FINANCIAL SERVICES TRIBUNAL

FST File No. PO192-2002
Decision No. P0192-2002

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 of the Superintendent of Financial Services to refuse to make an order under sections 69 and 87 of the Act relating to the Pension Plan for the Employees of Kerry (Canada) Inc., Registration Number 238915 (the "Plan");

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

BETWEEN:

ELAINE NOLAN, GEORGE PHILLIPS, ELISABETH RUCCIA, KENNETH R. FULLER, PAUL CARTER, R.A. VARNEY and BILL FITZ, being members of the DCA EMPLOYEES PENSION COMMITTEE, representing certain of the members and former members of the Pension Plan for the Employees of Kerry (Canada) Inc.

Applicants

-and-

SUPERINTENDENT OF FINANCIAL SERVICES and KERRY (CANADA) INC.

Respondents

BEFORE:

Mr. Colin H.H. McNairn
Vice Chair of the Tribunal and Chair of the Panel

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

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

APPEARANCES:

For the DCA Employees Pension Committee
Mr. Bill Fitz (at the evidence phase of the hearing)
Mr. Ari N. Kaplan &
Ms. Leanne Hull (at the argument phase of the hearing)

For the Superintendent of Financial Services
Ms. Deborah McPhail

For Kerry (Canada) Inc.
Mr. Ronald J. Walker &
Ms. Christine Tabbert

HEARING DATES:

March 2-3, 2004 (evidence phase)
June 8-9, 2004 (argument phase)

REASONS FOR DECISION

FACTS

History of the Plan and Trust Agreements

Kerry (Canada) Inc. ("Kerry Canada"), one of the respondents in this proceeding, is the successor to DCA Canada Inc. ("DCA Canada") and the sponsor of a pension plan for its employees that was initially established by its predecessor. We refer to the employer and plan sponsor from time to time as the "Company" and the pension plan for the Company's employees as the "Plan". Kerry Canada became the plan sponsor as a result of its purchase of the business of DCA Canada at the end of 1994, in an asset purchase transaction, and the subsequent amendment of the Plan to reflect the assumption of the Plan by Kerry Canada, as contemplated by the purchase transaction.

The Plan was established on a defined benefit basis by the terms of a plan text effective December 31, 1954 (the "1954 Plan") with funding through Company and employee contributions to a pension fund constituted as a trust under a trust agreement made as of December 31, 1954 between the Company and National Trust Company, Limited as trustee (the "1954 Trust Agreement"). We refer to the pension fund for the Plan as the "Fund". The 1954 Trust Agreement describes the Fund and the trust limitations associated with it as follows:

> The Company hereby establishes with the Trustee a Fund consisting of such money and such property acceptable to the Trustee as shall from time to time be paid or delivered to the Trustee and the earnings and profits thereon. All such money and property, all investments made therewith and proceeds thereof and all

> earnings and profits thereon, less any payments which at the time of reference shall have been made by the Trustee as authorized herein, shall constitute the Fund hereby created and established. The Fund shall be held by the Trustee in trust and dealt with in accordance with the provisions of this Agreement. No part of the corpus or income of the Fund shall ever revert to the Company or be used for or diverted to purposes other than for the exclusive benefit of such persons or their beneficiaries or personal representatives as from time to time may be designated in the Plan except as therein provided.

The initial beneficiaries of the trust were employees and retired employees of the Company, their beneficiaries or estates and their contingent annuitants (as per section 22 of the 1954 Plan).

A new trust agreement was entered into between the Company and the same trustee as of May 31, 1958 (the "1958 Trust Agreement"), the terms of which are similar to those of the 1954 Trust Agreement which it purports to replace. We have considered both the 1954 and 1958 Trust Agreements in these Reasons as the parties were unable to agree that, from the effective date of the 1958 Trust Agreement, the governing provisions of the trust are to be found exclusively in that Agreement.

Over the years, the Plan was amended a number of times, sometimes with an accompanying restatement of the full text of the Plan as amended. The Plan amendments have included amendments effective as of January 1, 1965 (the "1965 Plan Amendments") and amendments reflected in a revised and restated plan as at January 1, 2000 (the "2000 Plan"). The 2000 Plan has been submitted to the Superintendent of Financial Services (the "Superintendent"), the other respondent in this proceeding, for registration but has not yet been registered. The 1965 Plan Amendments and the 2000 Plan makes revisions to the obligation of the Company to make contributions under the Plan. Beginning in 1985 and continuing thereafter, at least through 2001, the Company has taken contribution holidays under the Plan, apparently on the faith of the revised contribution obligation.

