

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 “*Act*”);

AND IN THE MATTER OF a decision of the Director of Pension Plans Branch of the Financial Services Commission of Ontario by delegated authority from the Superintendent of Financial Services, dated March 30, 1999, with respect to the transfer of assets from the **Pension Plan for Salaried and Management Employees of Reliance Electric Limited (the “Reliance Plan”)**, Registration Number 0292946, to the **Revised Retirement Plan for Employees of the Allen-Bradley Division of Rockwell International of Canada (now the Pension Plan for Employees of Rockwell Automation Canada Inc. (the “Allen-Bradley Plan”))**, Registration Number 0321554;

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

BETWEEN:

MICHAEL LENNON et al.

Applicants

-and-

**SUPERINTENDENT OF FINANCIAL SERVICES
and ROCKWELL AUTOMATION CANADA INC.**

Respondents

BEFORE:

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

Heather Gavin
Member of the Tribunal and of the Panel

David A. Short
Member of the Tribunal and of the Panel

APPEARANCES:

For the Applicant:

Ken Peacock and Gerald Culliton

For the Superintendent of Financial Services:

Deborah McPhail

For Rockwell Automation Canada Inc.:

J. A. Prestage and Jeremy Forgie

Hearing Date:

November 21, 2005

REASONS FOR DECISION

Facts

History of the Plan and Trust Agreements

As the Parties did not provide the Tribunal with an Agreed Statement of Facts, we wish to lay out the relevant history of the Reliance Plan prior to the proposed merger with the Allen-Bradley Plan based on the Agreed Book of Documents provided and accepted additional documents tendered as evidence. Where discrepancies appear between the Applicant's Factum and the actual agreed plan documents we have relied on the plan documents within the Agreed Book of Documents. The panel was satisfied that the documents before it, particularly the 1980 documents referred to below are true copies of the relevant documents and accept the Agreed Book of Documents and the undisputed affidavits of Ms. Susan Seller and Mr. Paul Christiani and the certificate of Mr. K. David Gordon with respect to Tabs 1, 2 and 3 of the Agreed Book of Documents in this regard as filed by the Respondent Rockwell. We note that the Applicant offered no evidence to dispute the authenticity of any of the documents tendered and on which all parties relied. The panel did refuse to accept and review additional supplementary affidavits tendered by the Applicant which had no accompanying witnesses to supply vive voce evidence as to their authenticity or for cross-examination by the respondents and for which no argument was made as to relevance.

The Reliance Plan has its origins in a plan adopted by its parent corporation, The Reliance Electric and Engineering Company Retirement Plan for (Non-Bargaining Unit) Office Employees (the "U.S. Reliance Plan"), and more specifically in the "Trust Fund Part" of that plan, by an Instrument of Adoption executed October 28, 1957 by Reliance Electric & Engineering (Canada) Limited. The effective date of the participation in the U.S. Reliance Plan for the Canadian corporation and its employees was December 1, 1957 as defined in Article I. Such participation continued until January 1, 1966 when Reliance Electric & Engineering (Canada) Limited, adopted The Reliance Canadian Retirement Plan for (Non-Bargaining Unit) Office Employees (the "Original Reliance Plan") for all periods of eligible service after 1965 and

its related trust agreement with the Royal Trust Company with respect to periods after April 5, 1965. At January 1, 1966, section 1.1(g) of the trust agreement indicates that the participating employers were: Reliance Electric & Engineering (Canada) Limited; Reliance-Reeves-Master Limited; Les Transformatuers De Quebec, Inc. and “any other organization adopting the Plan”.

By an amendment to the U.S. Reliance Plan and appointment of a successor trustee, a portion of the assets of the trust of the U.S. Reliance Plan “allocable to actuarial liabilities for benefits to employees of Reliance Electric & Engineering (Canada) Limited and other subsidiaries and affiliates of The Reliance Electric and Engineering Company adopting such Plan” were to be transferred to The Royal Trust Company, which was appointed as the successor trustee of such trust with respect to such employees. We are satisfied that the trust agreement for the Original Reliance Plan made between Reliance Electric & Engineering (Canada) Limited and The Royal Trust Company in respect of The Reliance Electric and Engineering Company Retirement Plan for (Non-Bargaining Unit) Office Employees and signed by the trustee on April 5, 1965, is the original trust document for the Original Reliance Plan.

We note that the parties did not dispute or offer any evidence that the U.S. Reliance Plan and the Original Reliance Plan were each established pursuant to other than a trust.

On February 1, 1971, Reliance Electric Limited became the successor to the business operations of Reliance Electric & Engineering (Canada) Limited, and adopted the Original Reliance Plan.

The Original Reliance Plan underwent a series of plan amendments which were not discussed by any party, until January 1, 1980, when the Original Reliance Plan was amended and merged with four other pension plans, namely the Canadian Reliance Retirement Plan for Non-Bargaining Unit of Employees of Toledo Scale Divisions (the “Toledo Plan”); the Canadian Reliance Retirement Plan for (Non-Bargaining Unit) Office Employees of Dodge Division (the “Dodge Plan”); the Retirement Plan for the Employees of Lorain Products (Canada) Limited (the “Lorain Plan”); and the Pension Plan for Employees of Reliance Communication and Power Products Ltd. (the “Communication and Power Plan”), to continue as the Pension Plan for the Salaried and Management Employees of Reliance Electric Limited (the “Reliance Plan”) which is the subject Reliance Plan of this hearing. As of January 1, 1980, section 2.01 of Article 2 lists the following companies as participating employers in the Reliance Plan: Reliance Electric Limited, Reliance Electric Limited – Dodge Division; Reliance Electric Limited – Toledo Scale Division; Reliance Communication and Power Products, Ltd.; and Reliance Telecommunications Products Ltd.

Reliance Electric Company entered into a new successor trust agreement with the Royal Trust Corporation of Canada in respect of the Reliance Plan, as of December 31, 1979, with Royal Trust Corporation of Canada as successor trustee to the original trust agreement in respect of the Original Reliance Plan.

