2. an amount that is the product of a) and b)

   a) 2% per year of pensionable service not exceeding 35 years and

   b) the average of the best three consecutive years of remuneration paid to the Member by the Company.

The above prohibition will not apply to annual pensions of $275 or less per year of pensionable service."

2. The PPG Plan effective as at July 1, 1981 was a continuation and amendment of three merged Prior Plans: The Final Average Earnings Pension Plan for Salaried Employees of PPG Industries Canada Ltd. (Glass and Coatings & Resins Divisions), the Retirement Plan for Employees of Kalium Chemicals, a Division of PPG Industries Canada Ltd., and The Pension Plan for Salaried Employees of Stanchem Division of PPG Industries Canada Ltd., as adopted by PPG Industries Canada Ltd. effective July 1, 1981 for its salaried employees, as evidenced by a resolution dated June 2, 1982 (the PPG Resolution").

3. Under the PPG Resolution, PPG Canada Inc.("PPG") also merged the Duplate Plan into the PPG Plan, added Duplate Canada Inc. as a Participating Employer and added the Duplate Plan as a "Prior Plan", all effective July 1, 1982.

4. The PPG Resolution further stated that "any rights that a Member may have by virtue of his membership in a Prior Plan in respect of benefits under the Prior Plan accrued to June 30, 1981 shall not be diminished or rescinded by virtue of the introduction of the Plan."

5. By virtue of a resolution dated June 2, 1982 (the "Duplate Resolution"), Duplate Canada Inc. adopted the PPG Plan effective July 1, 1982 for its eligible salaried employees, and explicitly noted that:

   "any rights that any such eligible employee may have by virtue of his membership in the Duplate Canada Inc. Salaried Employees Pension Plan (hereinafter referred to as the Duplate Plan) in respect of benefits under the Duplate Plan accrued to June 30, 1982 shall not be diminished or rescinded by virtue of the adoption of the (PPG) Plan."

6. The PPG Plan is non-contributory and provides for a pension based on the higher of two formulae, under Article 5.01 which states that:

   "Normal Retirement Benefit

   A Member's monthly rate of normal retirement benefit, payable commencing on his Normal Retirement Date shall be (a) or (b) below whichever is greater:

   (a) Regular Benefit

      The sum of:

      (i) 0.85% of the Member's Final Average Monthly Salary up to the Final Average Pensionable Earnings, and

      (ii) 1.6% of his Final Average Monthly Salary in excess of the Final Average Pensionable Earnings,

      multiplied by his years and months of Credited Service.

   (b) Alternate Benefit

2007 ONFST 16 (CanLII)

1.25% of the Member's Final Average Monthly Salary up to $1,200, multiplied by his years and months of Continuous Service.

Notwithstanding anything contained herein to the contrary, the amount of retirement benefit payable to a Member shall in no event be less than the amount of pension benefit payable to him according to the terms of the Prior Plan of which he was a member based on his earnings and service up to July 1, 1981."

2007 ONFST 16 (CanLII)

We note that it was the position of the Applicant that given the relatively low salary cap under the Alternate Benefit formula, that formula was, in practical terms, for many employees, a flat-benefit rate of 1.25% times $1200 or $15 per month multiplied by years and months of Continuous Service. We find however that it was not expressed as a flat rate benefit, no evidence was adduced to prove that all of the Restored Service Members would be caught by that limit, nor was evidence adduced to prove that it was intended to be equivalent to the non-contributory pension benefits under the Duplate Plan. In fact we find that it is not equivalent to that formula.

7. Under the PPG Resolution, it states that "the dates July 1, 1982 and June 30, 1982 shall be substituted for July 1, 1981 and June 30, 1981, respectively wherever they occur in the (PPG) Plan in respect of such eligible salaried employees of Duplate Canada Inc.," having the effect of amending Article 5.01 of the PPG Plan as described in paragraph 6 above.

8. Key provisions of the PPG Plan effective July 1, 1981 as provided by the Applicant in the Agreed Book of Documents are:

   a) "Article 1.07, 'Company' shall mean PPG Canada, including its predecessors and any successor by merger, purchase or otherwise with respect to its Employees. Except as otherwise provided, any action to be taken, consent, approval or opinion to be given, or discretion or decisions to be exercised or made by the Company shall be the responsibility of PPG Canada."

   b) "Article 1.08, 'Continuous Service' shall mean service with the Company as determined according to Article 3."

   c) "Article 1.10, 'Credited Service' shall mean service with the Company as determined according to Article 3."

   d) "Article 1.15, 'Final Average Monthly Salary' shall mean the average monthly salary of a Member paid during the 60 consecutive months in the last 10 fiscal years of the Member's Continuous Service affording the highest such average preceding the Member's date of retirement or termination of employment whichever is applicable. In the case of an Employee who becomes totally and permanently disabled and continues to accrue Continuous Service pursuant to subsection 3.01(c), for the purpose of determining his Final Average Monthly Salary, salary shall include, for any period during which benefits under a Long Term Disability Plan of the Company are received, an amount based on the salary

in effect at the time of the Employee became disabled. For Members who terminate or retire prior to completing 60 consecutive months of Continuous Service, Final Average Monthly Salary shall be the monthly average of his salary received while an Employee."

e) "Article 1.20, 'Member' shall mean any person included in the membership of the Plan as provided in Article 2."

f) "Article 3.01, 'Continuous Service':

(a) Continuous Service shall include the number of years and months of an Employee's continuous period of employment as an Employee from the first day of the month of his latest date of hire as an Employee to his date of termination, retirement or transfer under Article 12.

(b) ***Continuous Service prior to July 1, 1981 shall not be less than the amount of pensionable service credited to the Employee under a Prior Plan.*** (*emphasis ours*)

(c) Continuous Service shall include any period of Total Disability for which an Employee is entitled to payments under a salary continuance program or disability benefits under a Long Term Disability Plan of the Company.

(d) Continuous Service shall include i) periods of leave of absence with pay, (ii) periods of Company-approved leaves of absence without pay, and (iii) periods of layoff up to 12 months in duration."

g) "Article 3.02, Credited Services:

(a) Credited Service shall include the number of years and months of a Member's Continuous Service subsequent to the first day of the month in which the Member attains age 25.

(b) Credited Service for service rendered prior to July 1, 1981 shall be reduced by:

(i) any period during which the Employee was eligible to participate but elected not to participate in a Prior Plan; and

(j) any period in respect of which the Employee withdrew his contributions made under a Prior Plan;

however, such Credited Service prior to July 1, 1981 shall not be less than the amount of pensionable service credited under a Prior Plan. (*emphasis ours*)

2007 ONFST 16 (CanLII)

(c) A Members' total period of Credited Service may not exceed 35 years."

9. The term "pensionable service" is not defined under the PPG Plan, although it is used in several instances in the PPG Plan text.

10. The parties adduced various internal Duplate Canada and PPG memorandum and correspondence with respect to the Duplate Restored Service issue. In particular, the Tribunal notes the existence of the following documents which were introduced into evidence:

a) A letter dated June 2, 1980 to Mr. J. D. Clements, one of the Restored Service Members, from Mr. D. R. Pepall, President and CEO of Duplate Canada Limited confirmed Mr. Clements 4.8 years of "pension service for Non-Contributory Benefits", consistent with the above-noted provisions of the Duplate Plan. This letter was not in dispute.

b) An undated booklet in respect of the PPG Plan entitled "Meeting a Combination of Needs for Retirement" recognizes certain periods of employment with "any division (Glass, STANCHEM, Coatings & Resins, Kalium Chemicals) before its consolidation into PPG Industries Canada Ltd." for the purposes of determining Credited Service. There was an exception for including periods of contributory service in which an employee declined to participate or during which an employee withdrew related contributions. An addendum to the booklet, effective July 1, 1982, stated that "DUPLATE CANADA INC., as an Affiliated Company has adopted the PPG Retirement Plan for Salaried Employees and has become a Participating Employer under the terms of the Plan." The terms of the booklet were described as "not the official governing document". The Tribunal finds as an undisputed fact that the booklet, which evidence indicated was given to Duplate employees following the plan merger, was silent with respect to Duplate Restored Service.

c) An internal Duplate memorandum dated June 14, 1982, to all Salaried Employees from D. R. Pepall advised salaried employees that Duplate had adopted the PPG Plan effective July 1, 1982, recognized a transfer of assets and liabilities to the PPG Plan and attached the booklet referred to in paragraph 10 (b) above. The memorandum states "Employee and Company contributions to the Duplate Plan will be transferred to the PPG Plan along with the related *pension service (emphasis ours).*" It also references the two PPG Plan benefit formulae and the concept of Credited Service and Continuous Service although there was no definition of those terms within the memorandum. The memorandum further referenced an Addendum to the Booklet, adduced into evidence, which simply referenced Duplate as a Participating Employer or Division, and inserted an effective date of July 1, 1982 for Duplate members.

The Tribunal notes that the ability to merge the Duplate Plan and the PPG Plan was not an issue before it, and further, that neither party raised any bar to such

2007 ONFST 16 (CanLII)

merger or related amendment. Consequently the Tribunal did not consider that aspect but makes as a finding of fact the merger of the Duplate Plan and the PPG Plan was an amendment to and continuation of the Duplate Plan at least in respect of service prior to July 1, 1982 given the provisions of Sections 3.01 and 3.02 of the PPG plan as noted above.

d) The first member statement produced under the PPG for Mr. J. D. Clements, a witness at this hearing, and related Duplate memorandum to him dated November 24, 1982 from J. M. Theissen, indicated "Credited Service to November 30, 1982 [of] 10.9167 years" and "in addition, ...restored service for Non-Contributory Benefits under the Duplate [Plan] of 4.8 years for service between your original date of hire (August 3, 1965) and your date of termination (May 1, 1970)."

e) The Applicant called as a witness, Mr. Kamaludin Ali, an actuary who was formerly an employee of GBB Associates Ltd. the actuary in respect of the PPG Plan. The evidence in the Agreed Book of Documents included a memorandum from Mr. Ali while at GBB Associates Ltd. to Mr. H. Wakefield, Corporate Secretary of PPG, dated July 27, 1982, stating that "the additional years of service granted to Messrs. Clements and Boswell only apply to the non-contributory benefit, we did not include this additional amount under the credited service shown (*on the member's annual statement*) although we did include it for purposes of calculating both the accrued and projected benefit." This memorandum pertains to the Duplate Plan prior to its merger with the PPG Plan.

f) An internal PPG memorandum dated November 18, 1982, from S. McAteer to M. Thieissen entitled "Subject: Pension Plan Presentation" in paragraph 2 states: "Service prior to July 1, 1982 would be the same as that credited under the prior plan".

g) Annual statements prepared for John D. Clements as of May 1, 1983, 1984 and 1985 indicated both Continuous Service and Credited Service of 15.75, 16.75 and 17.75 years respectively. These statements seem to include the Duplate Restored Service granted to Mr. Clements under the Duplate Plan for purposes of inclusion in the pension formulae of the PPG Plan.

   Mr. Ali testified before the Tribunal in respect of these statements that these statements which included Duplate Restored Service under PPG Plan Credited Service, and which were prepared by GBB Consultants Ltd. were "incorrect". Mr. Ali's testimony was that while the related programming and statements were to be revised three years after the merger to properly reflect the inclusion of Duplate service, the changes were not made immediately due to cost concerns. His understanding was that Duplate did not distribute the statements to the Restored Service Members although we find that he had no direct knowledge of that fact so we give his testimony in this regard no weight.

   Mr. Ali indicated that "corrected statements" were prepared by GBB Associates Ltd. in 1985. The Tribunal notes the testimony of Mr. Clements was that revised

2007 ONFST 16 (CanLII)

statements were given to him by PPG in 1987, which statement did include Duplate Restored Service in the calculation of the contributory benefit formula only under the PPG Plan. The attached letter from Mr. Pepall to Mr. Clements dated November 29, 1985 indicated that "The regular benefit formula in the PPG Canada Salaried Employees' Pension Plan will not apply to your restored salary service." The Tribunal accepts the testimony of Mr. Clements that the attached letter was not distributed to Mr. Clements until 1987 with the revised statement.

It was also Mr. Ali's testimony that the revised 1985 statement for Mr. Clements was not entirely consistent with the PPG Plan terms at the time. Mr. Ali indicated that PPG did not reconcile the PPG Plan text with the revised member statements until Amendment 8 was passed in 1985 but stated to be retroactive to 1982.

2007 ONFST 16 (CanLII)

11. PPG Canada Inc. purported to amend the PPG Plan effective June 30, 1982 by a resolution dated April 10, 1988 ("Amendment 8") to provide Restored Service Members with credit for Duplate Restored Service under a new Article 3.03 – Special Duplate Service and new Article 5.03 – Provisions for Members who have Special Duplate Service as follows:

"3.03 Special Duplate Service

(a) A Member shall have recognized as Special Duplate Service such service prior to July 1, 1982 which was:

(i) accrued prior to a break in service with Duplate Canada Inc. as determined in accordance with paragraph 18 of Article II of the Duplate Canada Inc. Salaried Employees' Pension Plan as in effect June 30, 1982; and

(ii) accrued as an hourly employee of Duplate Canada Inc. as determined in accordance with Article XII of the Duplate Canada Inc. Salaried Employees' Pension Plan as in effect June 30, 1982."

"5.03 Provisions for Members who have Special Duplate Service

The following provisions contained in this Section 5.03 apply only to Members who have Special Duplate Service.

(a) The normal retirement benefit payable to such a Member shall be the lesser of (A) or (B) below:

(A) The sum of:

(i) the Member's normal retirement benefits as determined in accordance with Section 5.01, and

(ii) 1.25% of the Member's Final Average Monthly Salary up to $1,200 multiplied by his years and months of Special Duplate Service.

(B) The sum of:

(i) 0.85% of the Member's Final Average Monthly Salary up to the Final Average Pensionable Earnings, and

(ii) 1.6% of his Final Average Monthly Salary in excess of the Final Average Pensionable Earnings, multiplied by 35 years.

(b) The amount of Early Retirement Benefit payable to such a Member shall be determined in accordance with Section 5.03 (a) on the basis of his Final Average Monthly Salary, his Continuous Service, his Credited Service, his Special Duplate Service and the Final Average Pensionable Earnings up to the date of his retirement and adjusted in accordance with Section 5.02. For the purpose of determining the adjustment, if any, to be made to such Early Retirement Benefit, Continuous Service shall include the Members Special Duplate Service.

(c) For the purpose of determining eligibility for a vested deferred annuity under Section 8.01(a), Credited Service shall include a Member's Special Duplate Service.

The deferred vested annuity payable to such Member shall be computed in accordance with Section 5.03(a) on the basis of his Final Average Monthly Salary, his Continuous Service, his Credited Service, his Special Duplate Service and his Final Average Pensionable Earnings up to the date of his termination of employment.

(d) If a former Employee other than an Employee described in Section 11.01 is restored to Service prior to Normal Retirement Date, his Special Duplate Service shall be restored in accordance with the provisions of Section 11.02.

2007 ONFST 16 (CanLII)

(e) In the case of such a Member who transfers to employment with the Parent Company or a Related Company or who transfers to hourly employment with the Company in accordance with Sections 12.01 (c) or 12.02 (c), the retirement allowance payable under this Plan shall be computed on the basis of Continuous Service, Credited Service and Special Duplate Service as defined in this Plan and the provisions of this Plan as in effect on the date of the Employer's transfer."

Amendment 8 does not treat Duplate Restored Service as Credited Service for the purpose of the "Regular Benefit' only the "Alternate Benefit" formulae under Section 5.01 of the PPG Plan.

The Tribunal notes that Amendment 8 was not actually signed until April 10, 1988 although the resolution was ostensibly authorised by the PPG Board of Directors on December 11, 1985. No evidence was adduced to prove that the PPG Plan members were ever given notice of Amendment 8.

12. Subsequent correspondence with Mr. Clements from various employees of PPG introduced into evidence made reference to Mr. Clements' Duplate Restored Service as being used only for the Alternate Benefit Formula under the PPG Plan. We find that Mr. Clements did not accept PPG's position on this matter and continued to raise objections which ultimately led to the matter before us.

13. A Notice of Proposal was issued by the Superintendent dated December 18, 2006 which provides the basis for this Application. The Notice of Proposal proposed to: (a) revoke the registration of Amendment 8 to the PPG Plan as it "reduces the accrued benefits of the Applicant by accounting for the Duplate Restored Service as an Alternate Benefit instead of as a Regular Benefit when calculating the Normal Retirement Benefit" and therefore "violates section 14 of the PBA and is void"; and b) further orders PPG Canada Inc. as Administrator of the PPG Plan to include the Duplate Restored Service as "Credited Service" under the PPG Plan.

