

**FINANCIAL SERVICES TRIBUNAL**

**IN THE MATTER OF** the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended by the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 (the “Act”);

**AND IN THE MATTER OF** a proposal by the Superintendent of Financial Services to make an Order under Section 87 of the Act in relation to the **PPG Canada Inc. Non-Contributory Retirement Plan for Salaried Employees**, Registration No. 0337048;

**AND IN THE MATTER OF** a hearing in Accordance with subsection 89(6) of the Act;

**B E T W E E N:**

**PPG CANADA INC.**

**Applicant**

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES**

**Respondent**

**BEFORE:**

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

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

Mr. John Solursh  
Chair of the Tribunal and Member of the Panel

**APPEARANCES:**

For the Applicant:  
Mr. Clifton P. Prophet and Ms. Leila Burden-Nixon

For the Superintendent of Financial Services:  
Ms Deborah McPhail

**HEARING DATES:**

September 19 and 20, 2007

**REASONS FOR DECISION****NATURE OF THE APPLICATION**

The Applicant seeks an Order that the Respondent Superintendent of Financial Services (the “Superintendent”) set aside the Proposal to Make an Order dated December 18, 2006, a) revoking the registration of Amendment 8 to the PPG Canada Inc. Non-Contributory Retirement Plan for Salaried Employees (the “PPG Plan”), Registration Number 0337048; and b) directing the Applicant to credit service for periods of employment of certain specific employees of Duplate Canada Inc. (the “Restored Service Members”), which occurred prior to a break in service, as “Credited Service” under the PPG Plan.

**ISSUES**

As agreed between the parties, the issues to be resolved by the Tribunal in this matter are:

- 1) How was the Duplate Restored Service to be recognized when the Duplate Canada Inc. Salaried Employees Pension Plan (the “Duplate Plan”) was incorporated into the PPG Plan in 1982?
- 2) Is Amendment 8 to the PPG Plan void pursuant to Section 14 of the *Pension Benefits Act, Ontario*?

**FACTS**

Both the Applicant and the Superintendent appeared before the Tribunal and filed written submissions, together with an Agreed Statement of Facts and an Agreed Book of Documents. The hearing proceeded on the basis of the Agreed Statement of Facts and the Agreed Book of Documents, and additional Exhibits, which the Tribunal fully reviewed, the salient portions of which are summarized below. In addition the Tribunal also heard oral testimony from a number of witnesses which was considered and whose evidence is also referred to below.

1. Prior to July 1982, Restored Service Members were covered under the Duplate Canada Inc. Salaried Employees Pension Plan (the “Duplate Plan”) which provided two defined benefit formulae. In the Duplate Plan text listed as at April, 1972, provided in evidence and not disputed, and which was effective as of January 1, 1969 and appears to consolidate the effect of Amendments 1 to 12 through 1981, we note the following key provisions:

a) Section II, Definitions, contains the following key definitions:

“Company, Duplate Canada Inc.”

“Contributory Earnings, for years subsequent to 1972, means monthly Earnings of a Member at a rate in excess of 1/12 of the Year’s Maximum Pensionable Earnings as defined by the Canada Pension Plan. Prior to 1973, Contributory Earnings meant monthly Earnings of a Member at a rate in excess of \$450.”

“Earnings, the basic salary a Salaried Employee receives for a stated period of normal full-time employment. Extra remuneration for over-time worked, incentive, Christmas or cost of living bonuses are excluded.”

“Final Average Earnings, the average monthly earnings of a Member for the five best years out of the ten-year period immediately preceding his Normal Retirement Date or the date of his actual retirement which ever is earlier. For Members with less than five years of service with the Company at retirement, Final Average Earnings are the average monthly earnings over all his Company service.”

“Final Average Contributory Earnings, means the average monthly Contributory Earnings of a Member for that five year period, out of the ten-year period immediately preceding his Normal Retirement Date or the date of his actual retirement whichever is earlier, in which the Member’s Earnings were higher than in any other such five-year period. For Members with less than five Years of Service with the Company at retirement, Final Average Contributory Earnings are the average monthly Contributory Earnings over all his Company service.”

“Member, an eligible Salaried Employee enrolled in the Plan on and after January 1, 1969, including a Salaried Employee who was a member of the Predecessor Plan as of December 31, 1968.”

