

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 Subsections 70(5), 87(2)(c) and 88(2)(c) of the Act respecting the Schering-Plough Healthcare Products Canada Inc. Salaried Employees’ Pension Plan, Registration No. 0297903;

AND IN THE MATTER OF a hearing in Accordance with subsection 89(8) of the Act

B E T W E E N :

SCHERING CANADA INC.

Applicant

-and-

**SUPERINTENDENT OF FINANCIAL SERVICES and ESTATE OF
KEN REYNOLDS, MICHEL GARIEPY, EDWARD TAYLOR, and JIM WILSON**

Respondents

BEFORE:

Lily Harmer
Member of the Tribunal and Chair of the Panel

Shiraz Bharmal
Member of the Tribunal and of the Panel

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

APPEARANCES:

For the Applicant:
Paul Dimitriadis and Kathy Bush

For the Superintendent of Financial Services:
Deborah McPhail

For the Estate of Ken Reynolds, Michel Gariepy, Edward Taylor and Jim Wilson:
Christine Tabbert

Hearing Date:

January 9, 2006

REASONS FOR DECISION

NATURE OF THE APPLICATION

Schering Canada Inc. ("Schering") seeks an Order preventing the Superintendent from proceeding with a Notice of Proposal to make an order requiring Schering to prepare and submit, within 60 days, a report amending that portion of the partial wind-up report dated February 19, 1997 (the "Partial Wind Up Report") on the partial wind-up of the Schering-Plough Healthcare Products Canada Inc. Salaried Employees' Pension Plan (the "Plan") dealing with the surplus attributable to members affected by the partial wind-up, to comply with the requirements of the *Pension Benefits Act* (the "Act").

The parties addressed the following issues:

1. Is Schering entitled to surplus under the Plan?
2. What is the amount of surplus related to the partial wind-up?
3. Does the Superintendent have the authority under the Act to refuse to approve the Partial Wind-Up Report on the basis of a lack of distribution of surplus to members on a partial wind-up, if the employer is entitled to surplus?
4. If Schering is entitled to surplus under the Plan, is section 8 of Regulation 909 under the Act *ultra vires* in the sense that it is beyond the regulation-making authority in the Act?
5. If section 8 of Regulation 909 is *ultra vires*, should the Superintendent be directed to approve Schering's Partial Wind-Up Report, as revised by Schering?

FACTS

The hearing proceeded on the basis of an Agreed Statement of Facts. The parties chose not to adduce any additional evidence at the hearing.

The Plan is a pension plan sponsored and administered by Schering that includes defined benefits. The Estate of Ken Reynolds, Michel Gariepy, Edward Taylor and Jim Wilson are members of the Plan who were affected by the partial wind-up of the Plan as at August 31, 1996 ("Plan Members"). The Superintendent of Financial Services (the "Superintendent") administers and enforces the *Financial Services Commission of Ontario Act*, and all other legislation that confers powers on or assigns duties to the

Superintendent, including the *Pension Benefits Act*. The Superintendent also exercises the powers and duties conferred upon the Superintendent by the relevant legislation.

Plan History

The Plan was established by Scholl-Plough Canada Inc. effective July 1, 1988. It was known at that time as the Scholl-Plough Canada Inc. Salaried Employees' Pension Plan. The Plan was originally funded pursuant to three funding agreements. The first was Group Annuity Policy Gr. P.P. 11694 issued by Standard Life Assurance Company of Canada ("Policy 11694") in respect of pre-1987 benefits for former members of the Plough Canada Employees' Pension Plan (the "Plough Plan"). The second was a Tri-Plan Policy Gr. P.W. 73973 issued by Standard Life Assurance Company to fund the money purchase pension under the Plan. The third was a trust agreement with Montreal Trust Company of Canada, effective July 1, 1988, to fund all benefits accrued under the Plan after July 1, 1988. This trust agreement was replaced by a trust agreement with Royal Trust Corporation of Canada on August 18, 1999.

The Plan was amended several times to reflect company name changes and reorganizations.