Applicant's Position

14. It is the position of the Applicant that the PPG Plan did not include the Duplate Restored Service of the Restored Service Members as "Credited Service" for any purpose prior to Amendment 8, nor was it intended to be "pensionable service" under the PPG Plan. Therefore, the Applicant argued that the Restored Service Members had no basis to expect that their Duplate Restored Service would count for pension benefit accrual purposes under the PPG Plan. Duplate Restored Service effectively would only be relevant in the context of the guarantee under the PPG Plan that benefits would not be less than what they were entitled to under the Duplate Plan based on earnings and service up to the date of merger.

2007 ONFST 16 (CanLII)

15. It is the position of the Applicant that Amendment 8 to the PPG Plan is therefore valid and does not reduce the accrued benefits of the Restored Service Members or violate s. 14(1) of the *Pension Benefits Act* of Ontario, as Duplate Restored Service was intended only to apply to a non-contributory flat rate benefit under the Duplate Plan. Amendment 8 was in this context a benefit improvement.

16. It is the Applicant's position that, in the alternative, even if Duplate Restored Service was intended to be counted as pensionable service in respect of the PPG Plan's Alternate Benefit formula, Amendment 8 was intended to be a clarification of how Duplate Restored Service was to be treated under the PPG Plan and is not an adverse amendment. It is the Applicant's position that PPG never intended to draft the PPG Plan text so as to put its members in a better position that they have been under a prior plan.

2007 ONFST 16 (CanLII)

Superintendent's Position

17. It is the Superintendent's position that the Duplate Restored Service was to be recognized for the purpose of factoring in years of service to be credited to the PPG Plan when the member's pension was calculated for both the Regular Benefit and Alternate Benefit Formulae, and not limited to the Alternate Benefit Formula. This result was reflected in the plain wording of the PPG Plan at the time the former Restored Service Members joined it. When Amendment 8 was introduced four years later, with retroactive effect, it purported to reduce this benefit by allowing it to be factored in only to the Alternate Benefit Formula, and the Alternate Benefit formula prevailed only if it resulted in a greater pension amount than the Regular Benefit formula. The Superintendent did not concede that the Alternate Benefit Formula was a "flat rate" benefit as the Applicant has suggested.

18. The Superintendent's position on the meaning of the term "pensionable service" was that it has a defined meaning in the *Income Tax Act* and is not a term of art. Since the Duplate Plan provided that Duplate Restored Service will be included in the Years of Service for the named individuals, it was pensionable service under the Duplate Plan, and therefore pensionable service when the Duplate Plan was incorporated into the PPG Plan. Otherwise the term "pensionable service" in the PPG Plan would have no meaning and the promise of recognition of prior Duplate continuous service and credited service "would be an empty promise". In addition, the Superintendent argued that the "guarantee under Article 5.01 (of the PPG Plan) only requires that a certain minimum service be granted to members adopted from the other plans and does not preclude enhancements when those other plans are adopted".

19. The Superintendent further argued that the Applicant's submissions on intention in drafting its own plan documents are irrelevant. If there is an ambiguity in the meaning of "pensionable service", the *contra proferentum* rule would apply in favour of the members.

Issue 1: How was the Duplate Restored Service to be recognized when the Duplate Canada Inc. Salaried Employees Pension Plan (the "Duplate Plan") was incorporated into the PPG Plan in 1982?

20. We find that Duplate Restored Service is pensionable service and therefore counts as both Continuous Service and Credited Service under the PPG Plan for the purpose of determining pension benefits under Article 5.01 in respect of pre-July 1, 1982 service. Further Duplate Restored Service shall count for the purposes of determining pension benefits under both the Regular Benefit and Alternate Benefit provisions of the PPG Plan.

Our reasons follow.

21. We find that on the merger of the Duplate Plan and the PPG Plan, that the restated PPG Plan was a continuation and amendment of the Duplate Plan. Upon such merger, the PPG Plan clearly indicated that Restored Service Members retained their rights "in respect of benefits under the Prior Plan accrued to June 30, 198[2] (*and such rights*) shall not be diminished or rescinded by virtue of the introduction of the Plan".[1] Continuous Service and Credited Service under the amended PPG Plan could not be "less than the amount of pensionable service credited under a Prior Plan". The Duplate Plan was a "Prior Plan" under the PPG Plan terms by virtue of the June 2, 1982 PPG Resolution and that fact was not disputed by the Applicant.

At a minimum therefore prior to the plan merger, Duplate Restored Service was to be included in the calculation of Prior Duplate Plan service under the non-contributory provisions of the Duplate Plan. The testimony of Mr. Ali, the Applicant's only witness, and the parties themselves, did not dispute this view. The Duplate Plan did not define the term "pensionable service" nor contain or define the term "Credited Service", but based pension benefits on Years of Service. "Years of Service" under the Duplate Plan included Duplate Restored Service for purposes of the non-contributory pension benefits.

22. However, at the time of the plan merger, if it was the intention of PPG Canada Inc. or Duplate Canada Inc. to effectively "freeze" the Duplate Restored Service under the Duplate Plan for the purpose of testing pre-merger benefits under the PPG Plan formula, then PPG could have easily amended the PPG Plan to do so. It also did not define "pensionable service", nor explicitly exclude Duplate Restored Service from its definitions of Continuous Service and Credited Service in calculating the Regular Benefit, although it could have done so in the 1982 PPG Resolution. PPG did not amend that PPG Plan at time of merger to do any of these things. It in fact did not explicitly reference the Duplate Restored Service until Amendment 8 was passed several years later.

23. Further the original annual pension statements for the years 1982-1985 in respect of Mr. J. D. Clements explicitly included Duplate Restored Service as Credited Service

[1] As per both the Duplate Resolution dated June 2, 1982, the PPG Resolutions dated June 2, 1982 and by sections 3.01(b), 3.02 (b) and5.01 of the PPG Plan.

2007 ONFST 16 (CanLII)

under the PPG Plan. While we heard Mr. Ali's testimony that these statements were knowingly produced as "incorrect", we do not find his statements that they were not corrected for the 12 Restored Service Members for cost reasons relevant or plausible. It was his own testimony that he never had direct discussions with any PPG employees nor was he involved in drafting any of the PPG Plan documents. In our view, it would have been an easy matter for PPG and/or GBB Associates Ltd. to produce twelve individual statements with frozen past service benefits for the Restored Service Members. PPG knowingly withholding the annual statements, if true, would have contravened the provisions of the *Pension Benefits Act* in any event, which requires a plan administrator (PPG) to provide such annual members statements. We accept Mr. Clements' testimony that he did receive the original statements as well as revised member statements which attempted to ignore Duplate Restored Service for benefit accrual purposes but the revised statements were not provided to Mr. Clements until 1987. We also find that practice adopted by GBB Associates Ltd. in calculating accrued benefits for members' statements or valuation purposes is not determinative of the meaning of the PPG Plan provisions, so we give Mr. Ali's evidence in this regard no weight.

2007 ONFST 16 (CanLII)

24. Under the provisions of Section 5.01 of the PPG Plan as it existed on June 1, 1982, which determine the pension entitlements of the Restored Service Members, Prior Plan benefits provide a "floor" for the PPG Plan benefits, not a maximum benefit. It is certainly open to plan sponsors to enhance past service benefits for specific classes of plan members, such as for the Restored Service Members. That is what was done under the Duplate Plan when Duplate Restored Service was granted. The fact that under the PPG Plan Restored Service Members may gain additional benefits on plan merger is neither prohibited in law nor unanticipated in practice. Of course PPG could have explicitly amended its plan to freeze those benefits at time of merger. It did not do so.

25. The Applicant submitted that under the PPG Plan, Duplate Restored Service is not pensionable service under the Duplate Plan. We disagree.

The term "pensionable service" is not defined under the *Pension Benefits Act*, but is a general term, not a term of art. The *Income Tax Act* Regulations, under which both the Duplate Plan and PPG Plans are subject for registration purposes, does include a definition of "pensionable service". The *Income Tax Act* Regulations state that: "'pensionable service' of a member of a pension plan under a defined benefit provision of the plan means the periods in respect of which lifetime retirement benefits are provided to the member under the provision".[2] The Applicant's own witness, Mr. Ali, in fact acknowledged that it meant service for which a pension benefit is given under a pension plan. We agree that the ITA definition provides a commonly-used definition of pensionable service.

We do not find any ambiguity in regards to the use of the term pensionable service under the PPG Plan text. We note that the Applicant did not offer an alternate

[2] *Income Tax Act*, Chapter 1 (5th Supp.), R.S.C. 1985, as amended, Regulation 8500(1).

construction of the term but tried to narrow its construction on the facts. In fact the Applicant's own witness provided a consistent construction with that put forward by the Superintendent.

26. We find that Duplate Restored Service did count as pensionable service under the Duplate Plan. We are of the view that no compelling evidence was adduced by the Applicant to support the Applicant's contention that Duplate Restored Service was not pensionable service under the Duplate Plan. It was pensionable service, and the term is broad enough to encompass Years of Service as defined under the Duplate Plan and Credited Service under the PPG Plan.

The pre-merger pension benefits for Restored Service Members were preserved under Articles 3.01, 3.02 and 5.01 of the PPG Plan and post-merger accrual followed the terms of the PPG Plan at merger. We find that given the definition of "pensionable service" as defined above under the *Income Tax Act*, its reasonable application to the PPG Plan text includes the Duplate Restored Service as pensionable service under the PPG pension formulae. Otherwise the term "pensionable service" in the PPG Plan formulae would have no reasonable meaning.

27. Even if the Tribunal were wrong in its interpretation of "pensionable service" and it was established that the term had some ambiguity, we still find that Duplate Restored Service is pensionable service under the Duplate Plan. The Duplate Plan clearly recognizes Duplate Restored Service as "Years of Service" for the purposes of the Non Contributory Pension Benefits. The pension formulae under the Duplate Plan based pension accrual on the member's Years of Service. It is entirely reasonable to equate "Years of Service" as "pensionable service" in this context while recognizing that a plan sponsor, if it chooses to do so, may by definition limit for pension accrual purposes certain periods of service. Duplate did so for example in applying the maximum pension accrual rule under the *Income Tax Act* and in not attributing Duplate Restored Service to its Basic Non-Contributory Pension formula. However, PPG did not similarly limit pensionable service in respect of its pension formulae under the PPG Plan when it merged with the Duplate Plan.

28. It was the Applicant's submission that even if Duplate Restored Service was pensionable service under the Duplate Plan, it was not intended to count towards the accrual of benefits under the PPG Regular Benefit formula.

In this event, the Applicant suggested that the Tribunal look first at the parties' objectives in interpreting the plan provisions. With respect, the Tribunal does not find it necessary to do so where, as in this case, the clear language of the plan provisions provide for a reasonable interpretation of their meaning and in our view produces a fair result. The Applicant referenced the case of *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co*[3]. for the proposition that intention is relevant. However we note that in that insurance case, the court stated:

[3] *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co*., (1979), 112 D.L.R. (3d) 49 (S.C.C.) at 58.

2007 ONFST 16 (CanLII)

> "Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties."

As noted above, the Applicant did not provide an alternative construction of the term "pensionable service". The plan terms were unilaterally drafted by PPG and we do not need to examine the intention of the parties (here meaning PPG and the plan members) to determine its meaning. The Restored Service Members had no input into the PPG Plan terms and did not receive copies of the PPG Plan text at time of merger. In fact, this Application is the result of efforts for almost two decades by at least one of those members who disputed the Applicant's position in respect of his Duplate Restored Service under the PPG Plan.

The Applicant submitted no evidence that the Duplate Restored Members were given written communication at date of merger about the PPG Plan terms, beyond the booklet and addendum referred to in paragraph 10(b) above, which booklet and addendum did not describe Duplate Restored Service, and the internal Duplate memorandum dated June 14, 1982. These facts were supported by both the testimony of Mr. Clements and of Mr. L. B. Boswell, both pensioners under the PPG Plan with Duplate Restored Service. It was Mr. Clements' undisputed testimony that employee meetings chaired by PPG Corporate Human Resource employees (Ms. Thiessen) in 1982 did not talk about Duplate Restored Service. Further it was not until 1987 that Mr. Clements received his revised annual statement that reflected the position that his Duplate Restored Service did not count under the PPG Plan for the Regular Benefits. In fact it didn't appear to count at all. If expectation or intent were relevant, we note that there was no evidence at the time of plan merger, that Duplate Restored Service would be "frozen" or applied only to the Alternative Benefit formula. Further the Applicant's only evidence as to PPG's intentions was Mr. Ali's testimony. We note that Mr. Ali indicated that he had had no direct discussions with PPG or the Restored Service Members, or in drafting the PPG Plan documents. Consequently we give no weight to his testimony on the issue of PPG's intentions or member expectations.

We accept Mr. Clements' assertions that he remained confused about the application of Duplate Restored Service under the PPG Plan. It was not until 1987 that it became clear that the regular benefit formula in the PPG Plan "will not apply to your restored salary service". Mr. Clements requested and received a copy of the PPG Plan text and Amendment 8 from PPG in 1999, although he did not receive any prior notice of Amendment 8.

29. Even if there were any ambiguity as to the application of Duplate Restored Service under the PPG Plan, in the absence of alternative constructions to the term pensionable service, we find that the doctrine of *contra proferentum* would apply. Any ambiguity in the meaning of "pensionable service" should therefore be constructed in the member's favour. The rule was stated by Estey J. in the Supreme Court of Canada decision in *McClelland and Stewart Ltd. v. Mutual Life Assurance*

2007 ONFST 16 (CanLII)

Co. Of Canada (1981) 2 S. C. R. 6, at page 15, and followed by the Ontario Supreme Court in *McCreight v. 146919 Canada Ltd.*[4], as follows:

"The principle of interpretation applies to contracts and other documents on the simple theory that any ambiguity in a term of a contract must be resolved against the author if the choice is between him and the other party to the contract who did not participate in the drafting."

The PPG Plan and related amendments were drafted by the Applicant and the interpretation *contra proferentem* should apply. Consequently we find that the term "pensionable service" under the PPG Plan includes Duplate Restored Service for purposes of both the Regular Benefit formula and the Alternate Benefit formula. If PPG had wanted to impose a different meaning it could have done so at time of merger. It did not. The result is neither an unrealistic one nor one that could not have been contemplated at the time of plan merger.

While the effect of the Alternate Benefit formula under the PPG Plan may be a flat rate benefit, it is not expressed as a flat rate benefit and is not equivalent to the contributory service formula under the Duplate Plan. As indicated, had PPG wanted to freeze Duplate Restored Service or otherwise limit the definition of Continuous Service and Credited Service under the PPG Plan to exclude Duplate Restored Service it could have done so.

The Applicant argued that the decision of the Nova Scotia Court of Appeal in the case of *White v. Halifax (Regional Municipality) Pension Committee*[5], supported its proposition that the PPG Plan should be read in its entirety and in context so as to limit the Restored Service Members from any entitlement to have superior benefits of their current pension plan applied to their former service. Effectively, the Applicant suggests that the Restored Service Members would get a "windfall" under this result and that result would be unreasonable.

In the *White* case, the applicants were members of the Halifax Regional Municipality ("HRM) pension plan, who claimed full credit for pre-1981 service for a former employer. The claim was in contract and estoppel. The HRM members claimed that the terms of the plan and/or the contents of an information and options package provided a contractual right to the benefit they sought. Further, the appellant argued that representations were made that they would get the benefit they claim. Unlike this case, in that case, there was no dispute that the appellant's years with a former employer (Dartmouth Transit Service or "DTS") counted as years of service in determining their benefits. The question was what percentage should be multiplied by the number of years of prior service.

In the *White* case, unlike this case, upon the initial merger of the employers the employees joined a pension plan having no previous pension plan with DTS. Several years later, the former DTS employees were allowed to "buy pension credit" for their

[4] McCreight v. 146919 Canada Ltd. (1991) O.J. No. 136, page 16.
[5] White v. Halifax (Regional Municipality) Pension Committee, (2007) N.S.J. No. 61 (NSCA).

2007 ONFST 16 (CanLII)

DTS service under a different pension formula, permitting them to receive two pensions at retirement: one for service with the Metropolitan Authority, and one for DTS service. When HRM was created, it became the employee of all the employees of the predecessor municipalities and the Metropolitan Authority, including the appellants.