On or about November 22, 1999, notice was given by the Company to its employees advising them that they were being given a one-time opportunity to convert their defined benefit entitlements, as of January 1, 2000, to a "new plan" established on a defined contribution basis, and requiring that any exercise of that option should be made by December 15, 1999, any such exercise to have the effect of eliminating any pension entitlements "under the current defined benefit plan". The 2000 Plan provides, among other things, for the addition of a defined contribution component to the Plan. Those participating in that component (designated "Part 2" under the 2000 Plan), funded by an insurance policy, include those employees who exercised their option to convert to a defined contribution arrangement and new employees hired after January 1, 2000 (collectively the "Part 2 members"). Those who did not exercise the conversion option remain in the defined benefit component of the Plan (designated "Part 1" under the 2000 Plan). As "Part 1 members", their pension entitlements continue to be provided from the

Fund, now reduced by the commuted values, as at December 31, 1999, of the accrued benefits of the employees who exercised their option to become Part 2 members.

History of the Dispute

The DCA Employees Pension Committee (the "Committee"), the applicant in this proceeding, made a request to the Superintendent to:

- order the Company to reimburse the Plan for all the contributions that the Company should have made to the Fund, together with income that would otherwise have been earned thereon, but for the contribution holidays that it had taken;
- deny registration of the 2000 Plan; and
- order the wind up of the Plan as at December 31, 1994 under s. 69 of the *Pension Benefits Act* (the "Act").

The Committee made an additional request of the Superintendent, asking that the Superintendent order the reversal of certain expense charges made against the Fund. The Superintendent's proposal in response to that request was the subject of an earlier proceeding before this Tribunal (see *Kerry (Canada) Inc. v. Superintendent of Financial Services and Elaine Nolan, George Phillips, Elisabeth Ruccia, Kenneth R. Fuller, Paul Carter, R.A. Varney and Bill Fitz, being members of the DCA Employees Pension Committee* (FST File No. PO191-2002), reported in the Financial Services Commission of Ontario Pension Bulletin, May 2004, vol. 13, issue 2, at pp. 132-145).

By notice of proposal dated April 22, 2002 (the "Notice of Proposal"), the Deputy Superintendent of Financial Services, acting as delegate of the Superintendent, proposed to refuse to take any of the three actions requested by the Committee noted above.

The Committee requested a hearing by this Tribunal, pursuant to s. 89(6) & (8) of the Act, with respect to the proposals in the Notice of Proposal, which has resulted in this proceeding. On application to the Tribunal, Kerry Canada was made a party to the proceeding.

The Issues in the Dispute

For the purposes of the proceeding, the parties identified three major issues, which can be summarized as follows:

- do the terms of the Plan and applicable Trust Agreement permit the Company to take contribution holidays since 1985 and, if not, should the Superintendent be directed to order the Company to pay into the Fund all employer contributions that it did not make by virtue of taking contribution holidays,

together with an amount equal to the income that would have been earned thereon in the Fund (the "Contribution Holiday Issue");

- is the 2000 Plan allowing for optional conversion to a defined benefit arrangement valid pursuant to the terms of the Plan and the Act and, if not, should the Superintendent be directed to refuse registration of the 2000 Plan (the "Conversion Issue"); and

- do the circumstances surrounding and immediately following the sale of assets by DCA Canada to Kerry Canada and the resulting changes in the Plan establish grounds for the Superintendent to order the wind up of the Plan and, if so, should the Superintendent be directed to order the wind up of the Plan and, if not, is there any other remedy that the Tribunal could or should order (the "Wind Up Issue").

We will deal with these issues separately and in the order in which we have described them.