The Reliance Plan continued to be amended at various points in time after 1980. In particular, the parties acknowledged the spin-off of the participating Toledo and Com/Tec divisions, the latter in 1995 with accompanying transfers of assets and related liabilities. However, no evidence or argument was led by any party to indicate that these previous transactions were relevant to the issue before the Tribunal.

As a consequence of the amalgamation of Reliance Electric Limited and Rockwell Automation Canada Inc. effective October 1, 1997, Rockwell Automation Canada Inc. (“Rockwell”) became the sponsor and administrator of both the Reliance Plan and the Allen-Bradley Plan. Rockwell applied on May 22, 1998 to the Superintendent of Pensions (now the Superintendent of Financial Services) to merge the Reliance Plan and the Allen-Bradley Plan to form the Pension Plan for Employees of Rockwell Automation Canada Inc. (the “Rockwell Plan”) and to transfer the assets from the exporting Reliance Plan fund to the importing fund maintained in connection with the Allen-Bradley Plan to form the fund maintained in connection with the Rockwell Plan. The Application was supported by a resolution of the board of directors of Rockwell dated January 21, 1998.

Rockwell provided notice of the merger to the Reliance Plan members on December 15, 1997 which advised the Reliance Plan members that they could make comments to the Superintendent within 45 days of receipt of the Notice. The Notice advised the Rockwell Plan members that their accrued pension benefits to the date of merger would not be reduced.

Prior to the Superintendent giving her consent, there were several letters from the Applicant’s counsel and reply by the Respondents, Rockwell, sent between the period January 8, 1999 and March 30, 1999. This correspondence included a request from the Applicant’s solicitor that the Reliance Plan be wound-up prior to the merger. On March 30, 1999, the Superintendent gave her consent to the transfer of assets under section 81 of the *Act*. No terms or conditions were attached to that consent.

At the time of the merger application, a valuation report prepared by Buck Consultants as at January 1, 1998 indicated that the transfer amount from the Reliance Plan was \$28,556,000 on a market value basis, which included an on-going surplus of \$8,472,000. The same valuation indicated that the Allen-Bradley plan fund had a market value of \$59,008,000 with a related on-going surplus of \$30,000. Upon plan merger, the Rockwell Plan also had a surplus position. No dispute by the parties was made as to these amounts. More importantly, the related valuation report indicated for each of the Rockwell Plan, the Allen-Bradley Plan and the Reliance Plan, had a transfer ratio of more than one, as at January 1, 1998.

The Applicant requested a hearing with respect to the Superintendent’s consent to the asset transfer. The Financial Services Tribunal convened a pre-hearing conference for this purpose on July 6, 1999. At that time, the proceeding was adjourned so that the Applicant could apply to the Superintendent for a wind up of the Reliance Plan.

On September 14, 2000, the Superintendent’s staff sent a letter to the Applicant’s counsel refusing to order the Reliance Plan wound up. The Applicant did not request a hearing with respect to that decision and the time has long elapsed with respect to any appeal of that decision. The parties did not argue that the windup request was still relevant, nor present any evidence in this regard.

In late 2004, this proceeding resumed.

Preliminary Matters

As a preliminary matter, on November 14, 2005, the Applicant's counsel Mr. Culliton requested the deferral of this hearing from its original date of November 15 to the 21st to permit him to attend on other court proceedings. That request was granted by the Tribunal Chair. On November 21st which was the second scheduled date for the hearing, with all parties present, Mr. Culliton requested a further delay, largely on the basis that although his firm had been engaged in the matter since 1999, he had only been asked to take over the file on October 27th and would like more time to prepare. After argument and consideration by the panel, the request was denied by the panel and the hearing proceeded. The panel indicated that it would re-iterate its reasons given verbally at the hearing, for its refusal to further delay the proceedings in this written decision.

The Tribunal noted the following reasons in its refusal of a further adjournment:

- a) The Applicant had not changed law firms. Mountain Mitchell had been engaged in this matter since 1998. While Mr. Culliton advised the Tribunal that the original lawyer engaged by the Applicant, Mr. Mitchell, had suffered some health problems in recent years, that fact had been disclosed some months ago to the Chair of the panel and several lawyers with Mountain Mitchell had been involved in various pre-hearing conference calls in the eleven months since the initial pre-hearing conference, including Mr. Culliton. Mr. Culliton had been fully engaged on the file since October 27th by his own admission and had participated in prior pre-hearing conferences with no prior request made for delay.
- b) Mr. Culliton had not indicated in his previous request of November 14 that he was not fully prepared to continue the proceedings on the 20th; on the contrary he indicated that he was so prepared. He further indicated on November 21st that he was, with the assistance of Mr. Peacock who had been engaged in the file from the onset, prepared to continue if their request for another deferral was denied. He indicated that they were both experienced senior legal counsel.
- c) The dates for the hearing had been agreed to by all parties in September of 2005. Mr. Culliton had only made his request to the panel and to the Superintendent's counsel the morning of the hearing on November 21st, when all parties and witnesses were already present. The panel noted that some witnesses and counsel in attendance were from outside of Toronto.
- d) Rockwell's counsel did not consent to the delay.

In fairness to the other parties in attendance who expressed a preference to continue, and in deference to the witnesses, counsel, court reporter and panel members already in attendance, and noting that all materials having been filed and before the panel, the Tribunal refused the request for another deferral. With the panel's consent, Mr. Peacock acted as lead counsel for the Applicant from this point onward. We note that although Mr. Peacock indicated that he had some

minor hearing difficulty, he indicated that he did not require any assistance, and we recognize that his able presentation did not appear to be impacted by any such difficulty.

The Issues in this Proceeding

At the pre-hearing conference of January 20, 2005, the parties agreed to frame the issues as follows:

- a) Does the Tribunal have jurisdiction to hear the matter before it?
- b) Should the Superintendent's consent to the transfer of assets from the Reliance Plan to the Allen-Bradley Plan be overturned?
- c) If the answer to (b) is yes, what is the appropriate remedy?

In the Applicant's Factum filed for hearing purposes in September 2005, item (b) was restated. Prior to the commencement of the hearing, as a preliminary matter the parties were permitted to present oral or written argument under Rule 16.05 of the Rules of Practice and Procedure for Proceedings Before the Tribunal, the merits of raising what appeared to be new or substantive issues not previously agreed to. Following a break in the proceedings to permit the parties time to consider their arguments, the parties agreed they felt they could continue based on the issues agreed to at the January 20, 2005 pre-hearing conference.