When the new HRM pension plan was created, it was found by the courts to define "Credited service" to exclude DTS service. Under a later conversion option offered under the HRM plan, members could elect to convert benefits accrued under a Prior Plan. At issue was whether years of DTS service were benefits accrued under the prior plan which could be converted to the terms and provisions of the current plan. In the alternative the court considered whether the current plan and/or the information and options package and their selection of option 1 gave the HRM members (1) "...a contractual right to have their DTS service credited at the higher rate", and, (2) if not, did the information and options package make an 'unambiguous representation' that gives rise to an estoppel which prevents the pension committee from denying that the appellants are entitled to such a benefit?"

In the *White* case, the court, having noted that "much turns on the precise wording of various documents" entered, as we have done in this case, into a detailed review of the documents. It then considered the interpretation of the plan provisions to be premised on principles of contractual interpretation, from the perspective of what a reasonable party would understand from the conduct of the other. As discussed above, in this case the facts are quite different. The term "pensionable service" in the PPG Plan is not subject to competing alternate meanings and the PPG Plan terms make it clear that Duplate Restored Service was pensionable service and therefore constituted both Continuous Service and Credited Service under the pension formulae as those terms were defined. Unlike the *White* case, this was not a case of conversion of past defined benefits into a different formula, nor of reliance and estoppel on member communications. In this case, the facts turn on the clear meaning of the plan documents, which we have concluded yield a reasonable and fair result, not expectations. The member communications by PPG at the time of plan merger supported the view that PPG did not explicitly exclude Duplate Restored Service from its definitions of Continuous Service and Credited Service in calculating the Regular Benefit, although PPG could have done so in the 1982 PPG Resolution by explicitly freezing the past service benefit. It is therefore not necessary to consider the fairness of the result, which is not unreasonable and is predictable in its outcome.

In summary on Issue 1, we find that Duplate Restored Service should be recognized as pensionable service under the PPG Plan when the Duplate Canada Inc. Salaried Employees Pension Plan (the "Duplate Plan") was incorporated into the PPG Plan in 1982 for purposes of both the Regular Benefit and Alternate Benefit formulae.

2007 ONFST 16 (CanLII)

Issue 2: Is Amendment 8 to the PPG Plan void pursuant to Section 14 of the *Pension Benefits Act, Ontario*?

30. Given our findings on Issue 1, we find on the second issue, that Amendment 8 to the PPG Plan is void pursuant to Section 14 of the *Pension Benefits Act, Ontario*. Our reasons follow.

Amendment 8 does not treat Duplate Restored Service as Credited Service for the purpose of the 'Regular Benefit' only the "Alternate Benefit" formulae under Section 5.01 of the PPG Plan. This fact was not disputed by the Applicant. Therefore it was not, as the Applicant argued, a benefit improvement, but a reduction in accrued pension benefits. Amendment 8 was not actually signed until April 10, 1988 although the resolution was ostensibly authorised by the PPG Board of Directors on December 11, 1985 with retroactive effect to July 1, 1982.

Under Section 14(1)(a) and (b) of the *Pension Benefits Act, Ontario*, an amendment to a pension plan is void if the amendment purports to reduce,

> "(a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment; (or)
>
> (b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan".

On the facts of this case, we find that Amendment 8 is void under Section 14(1) of the *Pension Benefits Act, Ontario*.

2007 ONFST 16 (CanLII)

CONCLUSION

We find in favour of the Superintendent on both Issues 1 and 2. The Superintendent is ordered to proceed with the Notice of Proposal dated December 18, 2006 in revoking the registration of Amendment 8.

Dated at the City of Toronto this 26th day of November, 2007.

"F. Holden"
Florence A. Holden
Member of the Tribunal and Chair of the Panel

"S. Bharmal"
Shiraz Bharmal
Member of the Tribunal and of the Panel

"John Solursh"
John Solursh
Chair of the Tribunal and Member of the Panel

2007 ONFST 16 (CanLII)

Tab 11

FINANCIAL SERVICES TRIBUNAL

Citation: Consumers Packaging Inc. v. Ontario (Superintendent Financial Services), 2002 ONFST 26
Decision No. P0162-2001-2
Date: 2002/11/29

2002 ONFST 26 (CanLII)

IN THE MATTER OF the *Pension Benefits Act,* R. S. O. 1990, c. P.8, as amended by the *Financial Services Commission of Ontario Act*, 1997, c.28 (the "Act");

AND IN THE MATTER OF a Proposal by the Superintendent of Financial Services to refuse to approve a partial wind up report filed by Consumers Packaging Inc. on May 19, 2000 with respect to a partial wind up of the O-I Canada Corp. Pension Plan (formerly called the "Consumers Packaging Inc. Pension Plan II"), Registration No. 0998682 (the "Plan") as at May 7, 1997 and a proposal to refuse to register an amendment to such pension plan filed by Consumers Packaging Inc. on May 19, 2000, titled Amendment #2;

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

BETWEEN:

CONSUMERS PACKAGING INC., by its monitor, KPMG INC.,
On behalf of O-I CANADA CORP.
("the Company")

Applicant

- and –

SUPERINTENDENT OF FINANCIAL SERVICES OF ONTARIO
(the "Superintendent")

Respondent

- and –

UNITED STEELWORKERS OF AMERICA, LOCAL 203G
(the "Union")

Respondent

BEFORE:

Martha Milczynski
Chair of the Tribunal

David Wires
Member of the Tribunal

David Short
Member of the Tribunal

APPEARANCES:

For the Applicant:

Mary Picard
Barbara Grossman

For the Superintendent of Financial Services:

Deborah McPhail

For the United Steel Workers of America, Local 203G

Michael Mazzuca

HEARING HELD:

July 29 & 31, 2002
Toronto, Ontario

2002 ONFST 26 (CanLII)

REASONS

Introduction

Consumers Packaging Inc., by its monitor KPMG Inc., on behalf of O-I Canada Corp. (the "Company") is the Applicant in this proceeding before the Financial Services Tribunal (the "Tribunal") in respect of the Notice of Proposal dated April 20, 2001 (the "NOP") issued by the Superintendent of Financial Services (the "Superintendent"). O-I Canada Corp. purchased the assets of Consumers Packaging Inc., in August, 2001 – for ease of reference, unless the context requires otherwise, the reference to "Company" shall include both O-I Corp. and Consumers Packaging.

The Company is the administrator of the Consumers Packaging Inc. Pension Plan II (the "Pension Plan" or "Plan") whose hourly paid unionized members were represented by the Respondent, United Steel Workers of America Local 203G (the "Union"). The Superintendent was also a respondent in this hearing.

The NOP set out the Superintendent's refusal to:

(a) approve the partial wind-up report filed by the Company on May 19, 2000 (the "2000 Report"); and

(b) register an amendment to the Pension Plan dated May 18, 2000 (the "2000 Plan Amendment").

2002 ONFST 26 (CanLII)

The 2000 Report and 2000 Plan Amendment were prepared and filed with respect to the partial wind-up of the Pension Plan effective May 7, 1997 due to the Company's closure of its plant in Hamilton, Ontario.

At issue is whether the 2000 Plan Amendment is a permitted amendment under the *Pension Benefits Act* ("PBA" or "Act") or is void due to a plan amendment filed by the Company in 1997 that enhanced certain (ancillary) bridge benefits (the "1997 Plan Amendment") which the 2000 Plan Amendment sought to restrict or reduce. The terms of the Plan with either the 1997 or 2000 Plan Amendment will have a corresponding impact on the calculation of liabilities for the purposes of the partial wind-up report.

For the reasons set out below, the Tribunal affirms the Superintendent's NOP and finds:

(a) the 1997 Plan Amendment that enhanced the early retirement bridge benefit to be valid and affective; and

(b) the 2000 Plan Amendment void.

Facts

This proceeding has a rather complicated and lengthy factual history and context. The matter of the partial wind-up of the Plan arising out of the May 1997 plant closure in Hamilton, Ontario has been the subject of two earlier Notices of Proposal issued by the Superintendent. These Notices of Proposal, issued on April 30, 1999 addressed certain inadequacies that the Superintendent found with the first partial wind-up report the Company filed in respect of this partial wind-up (the "1997 Report"). In this respect, the chronology of events and the various filings made by the Company is important:

- Consumers Packaging Inc. ("Consumers") closed its plant in Hamilton, Ontario on or about May 7, 1997.

- Consumers declared a partial wind-up of the Pension Plan effective May 7, 1997 in respect of its employees affected by the plant closure.

- On July 16, 1997, Consumers' board of directors passed a resolution adopting an amendment to the Plan with effect to May 7, 1997 to provide certain enhanced bridge benefits to members who had at least 10 years of continuous service as well as 55 points calculated in age and years of service (the "1997 Plan Amendment" providing for the "Enhanced Bridge").

2002 ONFST 26 (CanLII)

The Company clearly planned ahead and prepared for the plant closure and partial wind-up of the Plan in an organized and comprehensive manner:

- The availability of the Enhanced Bridge was communicated to Plan members even before the amendment had been made – in February 1997, Consumers distributed written statements outlining the benefits that would be provided to those affected by the plant closure.

- In April 1997, representatives of Consumers and the Plan actuaries conducted meetings and presentations with Plan members. The presentation material clearly communicated the Enhanced Bridge.

- By letter dated February 28, 1997 to the Pension Commission of Ontario (the "PCO", and effective July 1, 1998 replaced by the Financial Services Commission of Ontario, ("FSCO")), Consumers submitted copies of the notices sent to Plan members in connection with the upcoming partial wind-up of the Plan effective May 7, 1997. The correspondence also requested approval under subsection 70 (3) of the PBA for the payment of pension benefits to all eligible members who elected to retire at any time on or after February 1, 1997.

- PCO approval was granted for the payment of pension benefits by letter dated April 15, 1997.

- Benefits commenced being paid out from the Plan that included the Enhanced Bridge.

- By cover letter dated December 22, 1997, the Plan actuaries on behalf of Consumers, filed among other things, a partial wind-up report (the "1997 Report") and a copy of the 1997 Plan Amendment giving effect to the partial wind-up and Enhanced Bridge.

- The PCO replied by letter dated April 29, 1998. Among other things, this letter:

  - requested a completed Form of Application ("Form 1.1") for the 1997 Plan Amendment giving effect to the Enhanced Bridge;

  - advised that the 1997 Plan Amendment and 1997 Report did not include plant closure benefits for the purposes of "grow in" under section 74 of the Act; and

  - gave notice that the Union was requesting that certain additional employees be included in the Pension Plan and partial wind-up report (these were replacement "call in" employees who were deemed by the Company to be ineligible for Plan membership).

- By letter dated May 20, 1998, the actuaries, on behalf of Consumers, filed the Form of Application for registration in respect of the 1997 Plan Amendment – two other applications for registration in respect of two other plan amendments were also included in this correspondence.

- The 1997 Plan Amendment was never registered by the Superintendent, the other two plan amendments were registered – the Superintendent also never issued a Notice of Proposal to refuse to register the 1997 Plan Amendment.

- On April 30, 1999, the Superintendent issued a Notice of Proposal to refuse to approve the 1997 Report on the grounds that:

  (a) it did not include the "call in" replacement employees; and

  (b) certain "grow in" benefits required under section 74 of the Act were not provided.

- A second Notice of Proposal was also issued by the Superintendent on April 30, 1999 to order Consumers to include the "call in" employees as members of the Plan.

2002 ONFST 26 (CanLII)

- Consumers requested hearings before the Tribunal in respect of each of the two Notices of Proposal.

- Each of the "grow in" and "call in" issues was resolved prior to any hearing commencing before the Tribunal. Consumers, the Superintendent and the Union reached a settlement regarding the "call in" issue in December 1999. Pursuant to the terms of the settlement, an Order was issued by the Tribunal on January 10, 2000 requiring Consumers to accept as members of the Plan, those replacement "call in" employees who met certain conditions of Plan eligibility.

- The hearing regarding the "grow in" issue was scheduled to be heard by the Tribunal on March 7, 8 and 9, 2000. On March 1, 2000, however, Consumers advised the Tribunal, the Superintendent and the Union that it was withdrawing its request for hearing.

- On May 19, 2000, Consumers filed the 2000 Report and 2000 Plan Amendment. The 2000 Plan Amendment stated that the 1997 Report and the 1997 Plan Amendment "are of no force and effect, and are hereby revoked and rescinded". The accompanying letter from the Plan actuary stated that the 1997 Report and the 1997 Plan Amendment were of "no effect" and explained that the 2000 Report and related 2000 Plan Amendment did not provide the Enhanced Bridge.

- The 2000 Plan Amendment sought to revoke or rescind the Enhanced Bridge by restricting eligibility to those members with 10 years of continuous service, 55 points calculated in age and service **and** who had attained the age of 60 prior to commencing payment of his or her benefit. The 1997 Plan Amendment did not require the attainment of the age of 60 for receipt of the Enhanced Bridge.

- The cover letter referred to above from the Plan actuary that filed the 2000 Report and 2000 Plan Amendment stated further as follows:

> "In the 1997 Report, the Company voluntarily proposed to provide enhanced bridge benefits in excess of the requirements of the Act to all Unionized members with 55 points, who had completed 10 years of Continuous Service. The enclosed report does not include such enhancement.

2002 ONFST 26 (CanLII)

The following comments are intended to assist you in understanding the Company's position regarding this issue.

• • •

Unfortunately, as a result of the additional costs associated with "call in" and "grow in to plant closure" provisions, and given its fiduciary responsibility to ongoing Plan members, the Company can no longer in good faith voluntarily provide this bridge enhancement. Accordingly, such enhancement is no longer proposed. It is not included in the benefits and commuted values contained in the enclosed report.

For those already receiving bridge enhancements to which they are no longer entitled, for purposes of the enclosed report, payment of the bridge benefit has been assumed to continue up to and including payments due in the month of September 2000. The Company is currently in the process of preparing communication to affected members in this regard."

2002 ONFST 26 (CanLII)

- Following the filing of the 2000 Report and the 2000 Plan Amendment, Consumers distributed notices dated June 30, 2000 to members of the Plan affected by the partial wind-up informing them in general terms of the changes that would be made to their pension benefits pursuant to the 2000 Report. Members who would have been entitled to the Enhanced Bridge under the 1997 Report were told that it would not be provided. Subsequently, however, Consumers informed those members by letter dated August 21, 2000, that notwithstanding the June 30, 2000 letter, their Enhanced Bridge would be paid, "until such time as this issue is resolved with FSCO". Members who have attained the necessary eligibility requirements under the 1997 Plan Amendment have therefore begun to receive, and are still receiving, the Enhanced Bridge.

- On April 20, 2001, the Superintendent issued the NOP on the grounds that the 2000 Report calculated the commuted values for Plan members affected by the plant closure and partial wind-up on the basis of the 2000 Plan Amendment and not the 1997 Plan Amendment.

- On May 17, 2001, the Company requested a hearing before the Tribunal regarding the NOP.

Consumers Packaging Insolvency And The Sale To O-I Canada Corp.

- On May 23, 2001, the Ontario Superior Court of Justice issued an initial Order in respect of Consumers Packaging Inc. pursuant to the *Companies' Creditors Arrangement Act*. The Order appointed KPMG Inc. as "monitor" of the property and to conduct the business of Consumers Packaging Inc.

- On August 31, 2001, the Ontario Superior Court of Justice approved of a sale of certain assets of Consumers Packaging Inc. to a company then known as "3058888 Nova Scotia Corporation", which company is now known as O-I Canada Corp. Pursuant to the sale, the Plan was assigned to O-I Canada Corp.

- By letter dated November 28, 2001, O-I Canada Corp. wrote to counsel to the Superintendent to confirm that O-I Canada Corp. had assumed the rights, obligations and liabilities of Consumers Packaging Inc. regarding the Plan.

2002 ONFST 26 (CanLII)

Issues

The Superintendent issued the NOP on the grounds that the 1997 Plan Amendment was valid under section 13 and subsection 19 (3) (b) of the PBA, and that the 2000 Plan Amendment was void pursuant to subsection 14 (1) (c) of the PBA. It was the Superintendent's conclusion that the 2000 Plan Amendment was void because it sought to reduce the amount of the commuted value of the Enhanced Bridge, an ancillary benefit provided by the Plan for which a member or former member had met all eligibility requirements under the Plan necessary to exercise the right to receive payment of the benefit

The essential issue is therefore, whether in the circumstances of this case, having filed and implemented the 1997 Plan Amendment, the Company has irrevocably bound itself to provide the Enhanced Bridge, or whether because the 1997 Plan Amendment was never registered by the Superintendent, the Company can effectively change its mind due to subsequent cost considerations and provide the more limited bridge benefit proposed in the 2000 Plan Amendment.