CONTRIBUTION HOLIDAY ISSUE

The Company's Authority to Take Contribution Holidays under the Terms of the General Regulation

The General Regulation under the Act has, since 1966 (see Ont. Reg. 103/66, s. 2(11)), permitted an employer to take a contribution holiday, i.e. to refrain from contributing to an on-going pension plan that it sponsors to the extent that the funding of the plan is in a surplus position (see s. 7(3) of Ont. Reg. 909 and its predecessors). In *C.U.P.E. Local 1000 v. Ontario Hydro* (1989), 58 D.L.R. (4th) 552, the Ontario Court of Appeal said that an employer cannot rely on this permission unless the plan itself provides for or contemplates the taking of a contribution holiday (at p. 564). However, in *Askin v. Ontario Hospital Association* (1991), 2 O.R. (3d) 641, a differently constituted panel of the same court characterized the latter statement as referable to a situation where there is a calculated contribution mandated by the terms of a pension plan in the nature of that required by the statutory plan at issue in *Ontario Hydro* (see *Askin*, at pp. 651 & 657-658). In *Askin*, by comparison, the employer was required to contribute to a pension plan "on a basis determined by the Actuary from time to time" (see p. 644). In those circumstances, the court concluded that an employer is acting within the scope of the authorization for contribution holidays, contained in the General Regulation, where its actuary takes surplus into account when determining the employer's required contribution to the pension plan, subject only to any restrictions on such a practice contained in the plan text (see p. 651). In other words, surplus can be notionally applied against a contribution obligation so long as the plan does not prohibit it.

The Company's Authority to Take Contribution Holidays under the Terms of the Plan

We turn now to a consideration of the Company's contribution obligation under the Plan that was in effect when the Company began to take contribution holidays. Those contribution holidays were taken commencing in 1985. By that time, the original employer contribution provision of the Plan had been modified, as a result of the 1965 Plan Amendments, to provide as follows:

> The Company shall contribute from time to time but not less frequently than annually such amounts as are not less than those certified by the Actuary as necessary to provide the retirement income accruing to members during the current year pursuant to the Plan and to make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued as required by the Pension Benefits Act, after taking into account the assets of the Trust Fund, the contribution of Members during the year and such other factors as may be deemed appropriate (section 14(b)).

If this provision is valid, it would permit the Company to take contribution holidays for it is virtually identical to the employer contribution provision that was found by the Supreme Court of Canada in *Schmidt v. Air Products Canada Ltd.* (1994), 115 D.L.R. (4th) 631, to allow for contribution holidays (see pp. 671-672). In *Schmidt*, the court concluded that the employer contribution provision in question was like that in *Askin* rather than that in *Ontario Hydro* (at pp. 671-672). If that is so in respect of the employer's contribution obligation at issue in *Schmidt*, it must also be so in respect of the employer's contribution obligation in the present case, given that the two obligations are substantially the same. There is nothing in the Plan as altered by the 1965 Plan Amendments (nor in the 1954 or 1958 Trust Agreement) that imposes any restrictions on the taking of contribution holidays by the Company, which might distinguish the situation from that in *Askin* and *Schmidt*.

The Effect of the Trust on the Company's Authority to Take Contribution Holidays

The fact that the Fund is subject to a trust for the benefit of employees is not inconsistent with the authority of the Company to take contribution holidays since a contribution holiday does not amount to a use or diversion of the Fund assets, for purposes other than the exclusive benefit of employees and other beneficiaries, in violation of section 1 of the 1954 Trust Agreement (section 1 of the 1958 Trust Agreement is in similar terms). It is not a diversion of assets from the Fund to the prejudice of the beneficiaries because no payment is made from the Fund and the beneficiaries' entitlement is simply to receive the defined benefits provided in the Plan from the Fund. Any surplus in the Fund, in excess of what is required to satisfy those entitlements, to which the Company resorts for the purpose of a contribution holiday, is indefinite and only becomes ascertainable on a wind

up of the Plan (including a partial wind up, in which event a *pro rata* share of the surplus, relating to the part of the plan being wound up, becomes actual rather than notional; see *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, an unreported decision of the Supreme Court of Canada dated July 29, 2004, esp. at para. 46). Therefore, the taking of contribution holidays does not constitute an encroachment on the trust established in respect of the Fund. These conclusions are directly supported by the authority of *Schmidt* (see (1994), 115 D.L.R. (4th) 631, at p. 665).

The Validity of the Provisions of the Plan Authorizing Contribution Holidays

The next question that we have to consider is whether the employer contribution provisions introduced by the 1965 Plan Amendments are amendments to the Plan of a kind that are properly authorized.

