

**FST FILE #P0166-2001& P0175-2001
Decision No. P0166-2001 and P0175-2001-1**

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF THE *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended (the “Act”);

AND IN THE MATTER OF a Proposal by the Superintendent of Financial Services (the “Superintendent”) to Refuse to Consent to an application by Samsonite Canada Inc. for the payment of surplus to the employer from the **Samsonite Canadian Service Related Plan, Registration No. 398578** and a proposal by the Superintendent to Refuse to Consent to an application by Samsonite Canada Inc. for the payment of surplus to the employer from the **Samsonite Canadian Retirement Income Plan, Registration No. 373225**;

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

BETWEEN

SAMSONITE CANADA INC.

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Ms. Martha Milczynski
Chair of the Tribunal and of the Panel

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

Mr. William Forbes
Member of the Tribunal and of the Panel

APPEARANCES:

For Samsonite Canada Inc.
Mr. Greg Winfield

For the Superintendent of Financial Services:
Mr. Mark Bailey

HEARING DATES:

June 3, 2002

REASONS

INTRODUCTION

Samsonite Canada Inc. (the "Company") has requested a hearing before the Financial Services Tribunal (the "Tribunal") with respect to two Notices of Proposal (together the "NOPs" and each the "NOP") issued by the Superintendent of Financial Services (the "Superintendent").

The NOP dated June 1, 2001 relates to the Company's application to the Superintendent to withdraw surplus from the Samsonite Canadian Service Related Plan, registration No. 398578 (the "Hourly Plan"). As at the wind-up date, the Hourly Plan had surplus assets of approximately \$727,200. The Company proposed to distribute \$360,800 to Hourly Plan members and former members as benefit improvements, and \$366,400 was to be paid to the Company. The Company's proposal received consent from 88% of active members and 72% of inactive members.

The NOP dated October 11, 2001 relates to the Company's application to the Superintendent to withdraw surplus from the Samsonite Canadian Retirement Income Plan, registration No. 373225 (the "Salaried Plan"). As at the wind-up date, the Salaried Plan had surplus assets of approximately \$747,400. The Company proposed to distribute \$396,900 to Salaried Plan members and former members as benefit improvements, and \$350,500 was to be paid to the

Company. The Company's proposal received consent from 93% of the active members and 79% of inactive members.

The Hourly and Salaried Plans were terminated by the Company effective January 31, 1998.

Each of the Superintendent's NOPs proposed to dismiss the Company's application to withdraw surplus on the grounds that the terms of the Hourly Plan and Salaried Plan do not provide for "payment of surplus to the employer on the wind-up of the pension plan", and that consequently, the applications' compliance with subsection 79(3)(b) of the Pensions Benefits Act (the "PBA") was not established.

For the reasons set out below, the Tribunal affirms the Superintendent's NOPs. Although each of the current versions of the Hourly and Salaried Plans contain provisions that provide for the Company's entitlement to surplus on plan termination, such provisions are the product of amendments made to the Plans in 1980 that are contrary to the terms of the original (1969) Hourly and Salaried Plans and Trust documents.

The original Plan documents expressly and irrevocably restricted the scope of the Company's authority or ability to amend the terms of the Hourly and Salaried Plans and/or to receive payment of surplus upon the Plans' termination.

PBA REQUIREMENTS FOR SURPLUS WITHDRAWALS

The PBA and regulations establish a comprehensive regulatory regime for the withdrawal of surplus monies by employers from ongoing pension plans and from terminated pension plans. The regulatory requirements include provisions addressing notice to plan members and former members, the preparation and filing of valuation reports, and obtaining the requisite level of member/former member consent and, where applicable, the consent of any bargaining agent.

The only issue concerning the Company's applications for surplus withdrawal from each of the Hourly and Salaried Plans, however, is whether or not the following PBA requirement was satisfied:

ss. 79(3) Subject to subsection 89 (hearing and appeal), the Superintendent shall not consent to an application by an employer in respect of surplus in a pension plan that is being wound up in whole or in part unless, ...

(b) the pension plan provides for payment of surplus to the employer on the wind-up of the pension plan, ...

HOURLY AND SALARIED PLAN AND TRUST PROVISIONS

The Hourly and Salaried Plans were originally established in 1969 and in addition to pension plan documentation, included a trust agreement for each of the plans with The Canada Trust Company.

The relevant provisions of the text of the original plan documents for the Hourly Plan and for the Salaried Plan are, in all material respects, identical. Subsections 5.1, 7.1 and 7.2 of the original Hourly and Salaried Plans provide as follows:

ARTICLE V: CONTRIBUTIONS AND FINANCING

5.1 The Company shall make annual contributions to the Trustee, on the basis of qualified actuarial advice, in the amount necessary to provide benefits earned under the Plan during the year, and shall pay administrative expenses incident to the operation and management of the Plan. Any unfunded liability, or experience deficiency arising from the funding of benefits herein

provided shall be liquidated in the manner prescribed by the Ontario Pension Benefits Act of 1965 (including any amendments thereto) and related regulations, or other provisions of law applicable to the Plan.

The Company shall have no right, title, or interest in the contributions made by it to the Trustee, and no part of Plan assets shall revert to the Company except that any excess contributions as may have been made by the Company as a result of errors may revert to the Company.

The benefits of the Plan shall be only such benefits as can be provided by Plan assets, and there shall be no liability or obligation on the part of the Company to make any further contributions to the Trustee in the event of termination of the Plan except as otherwise provided under the Ontario Pension Benefits Act of 1965 (including any amendments thereto) and related regulations or other provisions of law applicable to the Plan. No liability for the payment of benefits under the Plan shall be imposed upon the Company or any officer, director, or stock-holder of the Company.