The determination of this issue requires the following questions to be answered:

- When is an amendment to a pension plan effective under the *Pension Benefits Act*?

- Does an amendment need to be registered by the Superintendent to be effective?

- What is the legal effect and status under the PBA of each of the 1997 and 2000 Plan Amendments?

2002 ONFST 26 (CanLII)

Pension Benefits Act

Counsel for the Company submitted at the hearing, and on a motion to compel answers to interrogatories brought prior to the hearing, that the provisions of the *Pension Benefits Act* were ambiguous. The Company sought to rely on evidence of the Superintendent's past practice to establish that amendments filed concurrently with wind-up reports could on occasion be amended or withdrawn. It was submitted that this evidence was in aid of interpreting the PBA such that it provided for plan amendments to be binding and effective only on registration, meaning that pending registration, an amendment could be withdrawn – even if implemented.

The Tribunal finds that the provisions of the *Pension Benefits Act* are clear, express and unambiguous and on that basis denied the motion. Whatever the Superintendent's past or current practice might be is not relevant. The statute is clear on the effect of filing an amendment and provides for it becoming effective, with express provision in the Act for subsequent registration.

The filing and implementation of the 1997 Plan Amendment, is not a case of error in drafting or a need for clarification of a plan amendment – this is a case of an ancillary benefit improvement that was promised, made, filed and implemented. The Enhanced Bridge became a part of the Plan effective May 7, 1997.

Pension Benefits Act – Excerpts

12. Application for registration of amendment

(1) [Application for registration of amendment]

The administrator of a pension plan shall apply to the Superintendent, within sixty days after the date on which the pension plan is amended, for registration of the amendment.

(2) Requirements for registration

An application for registration shall be made by paying the fee established by the Minister and filing, (1997, c. 28, s. 192(1).)

(a) a certified copy of the amending document;

(b) certified copies of any other prescribed documents; (1997, c. 28, s. 192(2).)

(b.1) a certification in a form approved by the Superintendent and signed by the administrator of the pension plan in which the administrator attests that the amendment complies with this Act and the regulations; and (1997, c. 28, s. 192(2).)

(c) any other prescribed information.

13. When amendment effective

(1) [When amendment effective]

An amendment to a pension plan is not effective until the administrator of the plan files an application for registration of the amendment and the application meets the requirements of section 12. (1997, c. 28, s. 193.)

14. Reduction of benefits

(1) [Reduction of benefits]

An amendment to a pension plan is void if the amendment purports to reduce,

(a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;

(b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or

(c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

(2) Application of subs. (1)

Subsection (1) does not apply in respect of a multi-employer pension plan established pursuant to a collective agreement or a trust agreement.

(3) Idem

Subsection (1) does not apply in respect of a pension plan that provides defined benefits if the obligation of the employer to contribute to the pension fund is limited to a fixed amount set out in a collective agreement.

17. Issuance of notice of registration

The Superintendent shall issue a notice of registration for each amendment to a pension plan registered under this Act.

18. Refusal or revocation of registration

(1) [Refusal or revocation of registration]

2002 ONFST 26 (CanLII)

The Superintendent may,

. . .

(d) refuse to register an amendment to a pension plan if the amendment is void or if the pension plan with the amendment would cease to comply with this Act and the regulations;

(e) revoke the registration of an amendment that does not comply with this Act and the regulations.

(4) Idem

A refusal of registration of an amendment to a pension plan or the revocation of an amendment to a pension plan operates to terminate the amendment as of the date specified by the Superintendent.

19. Duty of administrator

(3) Idem

The administrator of a pension plan shall ensure that the pension plan and the pension fund are administered in accordance with,

. . .

(b) the filed documents in respect of an application for registration of an amendment to the pension plan, if the application complies with this Act and the regulations and the amendment is not void under this Act.

. . .

(5) Idem, amendment

The administrator of a pension plan may administer or permit administration of the pension plan and the pension fund in accordance with an amendment pending registration or refusal of registration of the amendment.

It is clear from the *PBA* provisions above that the administrator of a pension plan has an obligation to administer a pension plan in accordance with filed documents and can implement or make effective plan amendments prior to the issuance of a Notice of Registration by the Superintendent. The Tribunal agrees with the Superintendent's and Union's submission that there is "no magic" in registration. Provided that the amendment is not void or contrary to the *PBA*, a plan amendment can be implemented and is thereby binding and enforceable pending registration. Indeed, there is no timeframe in the PBA within which the Superintendent must register or refuse to register an amendment.

2002 ONFST 26 (CanLII)

In this case, the Company promised and implemented the Enhanced Bridge even before filing an application to register the 1997 Plan Amendment, clearly intending it to form part of the Pension Plan.

The Company commenced payment of the Enhanced Bridge then filed the form of application for the registration of the 1997 Plan Amendment and therein certified that the amendment complied with the requirements of the *Act*. The Company paid the Enhanced Bridge and included it in the calculation of liabilities for the purposes of the 1997 Report, which for other reasons, was not approved. The Company cured those deficiencies but then sought to revoke the Enhanced Bridge.

The Tribunal is satisfied that the application the Company filed for the registration of the 1997 Plan Amendment met the requirements of Section 12 of the *Act* and that the Enhanced Bridge now forms part of the terms of the Pension Plan.

There was some evidence that the Company filed the application beyond the 60 days after the date on which the Amendment was made and did not request a filing extension. The Tribunal finds this to have been a technical breach cured in any event by the Superintendent's approval for the Company to pay benefits out of the Plan on April 15, 1997, and on the basis of the Superintendent not having issued a Notice of Proposal to refuse registration of the 1997 Plan Amendment following the filing of the board of directors' resolution in December, 1997 and the form of registration (Form 1.1) in May, 1998.

The 1997 Plan Amendment is therefore a valid and binding Plan provision pursuant to Section 13(1), 19(3)(b) and 19(5) of the *PBA*.

With respect to the 2000 Plan Amendment, to the extent that it purports to restrict eligibility to or change the terms of the Enhanced Bridge provided by the Plan, it is void by virtue of section 14(1)(c) of the *Act*. The 2000 Plan Amendment would reduce the amount or commuted value of an ancillary benefit that is provided by the Plan, as amended by the 1997 Plan Amendment for those members and former members who have met the amended Plan's eligibility requirements necessary to exercise the right to receive payment of the benefit.

2002 ONFST 26 (CanLII)

Doctrine of Legitimate Expectation

The Company's motion to compel answers to interrogatories relating to the Superintendent's past practice, in addition to being brought to aid in statutory interpretation, was also to argue that the doctrine of legitimate expectation applied to the Superintendent and the disposition of this hearing.

The Tribunal denied the Company's motion, but permitted the evidence at the hearing of Mr. Kevin Aseltine, an experienced actuary and Mr. Sheldon Wayne an experienced pension consultant and lawyer. This evidence did not, however, address whether or not Consumers Packaging Inc. had any expectation or understanding regarding the 1997 Plan Amendment and whether it could be withdrawn a number of years after its filing for registration and after its implementation. The evidence was more general and anecdotal in nature. In any event, it is clear that whatever reasonable expectation the Company might have had in relation to the Superintendent's review and approval of its partial wind-up report and plan amendments, the Company's remedies are procedural and cannot affect the substantive rights of third parties.

The rights of pension plan members affected by a partial wind-up cannot be made subject to the expectations of other parties. (See: *Monsanto Canada Inc. v. Superintendent of Financial Services* (2001), 198 D.L.R. (4th) 109 (Ont. Div. Ct.) affirmed by the Court of Appeal for Ontario – November 22, 2002; *Libbey Canada Inc. v. The Crown in Right of Ontario (Ministry of Labour) et al.* (1999), 42 O.R. (3d) 417 (Ont. C.A.); Ahani v. Canada (Min. of Citizenship and Culture), [2002] O.J. No. 431 (C.A.).

From time to time parties argue as they did in this case that the absence of a timely precise response to submissions made to FSCO or the practice of FSCO in other cases creates expectations that somehow accrue into substantive rights or obligations independent of the impact on the rights of members of a plan. Applicants ask for extensive discovery of the Commission's files. The Act and regulations and plan terms define the rights of the parties and they cannot be amended by FSCO administrative practices. If parties are concerned about delay, equivocation or lack of clarity in responses to their submissions, they have their administrative law remedies. Those remedies do not include declarations by the Tribunal that substantive rights that affect the interests of plan members were created or that unrepresented parties had their rights compromised.

2002 ONFST 26 (CanLII)

The Tribunal also rejects the assertion that the Company was denied procedural fairness or natural justice before the Superintendent. Through its actuaries and advisors, the Company anticipated the concerns the Superintendent would have with the 2000 Plan Amendment and Report, and made submissions together with the filings. The Superintendent's NOP is in any event notice of a proposed or intended decision or order and the matter of whether the NOP should be affirmed has also had a full hearing before the Tribunal.

2002 ONFST 26 (CanLII)

Company's Argument for Alternative Remedy

The Company argues in the alternative that the application of the 1997 Plan Amendment should be restricted to those members who qualified for the Enhanced Bridge as at May 18, 2000, the day that the 2000 Plan Amendment was approved by the Consumers Packaging Inc. board of directors.

The rights of the members of the Plan affected by the partial wind-up were, however, crystallized as at the effective date of the wind-up: May 7, 1997. All of the affected members' pension benefits and any other benefits and entitlements are frozen as at that date. This necessarily includes the Enhanced Bridge provided by the 1997 Plan Amendment. Those benefits cannot be impaired or reduced in any way. To do otherwise would ignore the statutory scheme of minimum pension standards, and the "special solicitude" certain provisions of the Act give to pension plan members who have lost their employment in the precise circumstances presented in this case (see *Firestone Canada Inc. v. Pension Commission of Ontario* (1990), 1 O.R. (3d) 122 (Ont. C.A.).

Order

Accordingly, having found the 1997 Plan Amendment establishing the Enhanced Bridge to be valid, effective and binding upon the Company (the Enhanced Bridge forming part of the Plan), the Tribunal directs the Superintendent to carry out the Notice of Proposal dated April 20, 2001.

The Tribunal remains seized with respect to the matter of costs in the event any party wishes to make a submission.

DATED at Toronto this 29th day of November, 2002.

"M. Milczynski"
Martha Milczynski
Chair, Financial Services Tribunal

"D. Wires"
David Wires
Member of the Tribunal

"David A. Short"
David Short
Member of the Tribunal

2002 ONFST 26 (CanLII)

Tab 12

FINANCIAL SERVICES TRIBUNAL

Citation: Royal Ontario Museum Curatorial Association v. Ontario (Superintendent Financial Services),
2013 ONFST 9
Decision No. P0508-2012-1
Date: 2013/08/15

2013 ONFST 9 (CanLII)

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P.8, and the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28;

AND IN THE MATTER OF a Notice of Intended Decision of the Superintendent of Financial Services to Refuse to Make an Order under sections 87(2)(a) and 18(1)(e) of the Act relating to The Royal Ontario Museum Pension Plan, Registration Number 0469866;

AND IN THE MATTER OF a Hearing in accordance with subsection 89(8) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8.

B E T W E E N:

THE ROYAL ONTARIO MUSEUM CURATORIAL ASSOCIATION

APPLICANT

and

SUPERINTENDENT OF FINANCIAL SERVICES

RESPONDENT

and

THE ROYAL ONTARIO MUSEUM, ONTARIO PUBLIC SERVICE EMPLOYEES UNION and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2

ADDED PARTIES

BEFORE:

Elizabeth Shilton
Vice-Chair of the Tribunal and Chair of the Panel

Patrick Longhurst
Member of the Tribunal and Member of the Panel

David Short
Member of the Tribunal and Member of the Panel

APPEARANCES:

For the Applicant – Darrell Brown
For the Superintendent of Financial Services – Deborah McPhail
For the Royal Ontario Museum – Dan Shields and Kathryn Bush
For the Ontario Public Service Employees Union – Susan Ursel
For the Service Employees International Union, Local 2 – Mary Hart

DATE HEARD:

May 22, 2013

2013 ONFST 9 (CanLII)

REASONS FOR DECISION

I. INTRODUCTION

[1] The Applicant The Royal Ontario Museum Curatorial Association ("ROMCA") is a trade union representing approximately 35 curatorial staff and librarians employed by the Royal Ontario Museum ("ROM"). The ROM provides a defined benefit pension plan for its employees, The Royal Ontario Museum Pension Plan (the "Plan"), with a benefit formula based on service and average earnings.

[2] Effective January 1, 2010, the ROM amended the Plan to change the basis on which average earnings would be calculated for purposes of determining retirement benefits. The Applicant challenged that amendment (the "Challenged Amendment") before the Superintendent of Financial Services (the "Superintendent"), alleging that it reduces the amount of the pension benefit accrued under the Plan with respect to employment before its effective date, contrary to s. 14(1)(a) of the *Pension Benefits Act* (the "*PBA*"). It sought an order that the Challenged Amendment violated s.14(1)(a) and could not be applied to service prior to the effective date of that amendment.

[3] On August 8, 2012, the Superintendent issued a Notice of Intended Decision ("NOID") to refuse to make such an order. Pursuant to s.89(8) of the *PBA*, the Applicant filed a Request for Hearing before this Tribunal, seeking a determination that the Challenged Amendment violates s.14(1)(a).

[4] This case raises the important question of the nature and scope of the limitations placed by s.14(1)(a) of the *PBA* on amendments to defined benefit pension plans. Section 14(1)(a) prohibits plan amendments which reduce the amount of pension benefits which have already accrued to plan members on the basis of service accumulated as of the effective date of the amendment. The parties disagree on what those benefits are, and how (or when) they should be quantified. This case requires us to determine whether s.14(1)(a) protects the amount of pension that would be generated by accumulated service *at the time the plan is amended,* or whether it protects the amount that service would have been generated *at the time of retirement* if the plan has not been amended. As we shall see, those two amounts may be significantly different.

[5] For the reasons that follow, we have determined that s.14(1)(a) of the *PBA* protects only the amount of pension that past service would generate at the time the plan is amended. Since the Challenged Amendment does not reduce that amount, it does not violate the statute. We have also determined that the Plan itself permits amendments of this type. Accordingly, we dismiss the Application.

[6] We recognize that this conclusion may disappoint the expectations of employees who are members of defined benefit plans with benefit formulae based on best or final average earnings. Such employees may believe that if they remain in the employer's service until they reach retirement, they will be entitled to a pension based on the language of the pension plan in place when they were first hired. In fact, the protection offered by Ontario pension law does not fully protect such expectations. For good or ill, the legislature has chosen to offer only limited protection against plan amendments, prohibiting only those which reduce accrued benefits, and not those which relate to benefits not yet accrued. Many if not most employers in Ontario have drafted the plan language to take advantage of this statutory "permission" to "change the pension deal". We see s.14(1)(a) as a legislative compromise which holds employers to the pension liabilities they have already incurred, but permits them to contain the expansion of future pension liabilities. Our interpretation of s.14(1)(a) reflects that compromise.

II. THE FACTS

[7] ROMCA is the Applicant in this matter. Two other trade unions also represent ROM employees who are members of the Plan: the Ontario Public Service Employees Union and its Local 543 ("OPSEU"), representing approximately 225 full-time and 160 part-time administrative, support and technical employees, and the Service Employees International Union, Local 2 ("SEIU"), representing approximately 80 security, maintenance and housekeeping staff.

[8] OPSEU and SEIU also oppose the Challenged Amendment. They are not applicants, however, because they chose to pursue their challenges through the grievance procedure under their respective collective agreements with the ROM rather than through the procedures provided under the *PBA*. Both grievances were referred to arbitration, and both were dismissed: the SEIU grievance by Arbitrator Stephen Raymond on June 22, 2011, and the OPSEU grievance by Arbitrator Maureen Saltman on January 18, 2013. Both arbitrators held that the Challenged Amendment did not violate the collective agreements.

[9] At a pre-hearing conference held on November 27, 2012, OPSEU and SEIU applied for and were granted status as Added Parties in this matter. They participated fully in the hearing, and support the position of the Applicant. Reference to the Applicant's arguments in this decision should be understood to include the arguments of the other two unions except where the context dictates otherwise.

[10] The ROM, which is the employer and Plan administrator, also applied for and was granted party status on November 27, 2012. The ROM supports the position of the respondent Superintendent. We refer to the ROM and the Superintendent jointly as the Responding Parties.

