

FST File No. P0162-2001

Decision No. P0162-2001-2

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

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”).

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”).

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.

- 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.

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."

- 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.

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?

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]

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.

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.

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.

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.

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