Prior Plan History

With effect from January 1, 1987, Scholl (Canada) Inc. and Plough Canada Inc. merged and continued as Scholl-Plough Canada Inc. Prior to that merger each of the two companies had sponsored its own pension plan ("Scholl Plan" and "Plough Plan"). A salaried employee of the merged company Scholl-Plough Canada Inc. who had been a member of either of those prior plans and who was employed by Scholl-Plough Canada Inc. on July 1, 1988 automatically became a member of the Plan.

The Plough Plan had been adopted as at January 1, 1982. It in turn was an amendment and restatement of the Retirement Income Plan for Employees of Schering Canada Inc. (the "Prior Plough Plan"), the provisions of which were set forth in Group Annuity Insurance Contract No. G.A. 471 issued by The National Life Assurance Company of Canada. The Prior Plough Plan dated back to 1955. No copy of Group Annuity Insurance Contract No. G.A. 471 is contained in the Plough Plan files of the Financial Services Commission of Ontario, or in Schering's files. In fact, no documents pertaining to the Prior Plough Plan were provided in evidence in this matter.

The Plough Plan adopted in January 1, 1982 was funded pursuant to a trust agreement between Plough Canada Inc. and the Guaranty Trust Company. That trust agreement was dated January 1, 1982. Assets under that 1982 Guaranty Trust agreement were transferred effective July 1, 1988 to the Montreal Trust Company of Canada, and held pursuant to the 1988 Montreal Trust agreement. The amount transferred on July 6, 1988 was \$1,112,321.55. Of this, the amount attributable to salaried members was \$773,210.00.

Prior to November 15, 1977, benefits under the Scholl Plan were fully insured under Group Policy Gr. P.W. 10660 issued by The Standard Life Assurance Company. The

commencement date of Policy 10660 was July 1, 1960. There was no plan text for the Scholl Plan. Effective November 15, 1977, liabilities relating to benefits for salaried members of the Scholl Plan, except those relating to pension payments which commenced prior to November 15, 1977, were assumed by Scholl (Canada) Inc. under the terms of Policy 11694.

Benefits under the Scholl Plan continued to be fully insured under Policy 11694 until December 31, 1986. Policy 11694 became paid-up effective January 1, 1987. Benefits accruing thereafter under the Scholl Plan were funded pursuant to the 1988 Montreal Trust agreement. A deposit of \$173,683.43 was made to Montreal Trust Company of Canada on August 2, 1988 and it covered benefits accrued between January 1, 1987 and June 30, 1988.

The Partial Wind up

The Plan was partially wound up as at August 31, 1996. Schering filed a partial wind up report dated February 19, 1997, stating that the surplus was \$416,585.00. The report did not specifically clarify whether the surplus amount referred to the partial wind up or to the Plan as a whole. The solvency liabilities for the eleven members affected by the partial wind up were \$339,198.00. The total solvency liabilities as of the date of the partial wind up were \$999,796.00.

In a letter to Schering dated February 24, 1998, the Superintendent pursuant to her authority under subsection 70(3) of the *Pension Benefits Act*, R.S.O. 1990, c.P.8 (the "Act") authorized the distribution of assets to the members, former members and other persons affected by the partial wind up. In the same letter, the Superintendent advised Schering that the surplus attributable to members, former members and other persons affected by the partial wind up must be dealt with in accordance with the Act.

On July 29, 1998, the Plan Members wrote to the Superintendent. They took the position that surplus must be distributed on a partial wind up and requested that the Superintendent require Schering to file a supplement to the partial wind up report setting out Schering's proposals for the distribution of surplus.

On August 31, 1998, Schering wrote to the Superintendent in response stating that Schering had dealt with the surplus in accordance with the Act and that no distribution of surplus was required.

On September 15, 1998, Ms. Penny McIlraith, Pension Officer of the Financial Services Commission of Ontario ("FSCO"), wrote to Schering. She requested that an amendment to the partial wind up report be filed by November 20, 1998, making provision for the distribution of surplus.

On October 15, 1998, Schering responded to FSCO and indicated that it would not be preparing an amendment to the wind up report to provide for a distribution of surplus since it was of the view that no distribution of surplus was required.

On October 14, 1999, the Superintendent issued a Notice of Proposal to make an order, on the basis of subsections 70(5), 87(2)(c) and 88(2)(c) of the Act, that would require Schering to prepare and submit, within 60 days, a report amending that portion of the partial wind up report dealing with surplus attributable to members of the Plan affected by the partial wind up.