[11] The parties' evidence was presented almost entirely through a detailed Agreed Statement of Fact ("ASF") and accompanying Agreed Book of Documents ("ABD"). That evidence was supplemented by expert reports from actuaries Jill Wagman (filed by the ROM), and Marcus

2013 ONFST 9 (CanLII)

Robertson (filed jointly by the Applicant, OPSEU and SEIU). In addition, the ROM filed a report from Paul Forestell, an actuary employed by the firm of Mercer (Canada) Limited ("Mercer"), the Plan's actuary. It was not clear whether Mr. Forestell's report was tendered as expert evidence; as an employee of the Plan actuary, he would not normally be qualified as an expert witness. Nothing turns on the characterization of his evidence, however, since his report is addressed primarily to issues of fact rather than opinion. The parties agreed that the actuarial evidence would be filed by way of written reports without requiring the actuaries to testify in person or be cross-examined on their reports, and the Tribunal has admitted it on that basis. No oral evidence was called.

2013 ONFST 9 (CanLII)

The General Evidence

[12] This Application challenges the validity of an amendment to the formula for calculating the basic defined benefit under the Plan.

[13] Section XIII(1) of the Plan permits the Board of Trustees of the ROM to amend the Plan, with certain limitations. The full text of Section XIII(1) is set out in the Appendix. The relevant portions read as follows:

> Although the Plan is intended to be permanent and to continue indefinitely, the Employer may, at any time, amend the Plan by resolution of the Board. No such amendment shall:
>
> ...
>
> > (b) reduce accrued benefits except upon termination of the Plan when, due to insufficient funds, a reduction in benefits is authorized by a federal or provincial jurisdiction administering a Pension Benefits Act or by the Canada Revenue Agency;
>
> ...
>
> Notwithstanding the above, the Employer may retroactively amend the Plan to the extent necessary to register it under the appropriate provisions of the Income Tax Act.

[14] Prior to the effective date of the Challenged Amendment, Sections I(16) and I(17) of the Plan defined the earnings base upon which member benefits were calculated. The relevant provisions are set out in the Appendix under the heading "Pre-Amendment Provisions of the Plan". The Plan generally provided that benefits would be calculated according to a Final Average Earnings ("FAE") formula based on the Plan member's best three consecutive years of earnings prior to retirement. A percentage of these earnings is then multiplied by years of accumulated service. In this decision, we call this benefit formula FAE3, or the "Old Formula".

[15] During 2008, the ROM became concerned about the deteriorating financial position of the Plan and sought advice from Mercer, the Plan actuary. In December of 2008, Mercer provided a document to the ROM which included a chart headed "ROM Pension Plan Provisions Relative to Market Practices" (ABD, Tab 7). The chart compared various benefit provisions of the ROM Plan to other similar defined benefit plans. It showed that 27% of such plans had an FAE3 formula, and 73% had less generous formulae which averaged best earnings over 5 years ("FAE5"). The document also included a chart headed "Royal Ontario Museum Pension Plan: Impact of Potential Plan Changes on Current Service Cost", which estimated that moving from the existing FAE3 formula to an FAE5 formula in the Plan would save $72,000 annually in

current service costs. A note on the chart referring to this change indicates: "May also be able to phase in to a 5-year salary averaging for past service". No cost saving figure was provided relating to past service at this time.

[16] In January 2009, Mercer provided additional materials to the ROM's Pension Committee (an employer-appointed committee constituted under the Plan). This material included a revised summary chart of the impact of potential plan changes on current service costs, which estimated that a change from FAE3 to FAE5 would produce $57,000 annual savings in current service costs. It also included information on the "Impact of Move to 5-Year Averaging for Past Service", which estimated that if an FAE5 formula were applied to past service (i.e. service accumulated before the effective date of the amendment), the Plan's going concern and accounting liabilities would decrease by $834,000, its pension expense would decrease by $117,000 and its solvency deficiency would decrease by $900,000 over 2-7 years following the effective date of a change (ABD, Tab 9, attachments to emails dated January 14 and January 15, 2009).

[17] By email dated May 5, 2009 (ABD, Tab 11), the ROM advised employee groups of the Plan changes that senior management were proposing to recommend to the Pension Committee. These recommendations included changing the earnings base from FAE3 to FAE5. This proposed change was described in the communication as follows:

> Change the salary/YMPE averaging to five years from three years (In order not to reduce accrued pensions, benefits will be based on the greater of a 3 year average earnings frozen at Jan.1, 2010, and the ultimate 5 year average earnings at the date of retirement).

[18] On May 26, 2009, the Pension Committee met to consider these recommendations on Plan changes. By email dated June 2, 2009, the ROM reported to employee groups that the Pension Committee had decided to recommend to the ROM board a change in the earnings base from FAE3 to FAE5. On June 23, 2009, ROM met with employee groups to continue discussions on member concerns and to answer questions.

[19] On August 12, 2009, ROM sent an email to Mercer advising that the Applicant ROMCA was claiming that the proposed change from FAE3 to FAE5 violated both the *PBA* and the collective agreement because it reduced "a previously agreed benefit". The email indicated that ROMCA was proposing a blended final average earnings formula ("Blended Formula") in which benefits for past service would continue to be calculated at the time of retirement on the basis of the Old Formula and the proposed FAE5 formula would be applied only to service after the effective date of the Challenged Amendment. The email from the ROM to Mercer states: "I know this doesn't provide any savings to the Museum so I was clear with them that this was a conscious decision on our part. However, they asked if we (meaning Mercer) could provide an analysis using actual salaries" (ABD, Tab 13).

[20] In a September 3, 2009 email, Mercer provided the requested analysis for both ROMCA and OPSEU members. The analysis compared pensions that could be expected by the average member under (1) the Old Formula; (2) the proposed amendment; and (3) ROMCA's proposed Blended Formula. Mercer estimated that the average ROMCA member retiring at age 65 would expect to receive a retirement pension of (1) $52,820 using the Old Formula for all service; (2)

2013 ONFST 9 (CanLII)

$51,311 using the formula under the proposed amendment; and (3) $52,300 using ROMCA's Blended Formula (ABD, Tab 14). (The average ROMCA member portrayed in this analysis was a curator aged 55 with 19 years of pre-2010 service and a 2010 salary of $88,561, retiring at age 65).

[21] As we understand it, (1) reflects the retirement pension the average Plan member would have expected to receive if ROM had made no amendment to the benefit formula; (2) reflects the outcome under the Challenged Amendment (and therefore reflects the position of Responding Parties before this Tribunal), and (3) reflects the position of the Applicant and the other unions before this Tribunal.

[22] From this document, it is evident that on average the Challenged Amendment reduces the annual pension amount that can be anticipated by the average ROMCA Plan member by $1509 overall (the difference between (1) and (2)). It is also evident that only *part* of that reduction relates to the impact of the amendment on *future* service; a significant amount of it (close to $1000, being the difference between (3) and (2)) reflects an anticipated reduction in the amount of pension that would be generated by *past* service.

[23] In the September 3 email, Mercer advised that "for both [ie ROMCA and OPSEU] typical members, the FAE5 becomes greater than the FAE3 in the second year". In this context, FAE3 refers to an FAE3 "frozen" as at December 31, 2009. Once FAE5 becomes greater than the frozen FAE3, FAE3 will become irrelevant for purposes of calculating pension.

[24] In that same email, Mercer also advised that if Plan members "would like to retain FAE3 on their past service" they would have to pay for it through increased contributions.

[25] On October 20, 2009, the ROM communicated the results of the Mercer analysis described above to the Applicant via email. The ROM also advised that it was not prepared to consider the Blended Formula (presumably even if the members were prepared to make increased contributions to pay for it) because it would increase the long term risk to the Plan (ABD, Tab 15).

[26] On November 2, 2009, the ROM gave formal notice of Plan amendment to all active members of the Plan and to the unions representing employees. By Resolution of the Board of Trustees of the ROM made December 10, 2009, the Plan was amended effective January 1, 2010. The Challenged Amendment was duly filed with FSCO, and registered on January 13, 2010.

[27] The Challenged Amendment made the change to the earnings base of which the ROM had previously advised Plan members, redefining the earnings base for retirement pensions in Section I, and making corresponding changes to the formulae used to calculate the amount of the pension benefits in Section V of the Plan. The relevant portions of the text can be found in the Appendix under the heading "Relevant Provisions of the Challenged Amendment". The effect of the change was that:

a. For new service (i.e. service accumulated from January 1, 2010), pension benefits would be calculated based on FAE5 (the "New Formula");

2013 ONFST 9 (CanLII)

b. For past service (ie service accumulated prior to January 1, 2010), pension benefits would be calculated according to (i) the Old Formula based on salary data frozen as at December 31, 2009, or (ii) the New Formula based on salary data on retirement or other termination from the Plan, whichever yielded the greater amount.

[28] On December 16, 2009, the Applicant's counsel wrote to the Superintendent seeking an order that the Challenged Amendment violated s.14(1)(a) of the *PBA* and should not be applied to past service. On August 12, 2010, the ROM responded to that request through its pension consultant, Mercer. By correspondence dated October 8, 2010, FSCO invited further submissions from both the Applicant and the ROM relating to the decision of the Alberta Court of Appeal in *Halliburton Group Canada Inc. v. Alberta*, 2010 ABCA 254 [*Halliburton*]. Both provided additional submissions, dated October 14, 2010 and October 26, 2010 respectively.

[29] On August 8, 2012, the Deputy Superintendent issued a NOID in which he indicated his intention to refuse to make the order requested by the Applicant. In para. 12 of the NOID, he gave the following reasons:

> The Amendment preserves the highest average salary accrued under the terms of the Plan prior to the effective date of the Amendment. The change in the way pension benefits are calculated applies only to earnings after the effective date of the Amendment. Future earnings are contingent events that do not form part of the amount of the commuted value of a pension benefit that has accrued as at the effective date of an amendment.

The Actuarial Evidence

[30] The ROM's expert actuary, Jill Wagman, FSA, FCIA, is currently the Managing Principal at Eckler Ltd.. Ms Wagman's report addressed two issues: (1) whether from an actuarial perspective the Challenged Amendment reduces the amount or the commuted value of pension benefits accrued prior to the effective date of the amendment; and (2) the effect of the Challenged Amendment.

[31] In Ms Wagman's opinion, the amendment does not reduce, from an actuarial perspective, the amount of pension benefit accrued under the Plan with respect to employment before the effective date of the amendment" (Wagman Expert Report, p.8).

[32] The essence of her evidence was that "[a]s understood by actuaries, ... the amount of pension accrued is ... a known amount that can be calculated at any point in time and does not require assumptions or estimations to be made in its calculation". In her opinion, the calculation uses earnings and service as of the date the calculation is made; calculations of accrued pension amounts do not include either future service or future salary projections (Wagman Expert Report, p.7).

[33] According to her evidence, for purposes of applying the Challenged Amendment, she testified that an actuary would calculate the amount of pension which had accrued to each Plan member as of the effective date of the amendment: i.e. as of January 1, 2010. In her opinion:

2013 ONFST 9 (CanLII)

Under the ROM Plan, the amount of the pension benefit accrued at any given date is equal to an amount determined by the formula described in Section V of the Plan, calculated using the member's Best Average Earnings and Credited Service as at the date of the calculation (Wagman Expert Report, p.7).

[34] Ms Wagman distinguished the calculation of *accrued pension amounts* from what she saw as a very different calculation, the calculation of *projected pension benefits*. Her report stated:

> [A] member's projected pension benefit is a hypothetical calculation of a member's estimated pension amount at a future date, based on assumptions including estimated number of years of future service credited under the plan and future changes in pensionable earnings. A member's projected pension is calculated by an actuary when conducting a going-concern valuation for funding purposes, using a projected benefit cost method, a method typically used in pension plans where the benefit is salary related (Wagman Expert Report, p.9).

[35] She acknowledged that "[o]ccasionally, a member's projected pension benefit is also calculated and included on their annual pension statement to illustrate what they may be entitled to receive upon retirement...". Even for this purpose, however, her evidence was that "these projected pension amounts generally do not assume any future growth rate in pensionable earnings. That is, only additional Credited Service is considered in the projection". She also acknowledged that actuaries take account of projected earnings when they conduct going-concern plan valuations for funding purposes. Calculations of this type are distinct from calculations of accrued pensions, however, which do not include such hypothetical amounts (Wagman Expert Report, p.9).

[36] In view of the consistent actuarial practice to which she testified, Ms Wagman expressed the opinion that the implications of a finding in favour of the Applicant would be "immense" for plan funding. Under the heading "Implications", her report expressed concerns that "virtually all actuarial valuations of defined benefit pension plans would need to be re-determined, with the effect of significantly increasing the plan's solvency liabilities and funding requirements, where there is a solvency deficiency" (Wagman Expert Report, p.10).

[37] The report of Paul Forestell, FSA, FCIA, also filed by the ROM, was directed towards "common practice as well as Mercer (Canada) Limited's typical practice with respect to plan design changes to manage cost in defined benefit plans" (Forestell Report, p.1). His report stated that:

> In determining if an amendment meets the test of PBA, section14(1)(a), it is Mercer and industry practice to use the member's service and earnings as of the effective date of the amendment to determine if the accrued benefit and commuted value of the pension for an affected member is reduced (Forestell Report, para. 2.03).

[38] Like Ms Wagman, he testified that:

> It is accepted actuarial practice that a member's accrued benefit at any particular date is based on the plan formula, the member's service and the member's earnings as of the date

2013 ONFST 9 (CanLII)

of the calculation. No assumptions are needed in order to determine the accrued pension as of any particular date (Forestell Report, para. 2.09).

[39] In response to these reports, the Applicant, together with OPSEU and SEIU, filed an expert report from actuary Marcus Robertson, FSA, FCIA. After reviewing both reports filed by the ROM, Mr. Robertson stated in his report: "I do not have concerns about the information provided or the claims made in the Mercer [i.e. Forestell] Report" (Robertson Report, p.2). He also indicated that he had no concerns about Ms Wagman's report with the exception of her discussion of the implications of a finding in the Applicant's favour (Robertson Report, p.3). With respect to that evidence, he stated:

> While I understand and agree with Ms Wagman's observations about the implications of including a provision for estimated future earnings in calculating accrued pensions in this paragraph, I do not understand why these comments are appropriate in relation to ROMCA's position.
>
> From my understanding of the documents you [i.e. his clients] provided, ROMCA is not suggesting that accrued benefits calculated at any particular determination date include estimated or projected earnings after the calculation date (Robertson Report, p.3).

2013 ONFST 9 (CanLII)

[40] His report does not explain the reasoning behind his understanding that the Applicant's position would not require projected earnings to be included in the calculation of accrued benefits at any particular determination date. Based on his understanding of the Applicant's position, he gave his opinion that a finding in favour of the Applicant would not have the broad implications suggested by Ms Wagman (Robertson Report, p.4).

III. THE ISSUES AND THE STATUTORY FRAMEWORK

[41] As reflected in the Pre-hearing Conference Memorandum, the parties have agreed that the Application raises the following issues for determination by the Tribunal:

i. Does the Amendment reduce the amount or the commuted value of a pension benefit accrued under the Plan with respect to employment before the effective date of the Amendment, contrary to s.14(1) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8?
ii. Does the Amendment reduce accrued benefits other than upon termination of the Plan, contrary to Section XIII(1) of the Plan?
iii. Depending on the answers to i. and ii. above, what order if any should the Tribunal direct the Superintendent to make?

[42] This statement of the issues reflects the legal framework within which the Tribunal must determine whether or not a pension plan amendment is valid. Section 14(1) of the *PBA* establishes a statutory minimum standard with respect to plan amendments. In addition to minimum statutory standards, however, s.19(3) of the *PBA* also imposes a statutory requirement that plans must be administered in accordance with their own terms; accordingly, before determining that an amendment is valid, the Tribunal must also have regard to the terms of the Plan itself, and any limitations those terms may impose on amendments.

[43] Section 14(1) provides as follows:

An amendment to a pension plan is void if the amendment purports to reduce,

(a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;

(b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or

(c) the amount or the commuted value of an ancillary benefit for which a member, former member or retired member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

2013 ONFST 9 (CanLII)

[44] Section 14(1)(a) is the only subsection that applies to basic benefits for active members; s.14(1)(b) applies benefits for retired or deferred members, and s.14(1)(c) to ancillary benefits. Accordingly, it is s.14(1)(a) that is relevant in this case.

[45] Some, but not all of the terms in s.14(1)(a) are defined in the *PBA*. Section 1 defines "pension benefit" as follows:

> ...the aggregate monthly, annual or other periodic amounts payable to a member or former member during the lifetime of the member or former member, to which the member or former member will become entitled under the pension plan or to which any other person is entitled upon the death of a member or former member.