We will now deal with each issue separately and in the order described above.

a) Does the Tribunal have jurisdiction to hear the case before it?

We find that we do have jurisdiction in this matter.

The Superintendent's consent to the asset transfer and plan merger was given under section 81 of the Act. The consent was given without condition. Section 89 of the Act which governs hearing rights does not provide for an express hearing right in this circumstance. However the Tribunal finds that it is bound by the recent decision of the Ontario Divisional Court in the case of *Baxter v. Ontario (Superintendent of Financial Services)*.¹ The circumstances in the Baxter case are the same as in this case, and the Tribunal notes that the *Baxter* case has not been the subject of appeal.

The Divisional Court in *Baxter* expressed a number of factors as to why there may be an implied right to a hearing where the Act does not expressly provide for it:

- a) the Legislature must have intended a fair and delicate balance between employer and employee interests in a pension dispute. It would be inequitable to grant a full hearing right where there was a refusal to consent or an order for the return of assets (as only an employer would be aggrieved by such a decision) but not where there was a consent (as only plan members would be aggrieved by this);

¹ *Baxter v. Ontario (Superintendent of Financial Services)* (2004) O.J. No. 4909 (Div. Ct.).

- b) the legislation contemplates a request coming from either the employer or the employee as reflective of the need for a fair process;
- c) the general scheme of the Act is that the Superintendent makes the initial decision, but the Tribunal has a general supervisory role under section 87 of the Act; and
- d) relying on the *Monsanto* decision, the Divisional Court noted that the Act is public policy legislation, intended “to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans and to ensure a balance between employee and employer interests that will be beneficial for both groups and for the greater public interest in established pension standards”².

We agree that section 89 of the Act creates a “hearing” process available to employees and employers, which is not circumscribed by the more rigid rules that apply to appeals. To quote the *Baxter* case, “The question of whether the asset transfer complied with s. 81(5) is a question that lies at the heart or core of the Tribunal’s regulatory mandate and expertise and the interpretation of that provision is squarely within the Tribunal’s jurisdiction.”³

Both the Applicant and the Superintendent agreed that the Tribunal had jurisdiction in this matter. The Respondent Rockwell offered no legal argument in the alternative, other than to reserve the right to raise the issue of jurisdiction in any appeal of this decision.

b) **Should the Superintendent’s consent to the transfer of assets from the Reliance Plan to the Allen-Bradley Plan be overturned?**

The statutory text for approval of asset transfers is set out in s. 81(5) of the *Act* which provides as follows:

“(5) The Superintendent shall refuse to consent to a transfer of assets that does not protect the pension benefits and any other benefits of the members and former members of the original pension plan and that does not meet the prescribed requirements and qualifications.”

The Applicant’s Position

The Applicant’s position in essence is that the Reliance Plan was established pursuant to a trust, which included in the trust any surplus which may arise in the related fund. Mr. Peacock argued that the 1980 trust documents, read alone, provided for irrevocable surplus entitlement on plan windup in favour of the Reliance Plan members and prohibited the ability to merge the Reliance Plan with another pension plan or to permit funds to be used for other than Reliance Plan

² *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, (2004), 2004 SCC 54, para 38 and in *Baxter* para 25.

³ *Baxter*, para 49.

members. Relying on the *Aegon* case⁴, he argued that as an irrevocable trust, the Reliance Plan could not be merged with the Allen-Bradley Plan, as to do so would fail to protect the Reliance Plan member's interest in the surplus at the date of merger and be contrary to s. 81(5) of the *Act* in failing to protect "other benefits of the members". Mr. Peacock relied heavily on the trust language in the 1980 trust agreement, although he acknowledged that the 1980 trust agreement was not the inception of the Reliance Plan trust, which went back at least to the 1965 agreement and was a continuation of that trust. He further argued that the Original Reliance Plan trust agreements also lacked a specific power of revocation and could not be subsequently amended to permit plan mergers.

Notwithstanding his position, he did not challenge the legality of the 1980 Reliance Plan merger.

Rockwell's Position

Rockwell's position is that the only issue before the Tribunal is whether the Superintendent's consent under s. 81(5) was correct, and that the appropriate standard of review in this case was one of "reasonableness". Counsel argued that the issue of surplus entitlement is not applicable in this case based on the *Baxter* decision, and further is irrelevant where the plan and trust documents explicitly permit plan merger. Mr. Prestage argued on a proper review of the plan documents, that the plan merger was permitted and further that the Applicant was mistaken as to the issue of surplus ownership.

Superintendent's Position

In essence the Superintendent's submission was premised on the position that surplus ownership was not a factor to be considered on an asset transfer, and that the terms of the Reliance Plan and trust permitted the merger. In the event that surplus ownership was a factor to be considered, the Superintendent's position was that the employer was entitled to surplus under the terms of the Reliance Plan and trust.

Analysis

The first consideration was a review of the documentation to determine if:

- a) the Reliance Plan was established pursuant to a trust; and
- b) the Reliance Plan permitted plan mergers.

We find that the Reliance Plan was established pursuant to a trust since 1965 and this finding was not contested by any evidence of the parties. Although the parties did not review the prior U.S. Reliance Plan documents in their submissions, the Applicant conceded that Reliance's participation in that prior U.S. Reliance Plan was pursuant to the trust portion of the plan. No party contended that the Reliance Plan was not established pursuant to a trust and the panel agrees.

⁴ *Aegon Canada Inc. v. ING Canada Inc.*, (2002), 34 C.C.P.B. 1 (Ont. S.C.J.), affirmed (2003), 38 C.C.P.B. 1 (Ont. C.A.).

However, the panel has determined that the plan and trust documents must be read together to determine whether there are any impediments to plan merger, and rejects the Applicant's assertion that only the trust documents are relevant. Although the parties refer to the "inception" of the Reliance Plan in 1980, we find that its inception dates to 1965.