The Effect of the Absence of an Express Power to Revoke the Trust

In *Schmidt*, the Supreme Court of Canada said that "in the context of pension trusts, the reservation by the settler [the Company in the present case] of an unlimited power of amendment does not include a power to revoke the trust"; rather, a revocation power "must be explicitly reserved in order to be valid" (at p. 660). The power to amend the trust established by the 1954 and 1958 Trust Agreements that is set out in those Agreements (in section 11) does not explicitly reserve such a power of revocation to the Company.

The 1954 Trust Agreement contains a recital, which is consistent with the body of the Agreement (including, particularly, section 1), to the following effect:

> WHEREAS it is desirable that funds irrevocably contributed for the payment of benefits under the Plan be segregated and held in trust in a Trust Fund for the exclusive benefit of such employees or their beneficiaries or personal representatives as shall be included under the Plan.

There is a similar recital, but in the past tense, in the 1958 Trust Agreement.

It is clear, therefore, that the relevant trust relates to funds contributed under the Plan. The trust does not extend to funds that would have been contributed under the Plan but for the assertion by the Company of a right to take a contribution holiday (or but for the Company's insolvency or any other circumstance). Nor is the Company's obligation to contribute to the Plan impressed with a trust. In fact, that obligation is one that has its source in the Plan rather than any trust agreement. The Plan is not part of the 1954 or 1958 Trust Agreement. In fact, the 1958 Trust Agreement recites the opposite, i.e. that the Agreement is part of the Plan. Neither the Plan nor either of those Trust Agreements says that the Plan, which contains the Company's contribution obligation, is part of the Trust Agreement. In these circumstances, the Company's contribution obligation cannot be part of the trust.

Thus, any change in the Company's obligation under the Plan to contribute to the Fund does not amount to a revocation of trust, in which case it does not have to be supported by an explicit reservation by the Company of a power to revoke the trust.

In *Schmidt*, the employer contribution provision in question was, as in the present case, the result of an amendment to the original terms of the pension plan (see pp. 671 & 682-683) and, as in the present case, the trust agreement establishing a trust fund for the pension plan did not explicitly reserve the power to revoke the trust (see p. 670). There is no suggestion in the majority reasons in *Schmidt* that the amendment might be invalid as a result of these factors, although that may simply be because the point was not argued by the parties challenging the contribution holiday taken by the employer in that case.

The Effect of the Maurer Decision

In the present case, the Committee relied on the decision of the Ontario Court of Appeal in *Maurer v. McMaster University* (1995), 23 O.R. (2d) 577, for the proposition that where a pension plan is subject to a trust for the benefit of employees, the plan text cannot be unilaterally amended by the employer to provide for contribution holidays unless a power to revoke the trust has been explicitly reserved to the employer. Unfortunately, the reasons delivered by the Court of Appeal in *Maurer* contain some apparent contradictions, raising doubts as to whether the court was in fact adopting this proposition or leaving for another day the resolution of the issue of whether such an amendment could be validly made in the absence of an explicit power to revoke the trust.

The court in *Maurer* stated, at one point in its reasons, that it was desirable to wait until the issue arises in a case before deciding whether an employer has the right to amend a trusteed pension plan unilaterally to allow it to take contribution holidays (at p. 580). As it wasn't necessary to decide that issue in *Maurer*, the court simply declined to support the trial judge's conclusion that there was such a right. But it then went on to amend the relief granted by the trial judge so as to provide a declaration that the amendments to the pension plan in question were invalid to the extent that they purported to give the employer the right to take contribution holidays, to have the return of actuarial surplus during the continuation of the plan and to receive surplus on termination or wind up of the plan (at pp. 580-581).