“Pension, a pension payable monthly to the recipient throughout his lifetime.”

“Predecessor Plan, the pension plan for Salaried Employees, established July 1, 1966.”

“Salaried Employee, any person in regular, full-time employ of the Company, whose normal Earnings are in the form of salary and who is not represented by a bargaining agent certified under the Ontario Labour Relations Act.”

“Statutory Benefit Age, the age at which any benefit becomes payable under the provision of the Old Age Security Act.”

“Years of Service, the period of years, taken to the nearest month, of an employee’s continuous employment by the Company for which he receives salary. In the case of Salaried Employees who were members of the Predecessor Plan on July 1, 1966, periods of employment before July 1, 1966 by a predecessor company or by an associated company the employees of which had coverage with Duplate employees in a predecessor pension plan shall be included in Years of Service as if they had been periods of employment by the Company except where such periods of employment are credited under the terms of another employee pension plan.

***For purposes of Non Contributory Pension Benefits, only, the following periods of service (which occurred prior to a break in service) will be included as Years of Service:***

<u>Employee</u>	<u>Previous Employment</u>	<u>Restored Service</u>
Boswell, L.B.	May 16, 1966 to August 22, 1969	3.3 years
Clements, J. D.	August 3, 1965 to May 1, 1970	4.8 years
Crooks, L.	September 17, 1973 to June 27, 1975	1.8 years
Linton, K.M.	March 23, 1970 to November 13, 1970	0.6 years
McAllister, L.M.	March 3, 1969 to February 6, 1970 and April 27, 1970 to March 28, 1975	5.8 years
Mailey, E.D.	April 12, 1955 to March 23, 1964	8.9 years
Marshall, J.J.	June 11, 1951 to January 14, 1958	6.5 years
Milne, S.D.	February 11, 1952 to November 15, 1956	6.8 years
Porteous, C.C.	March 9, 1964 to March 4, 1966	2.0 years
Ross, W.H.	April 14, 1965 to September 27, 1974	9.4 years
Martyn, A.M.	Excess over Plax Deferred Non-Contributory Benefits for the period July 21, 1958 to December 31, 1973	15.4 years
Taylor, E.W.	Excess over Fiberglas Deferred Non-Contributory Benefits for the period November 14, 1945 to July 19, 1957	10.7 years

***In the case of A.M. Martyn and E.W. Taylor the Non Contributory Pension Benefits payable hereunder shall be reduced by the amount of any pension payable from another employer sponsored pension plan in respect of such period of service.” (emphasis ours)***

The parties agreed that the special period of Restored Service described above for the listed individuals was the “Duplate Restored Service” that forms the basis of Issue 1 and that the Duplate Plan did not define the term “pensionable service” or contain the term “Credited Service”, but based pension benefits on Years of Service. The term “pensionable service” appears only to exist in Article XXIV – Maximum Pension.

b) Section VII - Member’s Contributions reads:

“Prior to January 1, 1973, a Member who had attained the age of 30 years was required to contribute 6% of his Contributory Earnings. Subsequent to December 31, 1972, a Member who has attained the age of 30 years is required to contribute 5% of his Contributory Earnings. No Member shall contribute to the Plan in any year an amount in excess of \$1,500.”

c) Section X – Non-Contributory Benefits reads:

“As of Normal Retirement Date each Member of the Plan shall be entitled to non-contributory benefits as follows:

1. Basic Non-Contributory Pension

A basic non-contributory Pension for life based on the Member’s Years of Service and date of retirement. The rate of benefit for Members in the service of the Company on and after January 1, 1980 will be:

\$10.50 per month per Year of Service for retirements effective on or after January 1, 1980.

2. Supplementary Benefit:

A month supplementary pension benefit based on the Member’s Years of Service and date of retirement. The rate of benefit for Members in the service of the Company on or after January 1, 1980 will be:

a) For retirements effective on or after January 1, 1980, \$10.50 per month for each Year of Service, subject to a maximum of \$262.50 and payable only until Statutory Benefit Age.

b) For retirements effective on or after January 1, 1980, \$8.75 per month for each Year of Service, subject to a maximum of \$218.75 and payable only after Statutory Benefit Age, reduced by the Estimated Statutory Benefit.