1965 Trust Agreement

We begin with a review of the 1965 Trust Agreement, in Article II, paragraphs 1 and 2 which read:

- “ 1. All cash and other assets (including any assets received from the predecessor Trustee) held in the Trust, together with all investment, reinvestments and proceeds thereof, shall be maintained and applied by the Trustee as a separate Trust Fund for the exclusive benefits of the participants and their beneficiaries, if any, under the Plan in accordance with the provisions hereinafter set forth.
2. The Trustee hereby agrees to hold and apply all cash and other assets constituting a part of the Trust Fund *subject to all the terms and conditions of the Plan* and to execute the Trust as herein provided”. (*emphasis ours*)

Article I defines “Plan” in this context with reference “only to the relevant provisions of such Trust Fund Part, as amended from time to time, *or to any plan which restates, supersedes or continues such provisions, as such plan may be amended or restated from time to time*, and (except as the Plan may hereafter change the definition thereof) the terms “Trust Agreement, “Trustee” and “Company” shall mean, respectively, this Trust Agreement (as amended or restated from time to time), The Royal Trust Company (or its successor or successors hereunder), and Reliance Electric & Engineering (Canada) Limited.” The preamble to the 1965 Trust Agreement refers to the “Trust Fund Part of the pension plan known as “The Reliance Electric and Engineering Company Retirement Plan for (Non-Bargaining Unit) Office Employees” (referred to herein as the U.S. Reliance Plan, the predecessor to the Original Reliance Plan) applicable to employees of Reliance Electric & Engineering (Canada) Limited and other Canadian Subsidiaries or affiliates of The Reliance Electric and Engineering company (an Ohio corporation) adopting such provisions of such Plan.” The 1965 Trust Agreement was effective May 1, 1965. The U.S. Reliance Plan was superseded by the Original Reliance Plan adopted effective January 1, 1966 and as noted previously several employers participated in that plan.

We find that the Original Reliance Plan was subject to a trust.

The 1965 Trust Agreement also states in Article VII, Amendment or Termination:

- “1. Reserved Rights. The Company has reserved, and does hereby reserve, the right, without the consent of the participants or their beneficiaries, if any, under the Plan, but subject to the limitations of Section 3 of this Article VII, to amend any provision of this Trust Agreement at any time as well as to terminate this Trust

Agreement and any trust created pursuant thereto, in whole or in part, at any time. Any such amendment or termination shall be expressed in an instrument in writing executed in the name of the Company by two officers thereof and shall be filed with the Trustee. Such amendment or termination shall become effective as of the date designated in such instrument. Any such amendment shall also be executed by the Trustee, but if the Trustee is unable or unwilling to execute such amendment, it may resign or be removed by the Company as provided. Any amendment may be made retroactively when necessary or advisable in the judgment of the Company to bring this Trust Agreement into conformity with governmental laws and regulations so as to qualify or register the Plan and Trust Agreement under the Income Tax Act of Canada or any Canadian province with which the Company files income tax returns or under the Pension Benefits Act, 1962-63, of Ontario or under any other relevant statute from time to time in effect.

2. Disposition or Discontinuance. In the event the Trust is terminated, in whole or in part, before the termination of the Plan, the Trustee shall, subject to the provisions of Section 3 of this Article and in so far as permitted by law, transfer the Trust Fund, or the part thereof to which the termination applies, to another trust or trusts or to an insurance company or companies or a governmental unit for the purchase of annuities, as the Company may direct, for the benefit of some or all of the participants. Upon the termination of the Plan as in the Plan provided, the Trustee shall make such disposition of the Trust Fund as is required *in accordance with the Plan*, and as to any matter not covered by the Plan or the Trust Agreement as the Trustee shall deem just and equitable. (*emphasis ours*)
3. Provisions Against Diversions. It shall be and is hereby made impossible, upon the termination of the Plan or this Trust or any part thereof, or pursuant to any amendment, modification or alteration of the Plan or this Trust Agreement or otherwise, for all or any part of the corpus or income of the Trust Fund to be used for, or diverted to, purposes other than for the exclusive benefit of the employees and former employers of the Company under the Plan, and such employees' beneficiaries, if any, under this Trust. This Section 3 may be amended in the manner provided in Section 1 of this Article VII, provided such amendment does not impair the qualification or registration of the Plan and Trust under the Income Tax Act of Canada or under the Pension Benefits Act, 1962-63, of Ontario or under any other relevant statute from time to time in effect."

The 1965 Trust Agreement therefore carries in paragraph 1 of Article VII a broad power of amendment, including the ability to terminate the trust and to transfer assets to a successor trustee, subject only to the restriction in paragraph 3 of Article VII which prohibits amendments to the trust agreement which may disqualify the plan for registration purposes under tax or pension legislation.

Further in reviewing paragraph 3 of Article VII, we accept the Respondent's argument that as a matter of interpretation the first sentence cannot be read alone, but must be read with the second sentence or the second sentence would have no purpose or clear meaning.

We find that the 1965 trust agreement is clearly to be read together with the Original Reliance Plan terms. Therefore we turn also to the terms of the Original Reliance Plan text, effective January 1, 1966, which is the successor to the U.S. Reliance Plan in respect of Canadian employees. While we did not review the provisions of the U.S. Reliance Plan as not all of the original documents in respect of that plan were available to the Tribunal, we note that the definition of “Trust Fund” in the Original Reliance Plan clearly impresses the funds transferred from the U.S. Reliance Plan to this Plan fund with a trust. The definition reads:

“Trust Fund. The assets held for employees of the Employers by the Trustee under the provisions of the Plan and the Trust Agreement, without distinction as to principal or income and without distinction as to the source thereof.”

“Trust Agreement” for service after 1965 is the 1965 Trust Agreement.

Section 10.2 of the plan text also states: “No employee, participant or any other person shall have any rights in or to the Trust Fund or any part thereof except as and to the extent expressly provided in the Plan and the Trust Agreement.”

Based on the provisions of Article II of the 1965 Trust Agreement and the definition of Trust Fund and section 10.02, these documents should be read together.