On November 10, 1999, Schering requested a hearing pursuant to subsection 89(6) of the Act in relation to the Superintendent's proposal to order Schering to amend the partial wind up report.

Plan Wind up

On July 15, 2004 the Plan's actuaries filed a wind up valuation and report as at May 30, 2003, indicating a wind up deficit of \$199,595. The wind up deficit takes into consideration \$211,667 of liabilities in respect of the portion of the surplus "tagged" for the partial wind up.

ANALYSIS

Surplus Entitlement

Schering argued that it was entitled to surplus under the Plan pursuant to section 12.04 of the 1988 Plan. Section 12.04 provides:

If there are any assets remaining after the liabilities for all benefits accrued under the Plan have been met, they shall be returned to the Company subject to any Applicable Legislation.

While the 1988 Plan seems to make it clear that Schering is entitled to any surplus, the 1988 Plan was not the first pension plan to provide pension benefits to employees of Schering or its predecessors. It was preceded by at least 3 former pension plans – the Scholl Plan, the Plough Plan, and the Prior Plough Plan (the "Former Plans"). A member of any of the Former Plans employed by Scholl-Plough (later Schering) on July 1, 1988, automatically became a member of the 1988 Plan. A review of the 1988 Plan is thus not the end of the necessary inquiry.

An applicant seeking to establish entitlement to pension surplus must demonstrate either that the plan was not subject to a trust and the contractual terms did not confer surplus entitlement on the members or, if the plan is impressed with a trust, the applicant has been entitled to plan surplus from the inception of the plan, or that it was authorized from inception to amend the plan to make the employer the beneficiary of the surplus. Thus, it is necessary to look to the complete plan and trust documents from the inception of the Plan to determine surplus entitlement, whether on a partial or full wind-up.¹

Schering based its argument for entitlement to the surplus on a reading of the Plan documents dating back to the inception of the Scholl Plan, and back to 1982 in

¹ *Schmidt v, Air Products of Canada Ltd.* (1994), 3 C.C.P.B. 1 (S.C.C.)

connection with the Plough Plan. Nothing in those documents would appear to derogate from Schering's position that it is entitled to the surplus, nor was any such argument made by the Superintendent before us. That is not, however, the end of the inquiry.

The 1982 Plough Plan text stated in its introduction:

As at July 1, 1955, Schering Canada Inc. adopted The Retirement Income Plan for Employees of Schering Canada Inc. (the "Predecessor Plan"). Effective May 1, 1971 eligible Plough Canada Inc. employees became covered for pension benefits under the Predecessor Plan.

The Predecessor Plan was amended from time to time. The most recent substantive amendment became effective as at January 1, 1975.

As at January 1, 1982 Plough Canada Inc. (the "Company") adopted the Plough Canada Inc. Employees' Pension Plan (the "Plan").

The Plan is an amendment and restatement of the Predecessor Plan with respect to all Employees of the Company who were members of such plan and, as such, the Plan incorporates and preserves the entitlements and benefits accrued by such members prior to January 1, 1982 under the Predecessor Plan.

Unfortunately in this case, an examination of all of the relevant Plan documents is not possible as none of the documents pertaining to the Prior Plough Plan are currently available. Nor was any evidence adduced to speak to the nature of those documents, save for a reference to a group annuity insurance contract discussed below. There is thus uncertainty as to whether or not the Plough Plan, from its inception, was subject to a trust, or whether the employer was entitled to surplus, or whether the power to revoke any trust existed at that date. A plan amendment from 1975 is also missing, so that no information is available to assist us in understanding how the Prior Plough Plan might have changed at that time.

Schering argued that a review of the documents was not necessary because the 1982 Plough Plan referenced the fact that the provisions of the Prior Plough Plan were set forth in a group annuity insurance contract, and that trust law doesn't apply in that context. This Tribunal has addressed this issue before, in the *Corporation of the City of Kitchener* case², relying on the Ontario Court of Appeal in *Howitt v. Howden Group Canada Ltd.*³, where the Court of Appeal specifically held that "[f]unding by way of a contract is not, however, necessarily inconsistent with the intention to create a pension trust". It depends in each case on an assessment of the language of the document(s) in issue. Without the documents, such an assessment cannot be made.