We think that the amended relief granted by the court was simply a reflection of its disagreement, on the basis of the *Schmidt* decision, with the pre-*Schmidt* determination of the trial judge that the employer could unilaterally amend the pension plan to provide that it was entitled to surplus during and at the termination of the plan even though it had no explicit power to revoke the trust in respect of the pension fund. Since some aspect of the amendments could not stand - i.e. their attempt to obtain for the employer any surplus in the fund - the court presumably thought that the amendments were invalid generally. In other words, the taint of association may well have caused the amendments to fail even to the extent that they gave the employer the right to take contribution holidays. The trial decision in *Maurer* appears to treat these amendments as a package (see (1991), 4 O.R. (3d) 139, at pp. 156 & 159). Consequently, we don't take *Maurer* as authority for the

proposition for which the Committee says that it stands. Rather, we think that *Maurer* did, indeed, leave open the question that has to be decided in the present case, i.e. whether an employer has the right to amend a trusteed pension plan to allow it to take contribution holidays in the absence of an express reservation of the power to revoke the trust. As we have already indicated, we think that the Company has that right on the basis that such an amendment would not revoke the trust established under the 1954 and 1958 Trust Agreements.

Possible Revocation of Trust by the Grant of Discretion to the Actuary to Fix the Company's Annual Contribution to the Plan

The Committee argued that the 1965 Plan Amendments effected a partial revocation of the trust established by the 1954 and 1958 Trust Agreements because they purport to give discretionary power to the Company's agent, the Plan actuary, to establish the amount of the employer's annual contribution to the Plan when the employer had previously alienated all control over the trust property. In our view, this argument misconceives the nature of the trust property, which consists of the actual contributions to the Fund and the earnings and profits thereon, net of any authorized payments from the Fund made by the trustee (section 1 of the 1954 and 1958 Trust Agreements). Any change in the basis for calculating the amount of the employer's contribution obligation under the Plan does not misdirect any of those funds and only impacts the Fund in the indirect sense that, going forward, the amount of the Fund may be less than it otherwise would be. But that wouldn't result in the Fund being inadequate at that time to meet pension obligations under the Plan, since any permitted contribution holiday would be limited to the amount that is surplus to what is required to satisfy those pension obligations.

The Scope of the Power of the Company to Amend the Plan

When measured against the general amending power in the 1954 Plan, the employer contribution provisions introduced by the 1965 Plan Amendments are clearly authorized. That amending power reserves to the Company "the right to change, modify, suspend or discontinue the Plan, should future conditions, in the judgment of the Company, warrant such action, provided that no change or modification will affect any rights that any member may then have with respect to the terms of payment of, or the amount of, retirement income, which the contributions made by the Member and/or the Company, prior to the effective date of such change or modification, will provide" (section 22). The changes in the employer's contribution obligation introduced by the 1965 Plan Amendments do not run afoul of this proviso.

Relevance of the Employer Contribution Provision under the Original Plan

We heard arguments from the Committee that the employer contribution provision under the terms of the 1954 Plan did not permit the Company to take contribution holidays. However, by the time the Company began taking contribution holidays, in 1985, this particular provision had been replaced as a result of changes effected by the 1965 Plan Amendments. Since we have found the new contribution provision in the 1965 Plan

Amendments to be valid and to authorize contribution holidays, there is no need for us to consider whether the Company could take contribution holidays under the terms of the 1954 Plan.

CONVERSION ISSUE

Section 18(1) of the Act provides, in clause (d), that the Superintendent may 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 [the] Act and the regulations".

Inconsistencies between the 2000 Plan and 1954 and 1958 Trust Agreements

The Committee argued that the 2000 Plan should not be registered because of certain inconsistencies with the 1954 and 1958 Trust Agreements, which render the 2000 Plan void because the trust established by those Agreements takes primacy over the Plan text. The Committee claimed that the 2000 Plan is inconsistent with the Trust Agreements in that it permits the employer, in sections 18.08 and 25.02, to take a holiday from its contribution obligation on account of Part 2 members (those who participate in the defined contribution component of the Plan) by resort to the surplus in the Fund, which is held for the benefit of the Part 1 members (those who participate in the defined benefit component of the Plan). We agree that this is indeed the case as these provisions allow the Company to use or divert some part of the Fund, i.e. the surplus, "to purposes other than for the exclusive benefit of" the beneficiaries of the trust in respect of the Fund who, by virtue of the 2000 Plan, are now the Part 1 members. Any holiday taken by the Company in respect of Part 2 contributions in this fashion can only be realized by actually moving money out of the Fund and transferring it to the insurer that is the funding agency for Part 2, for credit to the individual accounts of the Part 2 members. This action is inconsistent with section 1 of the 1954 Trust Agreement, recited above under the heading "FACTS" (section 1 of the 1958 Trust Agreement is in similar terms).