We note further that since the inception of the Original Reliance Plan, more than one employer participated in the plan. The ability to add additional employers at any time was clearly contemplated in Section 9.1 of the plan which states:

“Any other organization may, with the consent of the Board of Directors of Canadian Reliance, adopt the Plan by executing an instrument evidencing such adoption upon the order of its Board of Directors and filing a copy thereof with Canadian Reliance and the Trustee. Such adoption may be subject to such term as and conditions as the Board of Directors of Canadian Reliance approves.”

Section 12.1 of the Original Reliance Plan document states:

“Canadian Reliance has reserved, and does hereby reserve, the right to amend, modify or alter at any time any or all of the provisions of the Plan without the consent of other Employers, the Employer, participants or beneficiaries.”

Section 13.1 also reserved the power of termination:

“13.1 Canadian Reliance has reserved, and does hereby reserve, the right, without the consent of any other Employer, the employees of any Employer, participants or beneficiaries, to terminate the Plan at any time, either in whole or as to any designated group of employees (including former employees) and rehire beneficiaries....”

Following a scheme outlining the provision of accrued benefits on plan termination, section 13.4 outlines surplus ownership as follows:

“13.4 There shall be returned to each Employer any assets remaining in the Trust Fund attributable to its contributions after provision for all benefits under the Plan in accordance with Section 13.2 thereof.”

Based on the 1965 Trust Agreement and plan documents for the Original Reliance Plan, we find that the documents provided contemplated broad powers of amendment to the plan sponsor, which could reasonably be interpreted to include plan merger, and further that the Original Reliance Plan was not closed to new members or to new participating employers when it was established.

On February 1, 1971, Reliance Electric Limited became the successor to the business operations of Reliance Electric & Engineering (Canada) Limited, and adopted the Original Reliance Plan by an amendment to the Plan dated November 8, 1971.

1980 Reliance Plan

The Original Reliance Plan underwent a series of plan amendments which were not discussed by any party, until August 5, 1982, when the Original Reliance Plan was amended and merged with four other pension plans, namely the Canadian Reliance Retirement Plan for Non-Bargaining Unit of Employees of Toledo Scale Divisions (the “Toledo Plan”); the Canadian Reliance Retirement plan for (Non-Bargaining Unit) Office Employees of Dodge Division (the “Dodge Plan”); the Retirement Plan for the Employees of Lorain Products (Canada) Limited (the “Lorain Plan”); and the Pension Plan for Employees of Reliance Communication and Power Products Ltd. (the “Communication and Power Plan”), effective January 1, 1980, to continue as the Pension Plan for the Salaried and Management Employees of Reliance Electric Limited (the “Reliance Plan”) which is the subject Reliance Plan of this hearing. Under the terms of that amendment, effective January 1, 1980, the following companies were participating employers in the Reliance Plan: Reliance Electric Limited, Reliance Electric Limited – Dodge Division; Reliance Electric Limited – Toledo Scale Division; Reliance Communication and Power Products, Ltd.; and Reliance Telecommunications Products Ltd.

Reliance Electric Company entered into a new successor trust agreement with the Royal Trust Corporation of Canada in respect of the Reliance Plan, as of January 1, 1980, with Royal Trust Corporation of Canada (the “1980 Trust Agreement”) as successor trustee to the original trust agreement in respect of the Original Reliance Plan.

While the issue before the Tribunal is not whether or not the 1980 plan merger was appropriate, noting that the parties did not offer any argument that the 1980 merger was an issue, it does appear clear that in 1980, the Reliance Plan continued under a trust arrangement. The parties did not provide full documentation relating to all of the merged plans, but did provide limited documents for the Toledo Plan and the Dodge Plan. The Applicant’s argument was premised solely on the 1980 trust document for the Reliance Plan without reference to the other merged plans.

The 1980 Reliance Plan Documents

Given our earlier finding that the Original Reliance Plan was funded under a trust arrangement that continued on a merged basis in 1980, our initial analysis could stop at this point and we could rely on the 1965 plan documents and trust agreement to support our finding that the Plan and trust documents must be read together and that on such reading, a broad power of amendment that contemplates the addition of new participating employers and plan merger did exist.

However, we offer this additional analysis for completeness and to support our findings below. The assets of the Original Reliance Plan trust continued under this trust and the related resolution of August 5, 1982 refers to a “consolidation” of the plans, not the establishment of any new plans.

The 1980 Plan text provides a definition of “Pension Fund” that states:

““Pension Fund” means the pension fund and assets thereof established pursuant to the terms of the Plan and the Funding Agreement to which contributions are to be made by the Company and from which pensions and other benefits under the Plan are to be paid.”

The definition of “Funding Agreement” under the 1980 Plan text means “the trust agreement or agreements or pension investment contract or contracts, as amended, substituted or replaced from time to time, entered into between the Company and the Manager for the purposes of the Plan”, and “Company” means Reliance Electric Limited.

We re-produce parts of section 15 of the Plan herein:

“15.01 Amendment. The Company, by resolution adopted by its Board of Directors and delivered to the Manager, shall have the right to amend or change the Plan at any time and from time to time in any respect; provided however, that no amendment shall be effected to deprive a Pensioner or a Member of a benefit which has accrued to him under the Plan on the effective date of such amendment.”

15.02 Termination of the Plan. The Company, by resolutions adopted by its Board of Directors and delivered to the Manager, shall have the right to terminate the Plan at any time as to it and its Employees, subject always to the provisions of The Pension Benefits Act (Ontario) and any other legislation application to such termination.

Section 15.03, Application of the Fund, sets out the application of the fund in the event of the termination of the Plan, providing for a priority order of payment, and section 15.03(f) reads:

“All moneys which remain after the purposes enumerated in Paragraphs (a) to (e) of this Article 15.03 have been accomplished shall be paid over to the Company,

its successors or assigns; provided, however, that in the event that the Company, at the date of dissolution of the Plan, shall have become bankrupt or insolvent, or shall have taken the benefit of any statute providing for arrangements with creditors, or shall have been wound-up, either voluntarily or by order of a court, then in such event all moneys which remain after the purposes enumerated in this Section have been accomplished shall not be paid over to the Company, its successors or assigns, but shall be allocated to provide equitable increases in the benefits of those persons and in the respective order, enumerated in this Section 15.03; provided however the pension payable to any Member shall not exceed the maximum pension defined in Article 12 hereof..”