3. Use of Actual Statutory Benefit

If the Pensioner makes application for use of actual Statutory Benefit within twelve months of his first date of eligibility for such Statutory Benefit and furnished evidence, satisfactory to the Company, that the amount of his Statutory Benefit differs by at least \$1.00 per month from the Estimated Statutory Benefit, then in determining the benefit payable under Section X-2, the amount of his Statutory Benefit shall be applied in place of such Estimated Statutory Benefit effective as of the date of his retirement.”

d) Section XI – Basic Contributory Pension reads:

“A basic contributory Pension will be paid to a retired Member who has complied with the requirements under the present Plan and predecessor plans as follows:

- a) One per cent of his Final Average Contributory Earnings multiplied by his Years of Service as a Salaried Employee between his 30<sup>th</sup> and 45<sup>th</sup> birthdays, plus,
- b) Two per cent of his Final Average Contributory Earnings multiplied by his Years of Service as a Salaried Employee between his 45<sup>th</sup> and 65<sup>th</sup> birthdays.”

e) Section XXIV – Maximum Pension reads:

“Pension benefits payable out of or under the Plan (whether at retirement, termination of employment, or termination of the plan), shall not exceed an amount that is at an annual rate that is the lesser of 1) and 2):

- 1. \$1,715 times the number of years of pensionable service not exceeding 35 years;
- 2. an amount that is the product of a) and b)
  - a) 2% per year of pensionable service not exceeding 35 years and
  - b) the average of the best three consecutive years of remuneration paid to the Member by the Company.

The above prohibition will not apply to annual pensions of \$275 or less per year of pensionable service.”

- 2. The PPG Plan effective as at July 1, 1981 was a continuation and amendment of three merged Prior Plans: The Final Average Earnings Pension Plan for Salaried Employees of PPG Industries Canada Ltd. (Glass and Coatings & Resins Divisions), the Retirement Plan for Employees of Kalium Chemicals, a Division of PPG Industries Canada Ltd., and

The Pension Plan for Salaried Employees of Stanchem Division of PPG Industries Canada Ltd., as adopted by PPG Industries Canada Ltd. effective July 1, 1981 for its salaried employees, as evidenced by a resolution dated June 2, 1982 (the PPG Resolution”).

3. Under the PPG Resolution, PPG Canada Inc. (“PPG”) also merged the Duplate Plan into the PPG Plan, added Duplate Canada Inc. as a Participating Employer and added the Duplate Plan as a “Prior Plan”, all effective July 1, 1982.
4. The PPG Resolution further stated that “any rights that a Member may have by virtue of his membership in a Prior Plan in respect of benefits under the Prior Plan accrued to June 30, 1981 shall not be diminished or rescinded by virtue of the introduction of the Plan.”
5. By virtue of a resolution dated June 2, 1982 (the “Duplate Resolution”), Duplate Canada Inc. adopted the PPG Plan effective July 1, 1982 for its eligible salaried employees, and explicitly noted that:

“any rights that any such eligible employee may have by virtue of his membership in the Duplate Canada Inc. Salaried Employees Pension Plan (hereinafter referred to as the Duplate Plan) in respect of benefits under the Duplate Plan accrued to June 30, 1982 shall not be diminished or rescinded by virtue of the adoption of the (PPG) Plan.”

6. The PPG Plan is non-contributory and provides for a pension based on the higher of two formulae, under Article 5.01 which states that:

“Normal Retirement Benefit

A Member’s monthly rate of normal retirement benefit, payable commencing on his Normal Retirement Date shall be (a) or (b) below whichever is greater:

(a) Regular Benefit

The sum of:

- (i) 0.85% of the Member’s Final Average Monthly Salary up to the Final Average Pensionable Earnings, and
- (ii) 1.6% of his Final Average Monthly Salary in excess of the Final Average Pensionable Earnings,

multiplied by his years and months of Credited Service.

(b) Alternate Benefit

1.25% of the Member’s Final Average Monthly Salary up to \$1,200, multiplied by his years and months of Continuous Service.