There are two ways in which this inconsistency could be resolved. The 2000 Plan could be amended to eliminate the authority of the Company to apply the surplus in the Fund to satisfy its contribution obligation in respect of Part 2 members or the Part 2 members could be made beneficiaries of the trust in respect of the Fund (in which case it would seem to follow that the insurance policy that is the funding vehicle for Part 2 should be held by the trustee).

The fact that the 2000 Plan confines the beneficiaries of the trust in respect of the Fund to Part 1 members does not involve a breach of trust since the 1954 and 1958 Trust Agreements contemplate a potentially moving category of beneficiaries of the Fund, subject to the proviso that the category cannot be expanded to include the Company itself. In particular, the beneficiaries of the trust in respect of the Fund under those Agreements are such persons as from time to time may be designated under the Plan (as per section 1 of the Trust Agreements). Thus, the trust language leaves it to the terms of the Plan to designate the beneficiaries of the trust. The 2000 Plan makes such a designation in constituting the Part 1 members beneficiaries of the Fund to the exclusion

of the Part 2 members. Because of the express terms of the trust, as set out in the Trust Agreements, that designation is consistent with the terms of the trust and does not, therefore, involve a breach of trust.

Relevance of the *Aegon* Decision

We note that the circumstances of the present case are quite different from those in *Aegon*, on which the Committee relies. In that case, two pension plans were "merged" subject to the condition, imposed by the Pension Commission of Ontario, that the assets and liabilities of each plan were to be accounted for separately in the merged plan. The pension fund for one of the merging plans was in a surplus position and was subject to a trust for the benefit of plan members. The other merging plan was in a deficit position. The Ontario Court of Appeal held that no part of the assets of the fund in surplus could be applied to meet the liabilities associated with the other fund without breaching the trust in favour of the beneficiaries of the fund in surplus. In the present case, we don't have two funds in relation to a single pension plan. Rather, we have one pension fund (the Fund), which was formerly held in trust for the benefit of all employees, that, after the effective date of the 2000 Plan, is to be held in trust for Part 1 members by virtue of a change in the designation of the class of beneficiaries contemplated by the terms of the trust.

The Nature and Effect of Deficiencies in the Disclosure Associated with the Conversion Option

Finally, the Committee argued that the 2000 Plan should be refused registration because of inadequacies in the Company's process of disclosure to its employees in connection with the exercise of the conversion right associated with the changes effected by the 2000 Plan. We heard evidence as to the information and access to advice, and the time for obtaining and considering that information and advice, that were afforded by the Company to its employees. There appear to have been some shortcomings in the disclosure process, including a misdescription of the change of the pension arrangements that were subsequently to take place as the creation of a new defined contribution plan when a defined contribution component of the existing Plan was actually established. These shortcomings raise questions as to whether employees were adequately informed of the material factors that might affect their conversion decisions by the time they had to make that decision. However, we do not think that the alleged deficiencies would make the 2000 Plan void or inconsistent with the Act or the General Regulation. In fact, the conversion option was provided before the effective date of the 2000 Plan (i.e. before January 1, 2000) and was not established by that Plan; rather, the conversion process is simply described, in the past tense, in the 2000 Plan (in section 24.01). Therefore, any deficiencies in the process cannot fairly be taken to affect the validity of the amendments introduced by the 2000 Plan.

Neither the Act nor the General Regulation establishes a process for giving notice to pension plan members of a conversion option. While the Act does require, in s. 26(1), that notice be given of an adverse amendment to a pension plan that reduces pension benefits prospectively, a conversion from a defined benefit pension arrangement to a

defined contribution arrangement does not necessarily have that effect. Rather, it essentially changes the risks associated with pension benefits. In any event, even if notice of an adverse amendment was required in respect of the 2000 Plan, under s. 26(1) of the Act, the Superintendent would have been entitled, under s. 26(4), to refrain from requiring the Company to give such a notice if he was of the opinion that the 2000 Plan would not substantially affect pension benefits, rights or obligations of any members. The Superintendent has taken the position, in responding to the requests made to him by the Company (in an attachment to a letter dated April 22, 2002 from the Deputy Superintendent to the chair of the Committee) and in this proceeding that the employees potentially affected by the 2000 Plan had adequate notice. In any case, the Act does not say that a failure to give notice of an adverse amendment, when required under the Act, results in the amendment being void or otherwise non-registerable.