The 1980 Plan text therefore contains a broad power of amendment which includes by reasonable interpretation, the power of plan merger or consolidation without the need for any express provision.

We note the amendment and restatement of the Plan as at January 1, 1988, whereby section 15.01 was amended to state:

“Right to Amend or Terminate. The Company reserves the right to amend or discontinue the Plan, either in whole or in part, at any time or times, subject to the Income Tax Rules and the provisions of the Act. Without limiting the generality of the foregoing, such right to amend shall include the right to merge the Plan with another registered pension plan or plans, to divide the Plan into two or more registered pension plans, to transfer part of the assets of the Pension Fund to the fund of another registered pension plan or to convert all or part of the Plan to a money purchase pension plan.

No amendment to the Plan shall operate to reduce the amount or the value of the benefits which have accrued to Members prior to the date of such amendment, provided that the Plan may be amended to reduce benefits payable under the terms of the Plan where such amendment is necessary to avoid the revocation of the registration of the Plan under the Income Tax Rules and prior approval has been granted by the Pension Commission of Ontario.”

The definition of “Company” in section 1.09 was amended to now read:

“Company” means Reliance Electric Limited and any subsidiary, associated, or successor company designated by it which has adopted the Plan, except that any reference in the Plan to any action to be taken, consent or approval to be given, or decision to be made by the Company shall refer to Reliance Electric Limited acting through its Board of Directors or any person specified by said Board of Directors to so act.”

New Section 15.02(g) preserved the Company’s right to surplus on Plan termination by replicating the language of section 15.03(f) of the 1980 Reliance Plan.

1980 Reliance Plan Trust Agreement

We turn now to the 1980 Trust Agreement, which to our knowledge has not been amended or replaced.

The fourth recital incorporates the Plan by reference, stating:

“AND WHEREAS the Company has consolidated the Former Plans by establishing the Reliance Electric Salaried and Management Employees Pension Plan (hereinafter referred to as the Plan), *a copy of this is attached hereto and collectively made part hereof*, as it may be amended from time to time;” (*our emphasis*)

Section I reads:

“The Company hereby establishes with the Trustee a trust fund consisting of such sums of money and other property acceptable to the Trustee as may from time to time be paid or delivered to the Trustee together with any earnings and profits hereon. All such money and property, all investments made therewith and all earnings and profits thereon are referred to herein as the “Trust Fund”. The Trust Fund shall be held by the Trustee in trust and be dealt with in accordance with the provision of this Agreement. At no time shall any part of the Trust Fund be diverted to purposes *other than those pursuant to the terms of the Plan*, other than such part as may be required to pay taxes fees or expenses.” (*our emphasis*)

We also note these provisions of the 1980 Trust Agreement:

Section XI provides:

“In the event of the termination of the Plan as provided therein, the Trustee shall, subject to the satisfaction of all the liabilities with respect to the members and their beneficiaries under the Plan, dispose of the Trust Fund in accordance with the written direction of the Company.”

Section XII provides

“The Company reserves the right at any time and from time to time by way of a Resolution of its Board of Directors delivered to the Trustee to amend, in whole or in part, any or all of the provisions of this Agreement, provided that no such amendment which affects the rights, duties or responsibilities of the Trustee may be made without its consent, and provided further that no such amendment shall authorize or permit, at any time prior to the satisfaction of all liabilities with respect to the members and their beneficiaries under the Plan, any part of the Trust Fund to be used for or diverted to purposes other than those provided for under the terms of the Plan or for the payment of fees, expenses and taxes as provided for herein.

If, pursuant to the Plan, subsidiaries and/or affiliates of the Company and included thereunder, the Trustee shall be advised thereof by way of Resolution of the Boards of Directors of the Company and any such affiliate and/or associate delivered to the Trustee.”

Section XIII provides:

“ Wherever in this Agreement the word “Company” is used, it shall be deemed to mean and shall include any other company with which the company may amalgamate or with which it may be reconstructed, whether under its present name or any other name, or to which its undertaking and business for the time being may be sold or otherwise transferred.”

Although the Applicant presented limited evidence related to various member booklets which purportedly restricted, in some fashion, use of surplus, we have given no weight to these documents. The Applicant’s own witness conceded on examination that one such booklet related to another registered pension plan for hourly employees, not the Reliance Plan. The other booklets each referred to the company’s entitlement to surplus on both plan termination and on an on-going basis and to the booklet’s governance by the overriding plan provisions. Therefore the Tribunal has given no weight to the member booklet communications.

Although not disputed by any party, the Tribunal finds that both the Original Reliance Plan and the 1980 Reliance Plan were funded pursuant to a trust arrangement, and further accepts the Respondent’s contention that the terms of the trust agreement should be read together with the Plan document.

Further the Tribunal finds that both the Original Reliance Plan and the 1980 Reliance Plan permitted plan mergers under general broad powers of amendment at inception, and certainly explicitly under the 1988 amendment. In fact the creation of the 1980 Reliance Plan was itself the result of plan mergers, the appropriateness thereof which was not disputed by any party. Further, the Applicant concedes in his Factum that the “company had wide powers to amend”.

It is our finding that a general broad power of plan amendment without a clear impediment is sufficient to provide for plan merger and does not of itself constitute a revocation of a trust as the Applicant suggests in its Factum. In our view, the Applicant has not properly applied the dictates of the *Schmidt*⁵ decision when he asserts in his Factum that “even where an employer retains a broad right to amend the trust and the plan, the failure to reserve the right to revoke the trust is fatal to an attempt by an employer to amend the plan ...to merge the funds with other plans, either during the continuation of the plan or on its termination”.

The Tribunal next turned to an examination of whether there were any other impediments under the plan documents or in law to the Respondent’s right to amend the plan to permit a plan merger with another registered pension plan.

⁵ *Schmidt v. Air Products of Canada* (1994) 115 D.L.R. (4th) 631 (S.C.C.)