ARTICLE VII: AMENDMENT – TERMINATION – LIMITATION

7.1 The Company hopes and expects to continue the Plan indefinitely but necessarily reserves the right to amend or terminate the Plan at any time or from time to time for any reason. No such action by the Company shall operate to recapture for the Company any contributions previously made under the Plan by the Company prior to the satisfaction of all liabilities for Plan benefits. Except to the extent required to permit the Plan to meet the requirements of the Ontario Pension Benefits Act of 1965, as amended, the Canadian Income Tax Act, or the requirements of

any governmental authority, no such action by the Company shall affect adversely in any way any rights previously acquired under the Plan by retired Participants.

7.2 In the event of the termination of this Plan, the assets then in the possession of the Trustee shall be allocated, subject to provision for expenses incident to said termination, to the extent that they shall be sufficient, for the exclusive benefit of the then retired Participants and all other Participants or former Participants and their beneficiaries having an interest in this Plan. Such assets shall, subject to approval of the Ontario Pension Commission, be allocated to such persons in the following order of precedence:

- (a) To provide for the continuance of Pensions to retired Participants and their beneficiaries, if any;
- (b) If any assets remain after complete allocations for the purposes of (a) above, they shall be allocated toward the potential rights of non-retired Participants or former Participants eligible for a normal, deferred, early, or disability pension on an equitable and nondiscriminatory basis according to accepted actuarial principles;
- (c) If any assets remain after complete allocations for the purposes of (a), and (b) above, they shall be allocated toward the potential rights of non-retired Participants not included in the allocations under (a), and (b) above, on an equitable and nondiscriminatory basis according to accepted actuarial principles;
- (d) If any assets remain after complete allocations for the purposes of (a), (b), and (c) above, they shall be used to increase the benefits provided pursuant to the allocations made under (a), (b) and (c) above, on an equitable and nondiscriminatory basis according to accepted actuarial principles.

If the Ontario Pension Commission does not approve the foregoing method of allocation then the method shall be modified, where necessary, so that such approval can be received.

The above allocations shall be distributed by the Trustee in annuities or in such other manner as may be agreed upon by the Company and the Trustee. No Participant or other Employee or person shall have any rights or claims under the Plan beyond the capacity of the assets held by the Trustee to provide benefits in accordance with the above provisions.

The Hourly and Salaried Plans' Trust Agreements were made as at April 1, 1969. Each agreement provided that assets in the trust fund were to be used for "the exclusive benefit of such persons or their estates as may from time to time be designated in or pursuant to the Plan". Each agreement also contained a provision that their terms could not be amended so as to "authorize or permit any part of the Fund to be used for or diverted to purposes other than for the exclusive benefit of such persons and their estates as from time to time may be designated in or pursuant to the Plan".

ANALYSIS

The Company made submissions to the Tribunal that since inception and consistent with the original Hourly and Salaried Plan documentation, the Company was a "beneficiary" or "contingent beneficiary" under the terms of the Plans and Trust Funds and that therefore, the amendments made subsequently in 1980 to expressly provide for payment of surplus to the employer on plan termination were valid. The Company also made submissions that the 1980 amendments were consistent with the amending authority the Company reserved to itself in the original Plan and trust documentation. Such pension plan and trust provisions must, however, be express, unambiguous and clear to satisfy the "high bar" enunciated in *Schmidt v Air Products*

Canada Limited [1994] 2SCR611. As the excerpts from Schmidt that are set out in *Kent v Tecsysn International Inc.*(2000), 133 O.A.C. 312 (Ont. Div. Ct.) indicate:

Cory J. (for the majority) said:

Page 643: The Settlor of a trust can reserve any power to itself that it wishes provided that the reservation is made at the time the trust is created. The Settlor may choose to maintain the right to appoint trustees, to change the beneficiaries of the trust, or to withdraw the trust property. Generally, however, the transfer of the trust property to the trustee is absolute. Any power of control of that property will be lost unless the transfer is expressly made subject to it.

Page 647: As a result I find that, at least in the context of pension trusts, the reservation by the Settlor of an unlimited power of amendment does not include a power to revoke the trust. A revocation power must be explicitly reserved in order to be valid.

Page 656: The employer, as a Settlor of the trust, may reserve the power to revoke the trust. In order to be effective, that power must be clearly reserved at the time the trust is created. The power to revoke the trust or any part of it cannot be implied from the general unlimited power of amendment.

Page 659: In my opinion, the purposes of the trust were not fully satisfied by the payment of all defined benefits. One of the objects of the trust was to use any money contained in the fund for the benefit of the employees.

In the case at hand, the Company did not satisfy the Tribunal that there was the clear and unambiguous language in either the Hourly or the Salaried Plan documentation that would permit the Company to participate in any distribution of surplus assets on Plan termination or that would permit an amendment to the Plans to be made subsequently, to give effect to such distribution. The requirements of Subsection 79(3)(b) of the PBA have not been met to the high standard required to establish employer entitlement to surplus.

ORDER

Accordingly, the Tribunal affirms each of the Superintendent's NOPs and directs the Superintendent to dismiss the Company's applications for surplus withdrawal.

The Tribunal will remain seized for the purposes of considering either party's request for costs, such request and submissions to be made in writing within 30 days of this order.

DATED at Toronto, Ontario, this 21st day of October, 2002.

“Martha Milczynski”

Martha Milczynski, Chair of the
Tribunal and of the Panel

“Bill Forbes”

William Forbes, Member of the
Tribunal and of the Panel

“David Short”

David Short, Member of the
Tribunal and of the Panel