It also defines "commuted value" as "the value calculated in the prescribed manner and as of a fixed date of a pension, a deferred pension, a pension benefit or an ancillary benefit". The *PBA* provides no definition for the important term "accrued".

[46] As we have noted above, a plan amendment may also be void if it is not permitted by the terms of the plan itself. Like most Canadian pension plans, the ROM Plan does permit plan amendments: see Section XIII(1) of the Plan, set out in full in the Appendix. Section XIII(1)(b), however, places limitations on permitted amendments, providing that no amendment may "reduce accrued benefits except upon termination of the Plan...." The Plan does not define the term "accrued benefits".

IV. THE POSITIONS OF THE PARTIES

[47] The Applicant alleges that the Challenged Amendment violates both s.14(1)(a) of the *PBA* and Section XIII(1)(b) of the Plan, in that it reduces benefits accrued to Plan members.

[48] In its written submissions, the Applicant framed its core argument as follows:

> The answers to questions i. and ii. [see para.41 above] hinge on the Tribunal's determination of the meaning of "accrued benefits" for purposes of the PBA and the Plan. ROMCA asserts that, in a Plan that incorporates an earnings definition that requires the determination of earnings for purposes of calculating the retirement benefits to be calculated "prior to retirement", the accrued benefit earned as of December 31, 2009 must

include a right to have the pension determined based on future earnings in respect of the pre-2010 service. ROM is free to amend the Plan to modify the earnings definition for future service, but, under both section 14 of the PBA and section XIII(1) of the Plan, freezing earnings in respect of already accrued service is prohibited. To state this another way, if there is no qualification in the Plan that would allow an amendment to crystallize the earnings base, the projected earnings requirement is considered a vested and accrued benefit for service up to the effective date of an amendment (ROMCA Written Submissions, para. 9).

2013 ONFST 9 (CanLII)

[49] The essence of the argument is that pension benefits are earned by service and take their value from the benefit formula in place at the time the service was performed. It follows, the Applicant argued, that the right to have that formula applied to that service at the time of retirement is a benefit which has accrued to Plan members as of the effective date of the Challenged Amendment; "an amendment that has the effect of reducing the earnings base can only apply to the calculation of pension benefits in respect of future service" (ROMCA Written Submissions, para. 29).

[50] The Applicant's argument is a narrow and sophisticated one. It is *not* claiming that the ROM has no power to amend the Plan; it acknowledges that the ROM can amend the Plan with respect to future service and that the Challenged Amendment is valid insofar as it substitutes the New Formula for the Old Formula for future service. Nor does it claim that Ontario law would never permit amendments that would freeze the earnings base in a defined benefit formula as of a date prior to retirement; it argues that the validity of such an amendment would depend on the terms of the specific plan. Under the ROM Plan, however, it argues that such an amendment is not permitted because the Old Formula unequivocally guarantees that members' pensions will be calculated based on their best three years of earnings *prior to their retirement*. Under such language, the Applicant argues, "the projected earnings requirement is considered a vested and accrued benefit for service up to the effective date of an amendment" (ROMCA Written Submissions, para. 9).

[51] In addition, the Applicant does not claim that the Challenged Amendment reduces the commuted value of the pension benefit accrued under s.14(1)(a). It acknowledges that the concept of commuted value implies a point-in-time calculation, based on service and earnings as of that moment. However, it rejects the idea that the concept of an accrued benefit likewise implies any such point-in-time calculation. "The calculation of an accrued benefit", the Applicant argues, is a "simple mathematical calculation" (ROMCA Written Submissions, para. 10) which does not require actuarial analysis; it simply requires taking account of the benefit formula in place at the time service was accumulated, and applying that formula at the time of retirement to the service Plan members acquired prior to the effective date of the amendment.

[52] As previously noted, the Applicant grounds its argument on both the statute and the terms of the Plan. With respect to the interpretation of the Plan, it invokes the *contra proferentum* rule, which contemplates that where documents are ambiguous, they should be construed against the interest of the party who drafted or tendered them (ROMCA Written Submissions, para. 46). The Applicant does not assert that the Plan is ambiguous; indeed, it asserts that its "plain and ordinary meaning ... leaves no room for ambiguity" (para. 39). To the extent that the Tribunal may find it

ambiguous, however, the Applicant pointed out that the Plan members had no role in plan drafting, and therefore the Plan should be construed against the ROM's interest.

[53] OPSEU and SEIU support and adopt the arguments of the Applicant. OPSEU made both written and oral submissions. In its written submissions, OPSEU supplemented the Applicant's submissions by focusing on the language of the Plan. OPSEU argues that:

> In the context of this Plan, the "accrued benefit" for credited service prior to 2010 is the amount of the pension as it is calculable using the "Final Average Earnings" definition in place before 2010. Thus, the amount of the pension benefit for years of service prior to 2010 must be calculated using the earnings base in place prior to 2010, that is, the member's best 36 months of salary prior to retirement (OPSEU Written Submissions, para.48)

2013 ONFST 9 (CanLII)

[54] In oral submissions, OPSEU again emphasized the fundamental importance of the terms of the Plan. It argues that s.14(1) of the *PBA* underpins the terms of the Plan; as counsel put it, s.14(1) ensures that "promises made are promises kept". The promises made are to be found in the terms of the Plan. Under this Plan, OPSEU argues, Plan members have been promised a retirement pension based on earnings in place at the time of retirement; that promise is the "accrued benefit", and there is no capacity under this Plan to reduce that accrued benefit with respect to past service.

[55] The Responding Parties take the position that the Challenged Amendment does not reduce accrued benefits within the meaning either of the *PBA* or the Plan.

[56] Like the Applicant and its supporters, the ROM's argument focuses primarily on the meaning of the term "accrued", and the nature of the accrued benefits. The ROM argues that the only amount of pension which has accrued to a member as of the effective date of the Challenged Amendment is the amount to which that member would be entitled if she retired or otherwise left the Plan as of that date. It argues that accrued benefits are determined as of the effective date of the amendment, based on information current as of that date: i.e. service accumulated and earnings as of that date (ROM Written Submissions, para. 23). Since the Challenged Amendment ensures that the pension earned by a member for service prior to January 1, 2010 will never fall below the amount calculated on that basis, the ROM argues that the amendment does not violate either the statute or the Plan.

[57] The ROM acknowledges that pension benefits are earned benefits. It argues, however, that the only pension benefit which has been earned by service accumulated prior to the effective date of the amendment is the amount of pension that would be payable if the employee left the Plan as of that date. While an employee's past service might generate a larger pension amount after that date if the Plan were not amended, any such larger amount is purely hypothetical. It is not a benefit that has "accrued" as of that date; it is merely a projection of what benefits might accrue in future, based on contingent events, such as future salary increases, that have not yet occurred and may never occur.

[58] In support of its interpretation of "accrued benefits", the ROM relies heavily on the argument that its approach is supported by expert actuarial opinion. It pointed to consensus among all three actuaries who testified that according to standard actuarial practice, a member's

"accrued benefit" is calculated as of a specific date, based on information current as of that date. It argues that the implications of interpreting the term "accrued" in a manner that deviates from this standard practice would be very broad and very drastic, requiring actuaries to recalculate plan values in a wide variety of contexts.

[59] In response to OPSEU's submissions that the ROM's approach violates the "pension promise" reflected in the terms of the Plan at the time service was accumulated, it argues that the "pension promise" is contained in the *whole* Plan, not simply in the benefit formula. The whole Plan, the ROM argues, includes Section XIII(1) which contemplates modifications to the Plan, always provided that those modifications do not "reduce accrued benefits". To argue that the formula cannot be changed simply because it was in place at the time service was accumulated is to ignore the fact that the Plan gives the employer an explicit right to amend, limited only by its obligation to respect "accrued benefits".

[60] The Superintendent concurs with the ROM's submissions. In addition, the Superintendent bolsters his substantive interpretation of s.14(1)(a) with two supplementary arguments. First, he argues that the Tribunal owes deference to the Superintendent's NOID, and should review the NOID against a reasonableness standard rather than a correctness standard. Second, he relies on FSCO Policy Statement C200-101, entitled "Conversion of a Plan from Defined Benefit to Defined Contribution". He argues that this FSCO policy statement supports his substantive interpretation of s.14(1) of the *PBA,* and should be given "significant weight" because it represents the considered opinion of the expert and specialized regulator as to the meaning of the legislation.

[61] The ROM supports the Superintendent's position that this Tribunal should defer to the NOID, and be guided by FSCO Policy Statement C200-101. The Applicant and the other unions do not; they urge the Tribunal not to depart from its consistent jurisprudence affirming that when a NOID is challenged, the Tribunal will deal with the matter *de novo*, making its own independent judgment, and without deference to the opinion expressed by the Superintendent in the NOID. In addition, they argue that the FSCO Policy Statement on which the Responding Parties rely addresses plan conversions, as its title suggests, and therefore does not deal with the issue before us. Accordingly, the Tribunal should not give it any consideration.

V. ANALYSIS

[62] The evidence before us establishes that the Challenged Amendment is likely to reduce the amount of the pension received on retirement by Plan members who remain in the employ of the ROM after the effective date of the amendment. This probable effect is not contested by the Responding Parties; indeed, the amendment was designed for that purpose. A significant part of that reduction will result from the impact of the amendment on the amount of pension generated by past service: i.e. by employment before the effective date of the amendment (see para. 22, above). The question before us is whether an amendment with this effect is void pursuant either to s.14(1)(a) of the *PBA* or Section XIII(1)(b) of the Plan: in other words, whether such an amendment "purports to reduce the amount...of the pension benefit accrued" , or "reduce[s] accrued benefits" within the meaning of those provisions.

2013 ONFST 9 (CanLII)

[63] The argument by all parties focused primarily on s.14(1)(a) of the *PBA*; indeed, the issue originally raised by the Applicant before the Superintendent, and consequently the NOID, raised only the statutory issue, as did the Applicant's Request for Hearing before this Tribunal. Accordingly, we begin our analysis with s.14(1)(a), the statutory minimum standard. We then consider whether Section XIII(1)(b) of the Plan provides any additional protection for the pension benefits at issue here.

2013 ONFST 9 (CanLII)

[64] The dispute centres on the meaning of the terms "accrued" and "accrued benefit". The applicant argues that in a defined benefit plan of this type, in which the retirement pension is generated by a formula in which service is multiplied by an earnings-based formula, the benefit which has accrued to a plan member as of the effective date of the Challenged Amendment includes not simply the amount of pension that would be generated by that formula on any given date, but also the formula itself, as applied to that accumulated service. Under the terms of the Plan, it argues, employees who have accumulated service prior to the amendment have been given an irrevocable promise that they will receive a pension on retirement in which that service is multiplied by the earnings formula in effect at the time the service was accumulated. This promise, the Applicant asserts, is itself an "accrued benefit" under the Plan.

[65] The Applicant bases this argument primarily on what it sees as the logic of earned pension benefits. It argues that retirement pensions are entitlements earned through service. Since the entitlement flows from the service, it takes its value and should be calculated in accordance with the formula in effect at the time that service was rendered. By prohibiting plan amendments which reduce the pension amount "with respect to" past service, it argues, s.14(1)(a) prohibits amendments which substitute a less valuable earnings formula for a more valuable earnings formula with respect to that service.

[66] The Applicant argues that for active employees who are not retiring or otherwise leaving the Plan, calculating pension amounts as of the effective date of the amendment is an artificial exercise which deprives them of a significant part of the value of the pensions they have been promised under the terms of the Plan if they remain in the ROM's employ until they retire. For active employees, it argues, the only realistic focus is on the pension amount accumulated service will yield at the time of retirement. It concedes that this amount can only be estimated as of the effective date of the amendment, since for each individual employee, it depends on whether and how rapidly her salary increases prior to retirement (which in turn may depend on how long she remains in the ROM's employ). Such estimates are well within the capacity of actuaries, however; the lack of absolute certainty as to the ultimate pension amount a Plan member will receive based on prior accumulated service is not an obstacle to a determination that the right to pension calculated on that basis is an accrued benefit protected by s.14(1)(a).

[67] This argument depends for its normative resonance on the assertion that the benefit claimed – a pension at retirement based on the Old Formula – has already been "earned" as of the effective date of the amendment. To that extent, it begs the question before us: what is the benefit to which the employees' service has entitled them up to the effective date of the amendment? That question can only be answered by construing the language of s.14(1)(a) and the terms of the Plan, and in particular by determining the meaning to be ascribed to the terms "accrued" and "accrued benefit".

[68] What the Applicant is arguing is that what has accrued to Plan members as of the effective date is not a specific pension amount, but a set of rights, including a right to have the portion of the pension amount generated by past service calculated on the basis of the Old Formula when the individual Plan member retires. To use its own words, it argues that "the accrued benefit earned as of December 31, 2009 must include a right to have the pension determined based on future earnings in respect of the pre-2010 service" (ROMCA Written Submissions, para. 9). This formulation of the argument acknowledges, in the broad sense, that we must determine what benefits have accrued as of the effective date of the amendment. But it resists the argument of the Responding Parties that there should be a calculation of the *amount* of that benefit as of the effective date of the Challenged Amendment; on its argument, any such calculation must await individual decisions to retire.

[69] This approach does not sit easily within the wording of s.14(1)(a). The subsection is not framed in the language of vested or accrued *rights* (the Applicant and its supporters use the terms "vested" and "accrued" interchangeably). It is explicitly framed in the language of accrued "amounts". In our view, this language cannot be intelligibly applied to any specific plan amendment without making a determination of the "amount of the pension benefit" that has "accrued with respect to employment before the effective date of the amendment", followed by a determination as to whether or not the amendment will have the effect of reducing that amount. There must be more than a global assessment of rights as of the effective date; there must be a calculation made of "amounts". Our task in this case is to determine what "amount" has accrued to plan members, and whether the Challenged Amendment reduces that amount.

The *McGrath* Decision: When should "pension amounts" under Section 14(1)(a) be calculated?

[70] The Tribunal has not yet had occasion to consider the meaning to the term "accrued" as it applies to s.14(1)(a). Section 14(1) has, of course, been considered in prior Tribunal decisions: see *Consumer Packaging Inc. v. Superintendent of Financial Services and United Steelworkers of America, Local 203G*, FST Decision No. P0162-2001-2; *Hugo Jaik v Superintendent of Financial Services and the Board of Trustees of the Electrical Industry of Ottawa Pension Plan*, Decision No. P0235-2004-1; *PPG Canada v. Superintendent of Financial Services*, FST Decision No. P0290-2007-1 [*PPG Canada*]; and *McGrath v. Superintendent of Financial Services, OMERS Administration Corporation and OMERS Sponsors Corporation*, FST Decision No. P0335-2008-2 [*McGrath*]. However, none of these cases required the Tribunal to tackle the difficult concept of accrual as it relates to the rights of active members in a defined benefit plan with a "service x earnings" formula. The Tribunal case law may nevertheless provide some guidance. Of particular relevance is *McGrath*, the Tribunal's most recent and extensive consideration of s.14(1).

[71] Before turning to a detailed consideration of *McGrath*, however, it is useful to focus for a moment on the language of s.14(1)(a), and on the differences between the parties' approaches to that language. It was common ground among the parties that s.14(1)(a) requires an assessment of the *effect* of impugned amendment: *McGrath*, pp. 22-23. The parties differed, however, first as to the proper "trigger point" for assessing the effect, and second, as to what information should be used to assess the effect. The Applicant argued that the relevant trigger point for assessing the effect on active members is the date of their own retirement (or, presumably other departure from

2013 ONFST 9 (CanLII)

the Plan), and that any calculation of whether or not the Challenged Amendment reduced accrued benefits must take into account salary levels prevailing at that time. The Responding Parties argued that the relevant trigger point was the effective date of the Challenged Amendment, and that the calculation of whether or not there had been an unlawful reduction of accrued benefits should be based on both service and salary data current at that time. Both sides found support for their positions in the *McGrath* decision.

2013 ONFST 9 (CanLII)

[72] *McGrath* dealt with an application by Susan McGrath, a retired member of the OMERS pension plan, challenging an amendment to the indexation provisions of the plan. The OMERS plan, a defined benefit plan, provided for basic benefits that were 100 percent indexed to changes in the Consumer Price Index. OMERS amended the plan to modify the way the change in the CPI would be measured, substituting a "smoothing" method which compared average values of the CPI over 12-month periods ending in October of each year, for the more volatile method then in use, which had simply compared changes in the September indices of the relevant years.