Having carefully reviewed the documents before us, we find that there is no impediment under the Original Reliance Plan or the 1980 Reliance Plan or related trust documents to prohibit a plan merger with the Allen-Bradley Plan. We note that no evidence was provided by any party as to whether or not the Allen-Bradley Plan permitted plan merger. The only document provided in respect of the Allen-Bradley Plan was the January 1, 1992 restated plan text which contains a general power of amendment in Article XIV, section 14.1. However as the issue of whether there was a prohibition on plan merger under the Allen-Bradley Plan was not before the Tribunal, we do not feel it necessary to decide whether the members of the Allen-Bradley Plan have cause to contest the merger; to date they have not done so.

Therefore we return to the Superintendent's consent under subsection 81(5) of the *Act* which provides as follows:

“(5) The Superintendent shall refuse to consent to a transfer of assets that does not protect the pension benefits and any other benefits of the members and former members of the original pension plan and that does not meet the prescribed requirements and qualifications.”⁶

The position of the Applicant in essence is that the Superintendent should have conducted an inquiry as to surplus entitlement in reviewing the application for plan merger, and in failing to do so, exceeded her jurisdiction by failing to properly protect member rights to benefits, namely rights to actuarial surplus on plan windup. Further the Applicant contends that the members owned the surplus on plan windup under the terms of the 1980 trust agreement to the Reliance Plan.

Surplus is not a pension benefit. Let us consider the issue of whether or not surplus is a “benefit” under section 81(5) of the *Act*.

The decision of the Ontario Divisional Court in *Baxter v. Ontario* (Superintendent of Financial Services) provides a clear answer to this issue. In that case, the Divisional Court wrote at paragraphs 65 and 66:

“...Surplus is neither a pension benefit nor an “other benefit” under the PBA. Until the right to surplus crystallizes – and the right to surplus does not crystallize upon a transfer of assets – the surplus is simply as expressed in *Schmidt, supra* “the excess of the value of the assets of a pension fund related to a pension plan for the value of the liabilities under the pension plan”.

The term “pension benefit” is defined in the PBA as being the aggregate monthly, annual or other periodic amounts payable to a member or former member, to which the member or former member will become entitled under the pension plan. The term “any other benefits” is not defined in the PBA. The only types of benefits that are defined are “bridging benefits” in s. 1 and “ancillary benefits” in s. 40. Neither of these benefits include pension fund surplus assets. Accordingly the term “other benefits” in s. 81 (5) of the PBA could only mean benefits that are provided by a pension plan that are not

⁶ *Baxter*, para 55.

pension benefits or ancillary benefits as these are defined in the PBA. For example, a pension plan might provide disability benefits or income replacement benefits. The intent of s. 81(5) is to ensure that such benefits are also protected on any plan merger. In other words, then the successor merged plan should also so provide. If the appellants are correct that “other benefits” includes surplus, then an employer would be required to fund a pension fund to maintain the current level of a actuarial surplus in the pension plan, a result which in our view is contrary to the specific funding regime set out in the PBA and regulations (see s. 55(1)).”

This reasoning is consistent in our view with s. 55(1) of the *Act* which requires that a pension plan provide for funding sufficient to provide “pension benefits, ancillary benefits and other benefits under the plan”. Surplus is not a benefit to be funded.

The *Act* does not provide for any entitlement to surplus until the pension plan is wound up in whole or in part, and the surplus crystallizes and becomes actual (not actuarial) surplus. The Supreme Court of Canada states in *Schmidt* at paragraph 28:

“Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan. While a plan which takes the form of a trust is in operation, the surplus is an actuarial surplus. Neither the employer nor the employees have a specific interest in this amount, since it only exists on paper, although the employee beneficiaries have an equitable interest in the total assets of the fund while it is in existence.”

In the case before us, the plan members have no inherent interest in any plan surplus until the plan is wound up. Section 81 of the *Act* does not provide any right to a distribution of surplus to the members of the pension plan when their plan is merged with a successor plan. In fact, there is an express statement in s. 81(1) that the original pension plan is deemed not to be wound up and that the new plan is deemed to be a continuation of the original plan. Hence, any surplus that is transferred on a merger is not withdrawn, but remains in the plan. Therefore there is no evidence that the members suffered any loss of benefits on plan merger. Nor is there any support in our view, nor evidence offered, for the Applicants’ contention that on plan merger a revocation of trust follows.

We do find it necessary to comment on the application of the decision of the Ontario Court of Appeal in *Aegon Canada Inc. v. ING Canada Inc.*, (2003) O.J. No. 4755 (Ont. C.A.) referred to herein as the *Aegon* case. In *Aegon*, the court affirmed a decision of the trial judge that denied an employer the ability to merge two pension plans and use the surplus funds of one plan to fund benefits under the other plan, where the corpus and income of the plan in question was held for the exclusive use of its beneficiaries under a “closed” plan. The *Aegon* case turned on specific facts that a particular plan (the “Halifax Plan”) was subject to a trust and that the terms of that trust required the plan administrator to maintain the assets that derived from the Halifax Plan separate and distinct from the assets that derived from the other merging plan. In that case, the propriety of the asset transfer was not the issue, but the post-transfer conduct of the employer and the accuracy of warranties given by the employer in a subsequent share purchase agreement

were in dispute. The *Aegon* case did not consider the reasonableness of the Superintendent's consent to the transfer of assets, which is the very issue before this Tribunal.

Further the Divisional Court has previously noted that "There is nothing inherently objectionable about a merger of a pension plan that is in surplus with one that is not, even if the assets of the former plan are subject to a trust for the benefit of the members".⁷ On the facts of this case, both plans were in surplus at the date of the merger application, a fact which was not disputed by any party. We agree with the Superintendent's assertion that plan mergers may continue, consistent with the specific terms of their trust agreements.

In this case we have found that at all times since 1966, the Reliance Plan terms and trust agreement permitted a merger without conditions. At all times, the plan documents also contemplated that additional participating employers could be added to the Reliance Plan as well as future employees of Reliance. Unlike the *Aegon* case, in this case both plans are in surplus at date of merger. Neither the Reliance Plan nor Allen-Bradley Plan was closed to new members at the date of merger. Unlike the *Aegon* case, no undertaking was given by Reliance or requested by the Superintendent to track the assets and liabilities of the merging plans separately post-merger. No windup or partial windup scenario exists, and the Applicant has let lapse its right to appeal the 2000 decision of the Superintendent not to order a windup of the Reliance Plan. Accrued Reliance Plan member benefits to the date of merger do not appear to have been reduced as a result of the merger, and the Superintendent appeared satisfied in this regard.