Notwithstanding anything contained herein to the contrary, the amount of retirement benefit payable to a Member shall in no event be less than the amount of pension benefit payable to him according to the terms of the Prior Plan of which he was a member based on his earnings and service up to July 1, 1981.”

We note that it was the position of the Applicant that given the relatively low salary cap under the Alternate Benefit formula, that formula was, in practical terms, for many employees, a flat-benefit rate of 1.25% times \$1200 or \$15 per month multiplied by years and months of Continuous Service. We find however that it was not expressed as a flat rate benefit, no evidence was adduced to prove that all of the Restored Service Members would be caught by that limit, nor was evidence adduced to prove that it was intended to be equivalent to the non-contributory pension benefits under the Duplate Plan. In fact we find that it is not equivalent to that formula.

7. Under the PPG Resolution, it states that “the dates July 1, 1982 and June 30, 1982 shall be substituted for July 1, 1981 and June 30, 1981, respectively wherever they occur in the (PPG) Plan in respect of such eligible salaried employees of Duplate Canada Inc.,” having the effect of amending Article 5.01 of the PPG Plan as described in paragraph 6 above.
8. Key provisions of the PPG Plan effective July 1, 1981 as provided by the Applicant in the Agreed Book of Documents are:
  - a) “Article 1.07, ‘Company’ shall mean PPG Canada, including its predecessors and any successor by merger, purchase or otherwise with respect to its Employees. Except as otherwise provided, any action to be taken, consent, approval or opinion to be given, or discretion or decisions to be exercised or made by the Company shall be the responsibility of PPG Canada.”
  - b) “Article 1.08, ‘Continuous Service’ shall mean service with the Company as determined according to Article 3.”
  - c) “Article 1.10, ‘Credited Service’ shall mean service with the Company as determined according to Article 3.”
  - d) “Article 1.15, ‘Final Average Monthly Salary’ shall mean the average monthly salary of a Member paid during the 60 consecutive months in the last 10 fiscal years of the Member’s Continuous Service affording the highest such average preceding the Member’s date of retirement or termination of employment whichever is applicable. In the case of an Employee who becomes totally and permanently disabled and continues to accrue Continuous Service pursuant to subsection 3.01(c), for the purpose of determining his Final Average Monthly Salary, salary shall include, for any period during which benefits under a Long Term Disability Plan of the Company are received, an amount based on the salary in effect at the time of the Employee became disabled. For Members who terminate or retire prior to completing 60 consecutive months of Continuous

Service, Final Average Monthly Salary shall be the monthly average of his salary received while an Employee.”

e) “Article 1.20, ‘Member’ shall mean any person included in the membership of the Plan as provided in Article 2.”

f) “Article 3.01, ‘Continuous Service’:

(a) Continuous Service shall include the number of years and months of an Employee’s continuous period of employment as an Employee from the first day of the month of his latest date of hire as an Employee to his date of termination, retirement or transfer under Article 12.

(b) ***Continuous Service prior to July 1, 1981 shall not be less than the amount of pensionable service credited to the Employee under a Prior Plan. (emphasis ours)***

(c) Continuous Service shall include any period of Total Disability for which an Employee is entitled to payments under a salary continuance program or disability benefits under a Long Term Disability Plan of the Company.

(d) Continuous Service shall include i) periods of leave of absence with pay, (ii) periods of Company-approved leaves of absence without pay, and (iii) periods of layoff up to 12 months in duration.”

g) “Article 3.02, Credited Services:

(a) Credited Service shall include the number of years and months of a Member’s Continuous Service subsequent to the first day of the month in which the Member attains age 25.

(b) Credited Service for service rendered prior to July 1, 1981 shall be reduced by:

(i) any period during which the Employee was eligible to participate but elected not to participate in a Prior Plan; and

(j) any period in respect of which the Employee withdrew his contributions made under a Prior Plan;

***however, such Credited Service prior to July 1, 1981 shall not be less than the amount of pensionable service credited under a Prior Plan. (emphasis ours)***