[73] The case was heard by the Tribunal some two years after the challenged amendment had come into effect. The evidence established that over the short-term, the effect of the amendment had been to produce modestly lower pensions than would have been the case without the amendment. Ms McGrath argued, among other issues, that because the plan amendment had produced lower pensions between its effective date and the date of hearing, the amendment had reduced her pension contrary to s.14(1)(b) of the *PBA*.

[74] This argument was rejected in part because it was established by expert evidence that the old and the new indexation formulae were "actuarially equivalent", and would be expected to produce the same level of indexation over the long term. The Tribunal stated:

> We are persuaded that for amendments such as the one before us, the statute does not gauge whether or not the amount of a pension has been reduced based only on its immediate impact on the first periodic payment after it comes into effect (or indeed, only on its impact on periodic payments during the period between the date of implementation and the date of hearing). It instructs us to take a longer view (p.28).

[75] Despite its holding that the effect of an amendment to an accrued indexation formula must be assessed on a long-term basis, however, the Tribunal affirmed that the assessment must be made as of the effective date of the impugned amendment (pp.25-26). It explicitly rejected the argument that there could be a "wait and see" approach to whether or not a plan amendment reduced accrued benefits:

> A "wait and see" approach under which the assessment might be made as of a later date is simply not practicable, for three reasons. First, the result of that assessment could change over time, and it would be unreasonable and impractical to require that compliance with the requirements of s 14.1 of the Act be determined periodically for an indefinite period. Second, in the event that an amendment which initially appeared to be valid (and which initially might have increased pension payments) were found some time later to have had the effect of reducing aggregate pension payments and were therefore found to be void, the amendment could not practically be reversed, since pension payments including those to pensioners subsequently deceased would already have been made on the basis of the

> amendment. Finally, it is important that plan sponsors and the Superintendant be able to determine promptly and with finality whether or not an amendment is valid, taking the requirements of s. 14(1) into account – otherwise plan sponsors would be precluded from making amendments of the type whose impact could not be determined with certainty at the time of adoption, however desirable those amendments might be. Accordingly, our vantage point for assessing the longer-term impact of the amendment on the amount of the pension must be the date the decision is made, taking into account the information reasonably available to the plan sponsor at that time (p.27).

2013 ONFST 9 (CanLII)

[76] The Applicant relies on the Tribunal's holding that we must assess the impact of the Challenged Amendment from a perspective beyond its impact on its effective date; we must take a long-term perspective. The Applicant argues that it is clear that over the longer term, the Challenged Amendment will reduce retirement pensions; we should therefore follow *McGrath* and void the amendment.

[77] This argument is ingenious, but ultimately misconceived. It overlooks a key distinction between cases like *McGrath*, which are governed by s.14(1)(b), and cases like the one before us which are governed by s.14(1)(a). Ms McGrath was already a pensioner, and her pension rights had already accrued in their entirety on retirement. It was undisputed that she had an accrued entitlement to 100% indexation on her basic pension. The dispute was over whether or not the impugned amendment had the effect of reducing the amount of that accrued entitlement. In the context of that dispute, the Tribunal held that it was the long-term and not the short-term effect of the amendment that was relevant. In this case, the dispute is over the much more fundamental issue of whether or not the entitlement claimed by the Applicants has accrued at all. On that key issue, *McGrath* is of no assistance to the Applicant.

[78] The Responding Parties rely on *McGrath* to support their argument that in order to apply s.14(1), it is necessary to make calculations of the pension amounts involved as of the effective date of the amendment, based on information available at that time. We agree, for the same reasons the Tribunal took this view in *McGrath*. Although *McGrath* was a s.14(1)(b) case, the logic of the Tribunal holding in that case - that an assessment must be made once and for all as of the effective date of the impugned amendment - applies equally to s.14(1)(a). Plan administrators, plan members, the Superintendent and this Tribunal must be able to make an immediate determination at the time the plan is amended whether or not an amendment complies with the statute; they can only do so if the crucial questions – what "amount of a pension benefit" has accrued, and what impact that amendment will have on that amount – can be determined as of that date.

[79] We turn now to the question of what earnings data should be taken into account in making the calculation of what pension amounts have "accrued" as of that date.

"Accrued Benefits": The actuarial evidence and the general jurisprudence

[80] As we have seen, the Applicant vigorously resisted the notion that a calculation of pension "amounts" should be made as of the effective date of the Challenged Amendment. We have held that a calculation must be made as of that date. That holding does not resolve the question, however, of what earnings data must be used to make the calculation – in other words,

whether it should be made based on earnings data as of the effective date of the Challenged Amendment, or whether it should include a projection of future earnings. It follows from the Applicant's basic argument (although it did not frame it in quite this way) that if a calculation must be made at the time of plan amendment, it must be made on a basis which takes into account future earnings. The Responding Parties argue that it must be made taking into account only earnings data current as of the effective date of the Challenged Amendment.

2013 ONFST 9 (CanLII)

[81] The position of the Responding Parties is clearly supported by the practice of Canadian actuaries as reflected in the evidence before us. Both actuaries who gave evidence for the Responding Parties testified that as understood by actuaries, a calculation of accrued benefits is a calculation made at a specific point in time, involving data current when the calculation is made and without regard to future earnings projections. The Applicant's actuarial expert accepted the proposition that an actuary would calculate accrued benefits on the basis of current earnings levels and would not take account of future earnings increases. He merely asserted, without explaining, his understanding that the Applicant was not suggesting "that accrued benefits calculated at any particular determination date include estimated or projected earnings after the calculation date" (see paras. 39-40, above). Accordingly, there was consensus among the actuarial witnesses that if "the amount of the pension benefit accrued" were calculated on the effective date of the amendment, an actuary performing that calculation would use service and earnings data current as of that date, and would not take into account projected earnings increases.

[82] The Applicant attempts to counter this evidence by asserting that "[t]he determination of the accrued benefit issue does not require actuarial analysis. The calculation of an accrued benefit is a simple mathematical calculation" (ROMCA Written Submission, para. 10). In addition, it argues that the meaning of the terms used in s.14(1)(a) is a legal question to be determined by the Tribunal, and not by expert witnesses, no matter how well versed in the practicalities of pension administration and pension funding.

[83] In addition, in its written reply submissions, the Applicant attempted to argue that there is no consensus among actuaries about the meaning of the term "accrued benefits", relying on extracts from actuarial evidence summarized in other decisions (ROMCA Reply Submissions, para.10). Any alleged lack of consensus was clearly not reflected in the evidence before us, however; the Applicant chose not to cross-examine the ROM's actuaries, and as noted above, its own actuary agreed with the concept of accrued benefits reflected in the reports of the other two actuaries.

[84] We accept, of course, that the question of what the relevant terms mean in the context of the statute is a legal question, and it would be open to us to conclude that actuaries have been operating on an incorrect understanding of the meaning of "accrued benefits", or that the legislature intended to use the term "accrued" in s.14(1)(a) in a different sense than it is normally employed by pension actuaries. However, we would not be quick to dismiss an actuarial consensus with respect to the meaning of an essentially technical term which the legislature has chosen not to define. In our view, it is more probable than not that in using a term like "accrued" and a concept like "accrued benefits" in a pension statute, the legislature intended to adopt the meaning commonly given to the term by pension professionals such as actuaries.

[85] The actuarial evidence that "accrued benefits" are calculated on a point-in-time basis based on earnings and service current at the time of the calculation also enjoys significant support in the Canadian caselaw. It is consistent with the approach taken by the British Columbia Supreme Court in *Hockin* v. *Bank of British Columbia* (1993), 83 B.C.L.R. (2d) 337, a case dealing with the conversion of a plan from a defined benefit plan to a defined contribution plan. At issue in *Hockin* was how much of the pension fund needed to be set aside to account for "benefits which had accrued to the members", and how much was surplus. This raised the question of whether future salary projections should be used in determining accrued benefits. The court heard evidence from the defendant's actuary that it was "neither logical nor appropriate to include salary projections in the calculation of accrued benefits because the employee had not yet earned them" (para. 34). It accepted the argument that members' accrued benefits did not include salary projections.

[86] *Hockin* was reversed by the British Columbia Court of Appeal on an unrelated issue: see [1995] B.C.J. No. 688. The lower court's decision on the "accrued benefits" issue was nevertheless subsequently relied on by that same Court of Appeal in *Canadian Association of Smelter and Allied Workers, Local 1 v. Garvin* (2001), 89 B.C.L.R. (3d) 29 ("*CASAW*"). *CASAW* considered a union challenge to a plan amendment that changed the definition of pensionable earnings (on a phased-in basis) from one which included overtime earnings to one which did not. In an argument very similar to the Applicant's in this case, the union submitted that while the new earnings formula could be applied with respect to future service, it could not be applied with respect to past service because it would reduce accrued benefits.

[87] The court rejected that argument. It held that an accrued benefit must be calculated as at the effective date of the amendment "using the information then known (that is earnings and service to that date)". It concluded that:

> ... a plain reading of the words "right to benefits which had accrued" prior to January 1, 1990 is that the appellants had a right to receive their pension benefit calculated taking into account their highest average earnings, including overtime earned prior to January 1, 1990. They had no right to any benefits resulting from anything that occurred after that date, whether those things were additional earnings, service, contributions or anything else that had not yet occurred (para.26).

[88] The Responding Parties also cited a New Brunswick decision, *Quinn v. New Brunswick (Minister of Finance)*, [2011] NBQB, in which the court held that the terms "accrued" or "vested" "reference rights which are not contingent or dependent upon the fulfillment of any condition precedent" (para. 71).

[89] To bolster their argument that accrued benefits do not take into account future earnings, the Responding Parties also rely on caselaw establishing that for amounts or benefits to be considered "accrued", they must be "fully constituted", even if they can only be exercised or enforced at some point in the future: see *Ontario (Hydro Electric Power Commission) v. Albright* (1922), 64 S.C.R. 306; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 ("*Indalex*"). To be fully constituted, they argue, an amount must be calculable based on known data, excluding assumptions or estimations such as those that would be required to take account of future earnings. By this standard, they argue, the only "fully constituted" pension benefits as

2013 ONFST 9 (CanLII)

of the effective date of the Challenged Amendment are the benefits Plan members could claim if they left the Plan as of that date.

[90] In our view, the issue of whether or not future earnings can be identified with sufficient precision is something of a red herring in the context of this case. The Applicant does not dispute the basic proposition that for a benefit to have "accrued", it must be "fully constituted". It argues, however, that the benefit it claims - a pension amount for prior service calculated on the basis of the Old Formula at the time of retirement - was fully constituted as that term is understood in the caselaw.

[91] The Applicant argues that it is not necessary for an amount to be precisely ascertainable to be fully constituted and therefore accrued. In support of that proposition, it relies primarily on the very recent decision of the Supreme Court of Canada in *Indalex*, and particularly on the judgment of Deschamps J.. *Indalex* dealt with the legal status of the employer's required contribution to a plan found to be in deficit at the time of wind-up under s.75(1)(b) of the *PBA*. Section 75(1)(b) requires employers to make up shortfalls to the extent that they represent the value of certain "accrued" benefits. Deschamps J. determined that the employer's liability to make contributions sufficient to meet the plan's liabilities crystallized at the point of plan wind up, even though the amount of the required contribution could not be precisely quantified at that point. She held that:

> The fact that the precise amount of the contribution is not determined as of the time of the wind up does not make it a contingent contribution that cannot have accrued for accounting purposes .... *The use of the word 'accrued' does not limit liabilities to amounts that can be determined with precision.* As a result, the words "contributions accrued" can encompass the contributions mandated by s. 75(1)(b) of the *PBA* [i.e. with respect to accrued benefits] (para. 37, emphasis added).

[92] The Applicant also relies on *Dinney v. Great-West Life Assurance Co. et al.*, 2005 MBCA 36 (leave to appeal denied, [2009] S.C.C.A. No. 257), in which the Manitoba Court of Appeal took a similarly flexible approach to the degree of precise quantification necessary to meet the standard required for an accrued benefit: para. 71.

[93] There is ample authority, in our view, for the proposition that an amount may be "accrued" even though it may not be susceptible of precise calculation at the time a determination of accrual must be made. If we were persuaded that the Plan members had established an irrevocable entitlement to a "pension amount" calculated on the basis of Old Formula at the time of retirement, we would not be deterred by the fact that the precise amount of that entitlement could not be calculated as of the effective date; the formula would likely be sufficient to resolve that problem. However, the real and much more difficult issue in this case is whether members have established that they have accrued an entitlement to a pension amount calculated on this basis. It is on this issue that the application stands or falls.

[94] On this broader question, the Applicant finds little authority in the caselaw to support its position, with the exception of the *Halliburton* decision, discussed below.

[95] The Applicant relied on *Lacey v. Weyerhaeuser Company Limited*, 2012 BCSC 353. The court found in that case that retired employees were entitled to continued payment of various non-pension post-retirement benefits which the employer had argued were discretionary and

2013 ONFST 9 (CanLII)

therefore subject to cancellation. The case supports the proposition that post-retirement benefits are deferred compensation, earned when services are rendered and not at the time of retirement. In our view, however, the decision is unhelpful on the issue facing us here. Since the plaintiffs were retired, however, the case does not address the problem of how defined benefits accrue to active employees over the course of a career. In addition, the *Lacey* court did not confront a contractual or statutory provision which contemplates that contractual rights may be subject to amendment, as we must do in this case.

2013 ONFST 9 (CanLII)

[96] In general, the Applicant's response to the authorities of the Responding Parties was to argue in effect, that the *Indalex* decision was a "game changer" which effectively over-ruled decisions like *CASAW*. We are far from persuaded that this is the case, since the matters directly at issue in *Indalex* were quite remote from those at issue in this case.

[97] The only case that appears to provide direct support for the Applicant's position here is the decision of the Alberta Court of Appeal in *Halliburton Group Canada Inc. v. Alberta*, 2010 ABCA 254. We turn now to a detailed consideration of that decision.

The *Halliburton* Decision

[98] *Halliburton,* like the case before us, dealt with a defined benefit pension plan which provided for pensions to be calculated on a "years of service x earnings" formula. The employer converted the plan on a 'going forward' basis to a defined contribution plan. In a manner similar to the ROM, it amended the plan to "freeze" the prior earnings formula for service accrued up to the effective date of plan conversion. Certain former employees challenged that amendment. They were successful in obtaining directions from the Superintendent of Pensions that they had a right to have the prior formula applied at the time of retirement to service accumulated prior to the amendment. Halliburton filed for judicial review of the Superintendent's decision, and the issue eventually made its way to the Alberta Court of Appeal.

[99] The Court of Appeal defined the issue as follows: "The ultimate question in the judicial review proceeding was whether the amendment to the Plan constituted a retroactive reduction to a vested benefit in contravention of the *EPPA* [the *Employment Pension Plans Act*] and the pension plan" (para. 22). It went on to say:

> It is common ground between the parties that the result of the amendments is that at least some of the .... members will receive less pension for the period worked before January 1, 2001 than they would had there been no amendments. The real question then is whether the formula for calculating the pension is a vested right, or a Plan element that can be reduced by amendment (para. 32).

[100] The court ultimately confirmed the Superintendent's decision. Berger J.A., speaking for the court at para. 39, held:

> ... the seventeen employees prior to the effective date of the amendment were entitled to a pension premised upon their projected five years of employment preceding their normal retirement date. Amendments that deprive them of that entitlement contravene the Act and entitle the Superintendent to order deregistration of the amendments.

He concluded:

> I cannot accept the Appellant's submission that "prospective rights" in this case must be distinguished from "vested rights". After all, a vested right is capable of measurement and, as I have held, is properly measured in the case at bar, given the language of the Plan, on the basis of "prospective calculations". To repeat, the seventeen employees had acquired a right to measure their pension entitlements on a prospective basis. To deprive them of that entitlement constitutes a contravention of the Act (para. 40).

2013 ONFST 9 (CanLII)

[101] In sum, the *Halliburton* court held that the right to have their retirement pension calculated on the basis of the pre-amendment formula for prior service was an entitlement vested in plan members, and a plan amendment which reduced the value of that entitlement was void. The Applicant argues that the same reasoning should be applied here.

[102] The Responding Parties argue that *Halliburton* is distinguishable. They point out that the Court of Appeal was dealing on judicial review with the issue of whether or not the Superintendent's decision was reasonable. The Court's ultimate conclusion that the Superintendent's decision was reasonable does not amount to an authoritative interpretation of the Alberta statute. More substantively, they argue that Halliburton is distinguishable on the basis of the statutory language, which is different in material respects from s.14(1)(a) of the *PBA*.