While we make no finding as to the spin-off of various participating employers since 1980 under the Reliance Plan, notably Com/Tech, we note that both parties seemed to agree that it was irrelevant to the issues before the Tribunal and offered no evidence otherwise.

By all these facts, we find this case can be distinguished on its facts from *Aegon*. We believe that the reasoning of the Supreme Court of Canada in *Schmidt* and of the Court of Appeal in *Helig* should prevail.

Further we find that there is no requirement under the *Act* or regulations, or otherwise in law, for the Superintendent to take into account or to determine rights of surplus ownership on plan windup in assessing any application for plan merger. We note that agreement of the Superintendent in this regard, who states in paragraph 46 of his submission that "even if the members are entitled to surplus under the Reliance Plan and trust, this is simply not relevant on a pension plan merger". We agree.

Therefore we must consider whether the Superintendent's approval of the transfer request should be overturned on any other basis, based on a test of "reasonableness" as affirmed in the Ontario Divisional Court in the case of *Weevex*⁸ or of denial of natural justice or procedural unfairness as alleged by the Applicant.

⁷ Re *Helig and Dominion Securities Pitfield Ltd.* (1989) 67 O.R. (2nd) 577, at p. 582 (Ont. C. A.)

⁸ *Retirement Income Plan for Salaried Employees of Weevexx Corp. v. Ontario* (1999) 24 C.C.P.B. 154 (Div. Ct.), para. 20; (2002), 24 C.C.P.B. 154 (C.A.)

No evidence was submitted by the Applicant as to any denial of natural justice or procedural fairness on the part of the Superintendent. As a finding of fact, we find that the Applicant had the opportunity in 1998 and 1999 and did make submissions to the Superintendent on the merger and to reply to the Respondent's submissions, prior to the decision of the Superintendent in 1999. The Applicant was also given the opportunity to make submissions on the plan windup issue while this proceeding was put on hold pending that determination in 2000.

While the Applicant and Respondents could not come to an Agreed Statement of Facts, by considering thoroughly the submissions, witness testimony and argument, the Tribunal found only minor disagreements of fact, none material to any determination of the issues before it. While parties differed as to the interpretation of documents, as they are entitled to do, the Applicant appears to have a full and fair opportunity to make his case and to know the case against him. We find the contention by Applicant's counsel that agreed documents may in some manner be suspect, namely whether the 1980 Reliance Plan text was the "true" plan text without merit, given the total lack of evidence otherwise, and we accepted the undisputed affidavit evidence of Ms. Susan Seller and Mr. Paul Christiani and the certificate of Mr. K. David Gordon as to its authenticity. We also note that the Superintendent's counsel brought to the hearing the Commission's own file so that the Applicant could again review the documents, which he declined to do.

As noted previously, the Tribunal also refused to accept or consider documents tendered by the Applicant at the hearing, on which the Applicant's counsel was not prepared to call witnesses or authenticate in any other manner. The Tribunal had sufficient documentation before it to decide the issues.

There was no evidence before the Tribunal that the Superintendent had failed to consider its own internal guidelines in effect in 1999 to protect member benefits, namely A700-251, Full Asset Transfers under Section 81 – Superintendent's Consent Required. Although the guideline is not binding on the Tribunal, in our determination of the issues, we note that since both plans were in surplus at the time of the merger application, paragraph 11(a) of the policy which indicates that benefits may not be protected if on plan merger assets are less than liabilities, was satisfied.⁹ As noted previously, the Reliance Plan, the Allen-Bradley Plan and the Rockwell Plan all have transfer ratios in excess of one at the date of the merger.

Counsel for the Superintendent offered to the Tribunal and the parties at the hearing, a current checklist for merger applications, which checklist is publicly available on the FSCO website. However, as the Tribunal ascertained that those guidelines were not in fact considered by the Superintendent at the time of her decision, the Tribunal gives that document no weight in its decision.

In the face of the *Schmidt*, *Baxter and Helig* decisions, the provisions of the *Act*, and our findings above and below, we do not consider the Superintendent's decision unreasonable. No do we find any evidence of denial of natural justice or of procedural unfairness.

⁹ Financial Services Commission of Ontario Policy A700-251, October 29, 1996, published Bulletin 6/4 (Fall-Winter 1997), at pp. 2-3.

Based on these findings, our finding on the second issue (b), “Should the Superintendent’s consent to the transfer of assets from the Reliance Plan to the Allen-Bradley Plan be overturned?”, is No.

With our decision on issue (b), there is no need to consider the issue of remedy in (c), which asked; “If the answer to (b) is yes, what is the appropriate remedy?”.

Decision

The decision of the Director of Pension Plans Branch of the Financial Services Commission of Ontario by delegated authority from the Superintendent of Financial Services, dated March 30, 1999, to permit the transfer of assets from the Pension Plan for Salaried and Management Employees of Reliance Electric Limited (the “Reliance Plan”), Registration Number 0292946, to the Revised Retirement Plan for Employees of the Allen-Bradley Division of Rockwell International of Canada (now the Pension Plan for Employees of Rockwell Automation Canada Inc. (the “Allen-Bradley Plan”), Registration Number 0321554, is upheld without conditions.

The hearing application is dismissed.

Costs

The Applicant and Rockwell both requested an order for costs, but no argument was made or dollar amount suggested to the panel. The Tribunal makes no order as to costs, but is prepared to re-convene for the sole purpose of hearing submissions as to party costs if so requested by any party. If any party wishes to make application for an order of costs in this matter, it may do so by written request filed with the Tribunal and served on the other parties within 30 days of this decision. The other parties shall have 14 days to file and serve written responses to any such request.

Dated at the City of Toronto this 20th day of February, 2006.

“Florence A. Holden”

Florence A. Holden

Chair of the Panel and Member of the Tribunal

“Heather Gavin”

Heather Gavin

Member of the Panel and of the Tribunal

“David A. Short”

David A. Short

Member of the Panel and of the Tribunal