² *The Corporation of the City of Kitchener v. Superintendent of Financial Services*, FST File No. P0172-2001, June 24, 2004.

³ *Howitt v. Howden Group Canada Ltd.*, (1999) 170 D.L.R. (4th) 423 (Ont. C.A.)

The missing documents are therefore critical to a determination of the issue of entitlement. Without them it is not possible to ascertain the original nature of the Plan.

Schering must demonstrate its entitlement to the surplus based on an examination of all plan and trust documents from the Plan's inception⁴, which, because of the uncertainty caused by the missing documents, it cannot do. Schering cannot satisfy the "high bar" enunciated in *Schmidt v Air Products Canada Limited*. In the circumstances, therefore, we cannot find that the employer was entitled to the surplus.

Amount of Surplus

We understood from the position of the parties at the hearing that the second issue concerning the amount of surplus attributable to the partial wind-up is no longer in issue, in that the Superintendent is prepared to accept Schering's methodology used to determine an interim amount for discussion purposes as at May 30, 2003. The actual amount can only be determined as at the date of distribution. This will require a "roll-forward" of the amount calculated by Schering as at May 30, 2003, to the date of distribution. The Superintendent requested that Schering provide a more up to date number to Plan Members, and we see no reason why this should not be done at this time. We make no further comments on this issue, but leave it to the parties to work out at the appropriate time.

Superintendent's Authority

The third issue concerns the authority of the Superintendent to refuse to approve a partial wind-up report where the employer is entitled to surplus, on the basis of the lack of distribution of surplus to members on partial wind-up. As this Tribunal has found that in this case Schering has not satisfactorily proven that it is entitled to the surplus, there is no need to address this issue.

As the Supreme Court of Canada has made clear in *Monsanto Canada Inc. v. Superintendent of Financial Services*⁵, members of a pension plan affected by a partial wind-up are entitled to the same rights as they would have received on a full wind-up. This includes rights to surplus distribution. Acting on its assumption that it had full entitlement to the surplus, Schering advised the Superintendent that no distribution of surplus was required. In light of our finding that Schering has not established an entitlement to the surplus, Schering is required to effect a distribution of surplus in accordance with the Act and its regulations.

The Superintendent has a broad discretion under section 70(5) of the Act to refuse to approve a wind-up report that does not meet the requirements of the Act and the regulations or that does not protect the interests of the members. It has additional powers under section 87 of the Act to require Schering to take any action in respect of the Plan if the Superintendent is of the opinion on reasonable and probable grounds

⁴ *Corporation of the City of Kitchener*, supra.

⁵ *Monsanto Canada Inc. v. Superintendent of Financial Services* [2004] 3 S.C.R. 152.

that the administrator of the Plan is contravening a requirement of the Act or regulations.

In the circumstances of this case, where the employer has not established its entitlement to surplus, where no provision has been made to obtain the consent of the Plan Members to a distribution of the surplus, and where Schering has indicated that no surplus distribution is required, the Superintendent has the authority to refuse to approve the partial wind-up report.

Employee Consent

It is not necessary for this Tribunal to address the fourth or fifth issues concerning the validity of section 8 of Regulation 909 of the Act, given our finding with respect to surplus entitlement.

CONCLUSION

This case raises interesting and complex issues concerning surplus entitlement, the Superintendent's authority, and the validity of the consent requirements of Regulation 909. The primary, and underlying, issue was a determination of surplus entitlement. We find that the missing documents cause too much uncertainty about the underlying nature of the Plan, and whether or not it was impressed with trust at its inception. Schering thus could not establish with sufficient certainty that it had an entitlement to the surplus. In the circumstances, the remaining issues must be left to be determined on other facts another day.

The Superintendent may proceed with the Notice of Proposal dated October 14, 1999.

Dated at the City of Toronto this 12th day of April, 2006.

"Lily Harmer"

Lily Harmer

Chair of the Panel and Member of the Tribunal

"Shiraz Bharmal"

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Member of the Panel and of the Tribunal

"David Short"

David A. Short

Member of the Panel and of the Tribunal