For all of these reasons, the deficiencies in the conversion process would not, in themselves, constitute sufficient grounds for the Superintendent to refuse to register the 2000 Plan.

PARTIAL WIND UP ISSUE

The Committee argued that the Superintendent was entitled to, and should have, ordered a partial wind up of the Plan on the basis of the circumstances surrounding the sale of assets from DCA Canada to Kerry Canada as at the end of 1994. The authority of the Superintendent to order a partial wind up of a pension plan is derived from s. 69 of the Act. That section sets out a list of grounds for either a partial wind up or a full and final wind up of a pension plan, but does not require the Superintendent to order such action when the grounds are present. None of those grounds fits the circumstances surrounding the sale of assets from DCA Canada to Kerry Canada in 1994. Of course, by that time DCA Canada had begun to take contribution holidays, a practice that was continued thereafter by Kerry Canada. The Committee maintained that this amounted to a "cessation or suspension of employer contributions to the pension fund", in the sense of clause (a) of s. 69(1) of the Act, and, therefore, constituted grounds for a partial wind up of the Plan. We think that clause (a) of s. 69(1) should logically be taken to refer to a situation where an employer does not make contributions to a pension plan that it is not relieved from making by virtue of a surplus in the pension fund for the plan. As we have noted above, in our discussion of the Contribution Holiday Issue, neither the Act nor the Plan requires the Company to contribute to the pension fund for the Plan, i.e. the Fund, when it has a sufficient balance to cover pension liabilities. Moreover, both the General Regulation under the Act and the Plan specifically authorize the Company to take a contribution holiday in that event.

While we have found that the contribution holidays taken by the Company in respect of Part 2 of the Plan after January 1, 2000 were not validly authorized by the 2000 Plan, because of an inconsistency with the trust in respect of the Fund, that situation will be remedied by our orders in this case (see below under the heading "DISPOSITION") in that the 2000 Plan will be amended to provide the necessary authority or the Fund will be reimbursed for the amount of the contributions made from the Fund.

The Committee also argued that even if there were no current grounds for a partial wind up of the Plan, the Superintendent should be directed to monitor the Plan with a view to making an order for its partial wind up when there are no active members left in Part 1 of the Plan, at which time any employer contributions in respect of current service of employees under that Part would necessarily cease. Even if the latter event were to constitute grounds for a partial wind up of the Plan under clause (a) of s. 69(1) of the Act, we are not persuaded that the monitoring of the Plan is something that the "Superintendent ought to do in accordance with [the] Act and regulations" (see s. 89(9) of the Act) and, therefore, something that we should order the Superintendent to do.

Finally, the Committee made reference to s. 80 of the Act as justifying some form of alternative relief for employees whose potential interest in the surplus in the Fund was adversely affected as a result of the circumstances surrounding the sale of assets from DCA Canada to Kerry Canada. However, s. 80 has no application in connection with a sale of assets unless the purchaser brings any transferred employees under its own pension plan. That is not the situation in the present case as the transferred employees of DCA Canada remained members of the Plan, to which they had previously belonged, although it was no longer a DCA pension plan but a Kerry pension plan by virtue of a change of name and sponsorship.

DISPOSITION

For the foregoing reasons, we order the Superintendent to

(a) carry out the proposals contained in the Notice of Proposal (subject to para. (c) below), except for the proposal to refuse to deny registration of the 2000 Plan;

(b) deny registration of the 2000 Plan in its current form; and

(c) if within 90 days of the date of these Reasons the 2000 Plan is not amended, with effect from January 1, 2000, to make the Part 2 members beneficiaries of the trust in respect of the Fund, order Kerry Canada to reimburse the Fund for the amount of all contributions that, had it not taken contribution holidays after January 1, 2000, it would have had to make under the Plan in respect of the Part 2 members but that it made from the Fund, together with the income on the amount of such contributions that would have been earned thereon in the Fund.

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 Toronto, Ontario, this 1st day of September, 2004.

"Colin H.H. McNairn"
Colin H.H. McNairn, Vice Chair of the Tribunal and Chair of the Panel

"Shiraz Y.M. Bharmal"
Shiraz Y.M. Bharmal, Member of the Tribunal and of the Panel

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