[103] In the alternative, the Responding Parties argue that *Halliburton* is wrongly decided. They submit that *Halliburton*'s "holding is inconsistent with the weight of authority and with the expert evidence and should not be followed in Ontario" (ROM Written Submissions, para. 29). They point out that *Halliburton* addressed the issue strictly within the four corners of the *EPPA* and the Halliburton plan, and did not consider decisions from other Canadian jurisdictions which, they submit, would have led the Court to a different conclusion.

[104] *Halliburton* is clearly not binding on this Tribunal. Nevertheless, the practical problem before the court in *Halliburton* was virtually indistinguishable from the practical problem before us: whether the relevant legal limitations on plan amendments which impede retroactive reductions in pension benefits earned by past service under the plan protect the benefit formula in effect at the time the service was acquired, or only the value of the benefit that service would have earned up to the time of plan amendment. It behooves us to test the court's conclusions in *Halliburton* to assess whether they are persuasive and applicable within the Ontario context.

[105] We are not persuaded that *Halliburton* turns simply on the standard of review. It is true, of course, that, a considerable portion of the decision is devoted to that issue; ultimately the court determined that the Superintendent's decision need only be reasonable to survive court review. But the court also entered into an independent assessment of the statutory rights involved, and came to the conclusion that the impugned amendment in that case was void pursuant to the *EPPA*.

[106] We are persuaded, however, that there are material differences between the statutory provisions governing *Halliburton* and those governing this case. *Halliburton* was decided under s.81 of the *EPPA*, the relevant provisions of which are as follows:

(1) An amendment to a pension plan, or, where one plan has been adopted in place of another, the plan so adopted, may not reduce

(a) a person's benefits in respect of employment on or after the initial qualification date and before the date of the amendment or adoption of the other plan...

...

(2) Unless the plan so provides, subsection (1)(a) does not apply to that portion of the benefits that is based on the earnings of a member projected in relation to a period after the date of the amendment or adoption of the other plan.

2013 ONFST 9 (CanLII)

[107] Two differences between s.81 of the *EPPA* and s.14(1)(a) of the *PBA* stand out as critical. First, the *EPPA* protects "a person's benefits in respect of employment" prior to the amendment, while the *PBA* protects "the amount of pension accrued in respect of employment prior to the effective date of the amendment". As the Responding Parties have pointed out, s.81 of the *EPPA* does not refer to the "amount" of the benefit, nor does it contain the crucial word "accrued". Second, the *EPPA* specifically addresses the issue of projected earnings and provides that those earnings fall outside the scope of s.81(1)(a) of the *EPPA*; the *PBA* makes no reference to projected earnings.

[108] It appears to us that the *Halliburton* decision may ultimately turn on those differences, although we confess that we have not found all of the court's reasoning on the core issues easy to follow. The key paragraph is para. 35, which we quote in its entirety:

> Sections 81(1)(a) and 81(2) of *EPPA* contemplate a temporal analysis. Section 81(1)(a) speaks of benefits acquired from day one of employment ("the initial qualification date") accruing thereafter to the day of the amendment of the Plan. An amendment may not reduce those benefits. The Appellant argues that the provision should be read to permit reduction of benefits that would otherwise have accrued after the amendment. I disagree. At best the enactment is silent. In any event, the effect of s. 81(2) is that s. 81(1)(a) does not apply to projected benefits. A plain reading of the Plan makes clear that the Plan contemplates that projected earnings are to be taken into account in the determination of employee benefits. The cumulative effect of all of the foregoing is that as at the point that any individual becomes a participant in the Plan, they are entitled to have their defined benefit calculated in accordance with the DB formula. The formula requires that the compensation number used is the one that is the highest for five of their last ten years of employment "prior to [an employee's] normal retirement date." [emphasis in the original]

[109] In this passage, the court observes that "the effect of s. 81(2) is that s. 81(1)(a) does not apply to projected benefits". It is unclear why this conclusion is helpful to the employees' case; indeed, it might appear to have had the opposite effect, since it clearly removes projected earnings from the protection of s.81(1)(a). In any event, the *PBA* clearly has no equivalent to s.81(2); the statutory language in Ontario does not directly address the issue of projected earnings, and there is no basis on which we could conclude, as the Alberta court appears to have concluded, that the statutory language does not apply to the issue before it.

[110] Equally pertinent to our situation is the question of how the Alberta court characterized the nature of benefit claimed: i.e. a benefit based on projected earnings. As noted above, the Alberta statute does not use the term "accrued". The court nevertheless discussed the issue partly in terms of accrual. The court stated: "The Appellant argues that the provision should be read to permit reduction of benefits that would otherwise have accrued after the amendment. I disagree. At best the enactment is silent" (para. 35).

[111] This passage is consistent with the interpretation that the benefits at issue are benefits that accrue *after* the effective date of the impugned amendment. It certainly implies that in the court's view, the validity of the amendment does not turn on whether the benefits at issue accrue *before* or *after* the effective date of the impugned amendment. In Ontario, this question is clearly crucial, since s.14(1)(a) unequivocally applies *only* to protect benefits which accrue *prior* to the effective date of the amendment.

[112] The *Halliburton* decision therefore does not assist us in interpreting the statutory language before us; we accept the argument of the Responding Parties that the clear distinctions between the Alberta and Ontario statutes give Halliburton limited value as a precedent for applying in s.14(1)(a) of the *PBA*.

Section XIII(1) of the Plan

[113] The Applicant asserts, however, that even if the statutory provisions are distinguishable, the provisions of the plans involved are sufficiently similar that we can look to *Halliburton* for guidance on whether the Challenged Amendment is void pursuant to Section XIII(1)(b) of the Plan.

[114] Section 9.01 of the Halliburton plan, quoted in para. 28 of the court's decision, permitted plan amendments provided that they did not "reduce the value of benefits vested in Participants as of such effective date or cause a reversion of any funds to any Employer prior to satisfaction of or provision for all benefits then accrued". The court's only explicit holding related to its conclusion that the impugned amendment in that case was void under s.81 of the *EPPA*. By implication, however, it also held it void pursuant to the terms of the Halliburton plan, since it found that the right claimed by the employees was a "vested" right of which plan members could not be deprived (paras. 39-40). Certainly the terms of the plan were so central to the case that the Alberta Superintendent acknowledged that the issue to be decided was "tied so closely to the specific wording of the Plan that no case law provides guidance on the matter": para. 33.

[115] The Applicant argues that the language of the Plan in *Halliburton* is analogous to the language of the ROM plan, which prohibits amendments that "reduce accrued benefits except on termination of the Plan" (see Appendix). As a matter of Plan interpretation, it asks us to find, as the *Halliburton* court did, that the right to have retirement benefits calculated on the basis of the Old Formula is a vested or accrued right immune from the employer's power of plan amendment.

[116] We do not find the language of "vesting" helpful to our analysis here. The ROM Plan does not use the term "vested"; like the Ontario statute, it uses the term "accrued benefits". We are aware that in *Dinney*, the Manitoba Court of Appeal found that the terms "accrued" and "vested" have the same meaning in the context of *rights*: *Dinney*, paras. 31-32. This does not mean that they are equivalent for all purposes, however, and indeed they are not; benefits may be

2013 ONFST 9 (CanLII)

accrued but not yet vested, a distinction clearly reflected, for example in s.75(1)(b)(ii) of the *PBA*, which requires employers to make up shortfalls for certain benefits only if they are both accrued and vested. Even more pertinently, while the *Halliburton* court found that the plan provisions providing for retirement pensions to be calculated on the basis of earnings at the time of retirement gave rise to "vested" rights, it unfortunately does not explain *why* those rights were vested and therefore immune from amendment under the terms of the plan. Accordingly, the decision is unhelpful in explaining why the court arrived at a decision that appears to be inconsistent with other Canadian caselaw on analogous issues.

2013 ONFST 9 (CanLII)

Conclusion

[117] We are not persuaded that the *Halliburton* approach is applicable in Ontario. We must address the problem before us on the basis of the Ontario statute and the language of the ROM Plan. In the context of Ontario law, we hold that the Challenged Amendment does not reduce "the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment" within the meaning of s.14(1)(a), or any "accrued benefit" within the meaning of Section XIII(1) of the Plan.

[118] As we have already indicated, we take the view that s.14(1)(a) does not focus on abstract questions of "rights"; instead, it requires the concrete calculation of "the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment". We have determined that the accrued pension amount contemplated by s.14(1)(a) must be calculated as of the effective date of the Challenged Amendment. We are also persuaded that in a defined benefit plan with a "service x earnings" formula, an accrued pension amount calculated as of that date would be based on earning data current as of that date, unless the plan otherwise provides; such a calculation would not include an estimate of projected future earnings. The Challenged Amendment protects that amount. Accordingly, there is no violation of s.14(1)(a).

[119] We have not reached this view of the meaning of s.14(1)(a) simply because it is the view taken by actuaries, although we do, of course, take some comfort in that fact that our view is consistent with actuarial practice. We have reached this view because we are persuaded that it reflects the compromise intended by the legislature. In a plan structured like the one before us, it is only the amount generated on the basis of current data to which a Plan member could legitimately claim entitlement as of the effective date of the amendment. Further entitlements may indeed accrue after that date, based both on further service and on the impact of higher earnings both on past and future service. Those impacts can be estimated as of the effective date of the amendment. But estimates are not entitlement; they are merely estimates, which may or may not accrue to the member, depending on events which remain contingent until they have actually occurred.

[120] We take the same view of the meaning of the term "accrued benefits" under Section XIII(1)(b) of the ROM Plan. We note that while the Applicant and its supporters asserted a violation of both the statute and the Plan, the original application, the NOID and the Applicant's request for hearing addressed only s.14(1)(a), and no party before us seriously asserted that Section XIII(1) provided broader protection than s.14(1)(a). We acknowledge that Section XIII(1)(b) refers to "accrued benefits" rather than to "amounts.....accrued." However, in our

view there is a functional equivalence between the statutory language ("the amount of the pension benefit accrued") and the Plan language ("accrued benefits"); the focus of both the statute and the Plan is on ensuring that amendments do not deprive the parties of the pensions they have earned and could claim if they retired as of the effective date of the amendment.

[121] In reaching our conclusion on the meaning of Section XIII(1)(b) of the Plan, we have taken due note of the fact that Plan members had no role in the drafting of the Plan language. We do not, however, find the language ambiguous and no ambiguity was asserted. Accordingly, there is no basis for the application of the *contra proferentum* rule.

[122] We note that our decision is based on our interpretation of the statutory minimum standard and the language of the ROM Plan, which we have found to provide protection against plan amendments that is equivalent to the minimum standard. Plans may, of course, provide more protection than the statutory minimum standard against changes to the terms of the plan, and other cases will have to be determined on their own plan language.

[123] In closing, we address one final issue. While our conclusion is consistent with the NOID, and with the Superintendent's interpretation of FSCO Policy Statement C200-101 (Plan Conversion), we have reached that conclusion independently, without reliance on either. Accordingly, it is not necessary for us to address the argument of the Responding Parties that we should show deference to NOIDs, and accord "significant weight" to FSCO Policy Statements. We leave those issues for another case and another day.

VI. ORDER

[124] The Application is dismissed. Accordingly, the Tribunal directs the Superintendent to make the decision reflected in its Notice of Intended Decision dated August 8, 2012.

Dated at Toronto, this 15th day of August, 2013.

"Elizabeth Shilton"
Elizabeth Shilton
Vice-Chair of the Tribunal and Chair of the Panel

"Patrick Longhurst"
Patrick Longhurst
Member of the Tribunal and Member of the Panel

"David Short"
David Short
Member of the Tribunal and Member of the Panel

2013 ONFST 9 (CanLII)

APPENDIX

Pre-Amendment Provisions of the Plan

Section I (Definitions)

16. Final Average Earnings shall mean the average Earnings from the Employer for the thirty-six (36) consecutive months of employment with the Employer, prior to retirement, in which the Employee received the greatest Earnings. In the event that the period of service with the Employer is less than thirty-six (36) months, then Final Average Earnings shall be the average annual Earnings from the Employer for the period of service. In respect of Members working other than full-time, their Final Average Earnings would be computed using their Earnings for the period in question, grossed up to a full-time rate, proportionate to the ratio that full-time employment (1820 hours per annum for Members other than SEIU Members and 2080 hours per annum for SEIU Members) bears to their hours of work.

2013 ONFST 9 (CanLII)

17. Final Average YMPE shall mean the average of the YMPE for the same period of service used in the computation of the Final Average Earnings.

Section V (Amount of Retirement Benefits)

1 (c) For Service after 1994
A member shall be entitled to a normal retirement benefit commencing at the Member's normal retirement date in an annual amount equal to the Member's period of Credited Service after 1994 multiplied by the sum of the following:

(i) 1.3% of the Member's Final Average Earnings up to the Final Average YMPE; and

(ii) 2% of the Member's Final Average Earnings in excess of the Final Average YMPE.

[Slightly different formulae apply for service prior to this date.]

Relevant Provisions of the Challenged Amendment

Section I (Definitions)

3.1 Best Average Earnings shall mean the greater of Frozen Average 3 Earnings (if applicable) or Final Average 5 Earnings at the date a determination is required.

16. Final Average 5 Earnings shall mean the average Earnings from the Employer for the sixty (60) consecutive months of employment with the Employer prior to retirement in which the Employee received the greatest Earnings. In the event that the period of service with the Employer is less than sixty (60) months, then Final Average 5 Earnings shall be the average annual Earnings from the Employer for the period of service. In respect of Members working other than full-time, their Final Average 5 Earnings would be computed using their Earnings for the period in question, grossed up to a full-time rate, proportionate to the ratio that full-time

employment (1820 hours per annum for Members other than SEIU Members, 2184 hours per annum for SEIU Members in Service Worker I and Service Worker II jobs, and 2080 hours per annum for all other SEIU Members) bears to their hours of work.

17. Final Average YMPE shall mean the average of the YMPE for the same period of service used in the computation of the Final Average Earnings.

17.1 Frozen Average 3 Earnings shall mean the average Earnings from the Employer for the thirty-six (36) consecutive months of employment with the Employer, prior to January 1, 2010, in which the Employee received the greatest Earnings. In the event that the period of service with the Employer prior to January 1, 2010 is less than thirty-six (36) months, then Frozen Average 3 Earnings shall be the average annual Earnings from the Employer for the period of service prior to January 1, 2010. In respect of Members working other than full-time, their Frozen Average 3 Earnings would be computed using their Earnings for the period in question, grossed up to a full-time rate, proportionate to the ratio that full-time employment (1820 hours per annum for Members other than SEIU Members, 2184 hours per annum for SEIU Members in Service Worker I and Service Worker II jobs, and 2080 hours per annum for all other SEIU Members) bears to their hours of work.

2013 ONFST 9 (CanLII)

Section V (Amount of Retirement Benefits)

(1) (c) For Service after 1994 but prior to 2010

A Member shall be entitled to a normal retirement benefit commencing at the Member's normal retirement date in an annual amount equal to the Member's period of Credited Service after 1994 and prior to 2010 multiplied by the sum of the following:

(i) 1.3% of the Member's Best Average Earnings up to the Final Average YMPE; and

(ii) 2% of the Member's Best Average Earnings in excess of the Final Average YMPE.

(d) For Service on and after January 1, 2010

A Member shall be entitled to a normal retirement benefit commencing at the Member's normal retirement date in an annual amount equal to the Member's period of Credited Service after 2009 multiplied by the sum of the following:

(i) 1.3% of the Best Average Earnings up to the Final Average YMPE; and

(ii) 2% of the Member's Best Average Earnings in excess of the Final Average YMPE.

Section XIII(1) of the ROM Plan (unaltered by the amendment)

Section XIII1 (Modification)

1. Although the Plan is intended to be permanent and to continue indefinitely, the Employer may, at any time, amend the Plan by resolution of the Board. No such amendment shall:

(a) prior to the satisfaction of all liabilities for benefits accrued to the date of the amendment with respect to Members, retired Members, and their beneficiaries and joint annuitants, allow any part of the Fund to revert to or be recoverable by the Employer or to be used for or diverted to purposes other than the exclusive benefit of such Members, retired Members and their beneficiaries and joint annuitants.

(b) reduce accrued benefits except upon termination of the Plan when, due to insufficient funds, a reduction I benefits is authorized by a federal or provincial jurisdiction administering a Pension Benefits Act or by the Canada Revenue Agency ; or

(c) enlarge the duties or liabilities of a Custodian without its written consent. Notwithstanding the above, the Employer may retroactively amend the Plan to the extent necessary to register it under the appropriate provisions of the Income Tax Act.

2013 ONFST 9 (CanLII)