- (c) A Members' total period of Credited Service may not exceed 35 years."
9. The term "pensionable service" is not defined under the PPG Plan, although it is used in several instances in the PPG Plan text.
10. The parties adduced various internal Duplate Canada and PPG memorandum and correspondence with respect to the Duplate Restored Service issue. In particular, the Tribunal notes the existence of the following documents which were introduced into evidence:
- a) A letter dated June 2, 1980 to Mr. J. D. Clements, one of the Restored Service Members, from Mr. D. R. Pepall, President and CEO of Duplate Canada Limited confirmed Mr. Clements 4.8 years of "pension service for Non-Contributory Benefits", consistent with the above-noted provisions of the Duplate Plan. This letter was not in dispute.
  - b) An undated booklet in respect of the PPG Plan entitled "Meeting a Combination of Needs for Retirement" recognizes certain periods of employment with "any division (Glass, STANCHEM, Coatings & Resins, Kalium Chemicals) before its consolidation into PPG Industries Canada Ltd." for the purposes of determining Credited Service. There was an exception for including periods of contributory service in which an employee declined to participate or during which an employee withdrew related contributions. An addendum to the booklet, effective July 1, 1982, stated that "DUPLATE CANADA INC., as an Affiliated Company has adopted the PPG Retirement Plan for Salaried Employees and has become a Participating Employer under the terms of the Plan." The terms of the booklet were described as "not the official governing document". The Tribunal finds as an undisputed fact that the booklet, which evidence indicated was given to Duplate employees following the plan merger, was silent with respect to Duplate Restored Service.
  - c) An internal Duplate memorandum dated June 14, 1982, to all Salaried Employees from D. R. Pepall advised salaried employees that Duplate had adopted the PPG Plan effective July 1, 1982, recognized a transfer of assets and liabilities to the PPG Plan and attached the booklet referred to in paragraph 10 (b) above. The memorandum states "Employee and Company contributions to the Duplate Plan will be transferred to the PPG Plan along with the related *pension service (emphasis ours)*." It also references the two PPG Plan benefit formulae and the concept of Credited Service and Continuous Service although there was no definition of those terms within the memorandum. The memorandum further referenced an Addendum to the Booklet, adduced into evidence, which simply referenced Duplate as a Participating Employer or Division, and inserted an effective date of July 1, 1982 for Duplate members.

The Tribunal notes that the ability to merge the Duplate Plan and the PPG Plan was not an issue before it, and further, that neither party raised any bar to such

merger or related amendment. Consequently the Tribunal did not consider that aspect but makes as a finding of fact the merger of the Duplate Plan and the PPG Plan was an amendment to and continuation of the Duplate Plan at least in respect of service prior to July 1, 1982 given the provisions of Sections 3.01 and 3.02 of the PPG plan as noted above.

- d) The first member statement produced under the PPG for Mr. J. D. Clements, a witness at this hearing, and related Duplate memorandum to him dated November 24, 1982 from J. M. Theissen, indicated “Credited Service to November 30, 1982 [of] 10.9167 years” and “in addition, ...restored service for Non-Contributory Benefits under the Duplate [Plan] of 4.8 years for service between your original date of hire (August 3, 1965) and your date of termination (May 1, 1970).”
- e) The Applicant called as a witness, Mr. Kamaludin Ali, an actuary who was formerly an employee of GBB Associates Ltd. the actuary in respect of the PPG Plan. The evidence in the Agreed Book of Documents included a memorandum from Mr. Ali while at GBB Associates Ltd. to Mr. H. Wakefield, Corporate Secretary of PPG, dated July 27, 1982, stating that “the additional years of service granted to Messrs. Clements and Boswell only apply to the non-contributory benefit, we did not include this additional amount under the credited service shown (*on the member’s annual statement*) although we did include it for purposes of calculating both the accrued and projected benefit.” This memorandum pertains to the Duplate Plan prior to its merger with the PPG Plan.
- f) An internal PPG memorandum dated November 18, 1982, from S. McAteer to M. Theissen entitled “Subject: Pension Plan Presentation” in paragraph 2 states: “Service prior to July 1, 1982 would be the same as that credited under the prior plan”.
- g) Annual statements prepared for John D. Clements as of May 1, 1983, 1984 and 1985 indicated both Continuous Service and Credited Service of 15.75, 16.75 and 17.75 years respectively. These statements seem to include the Duplate Restored Service granted to Mr. Clements under the Duplate Plan for purposes of inclusion in the pension formulae of the PPG Plan.

Mr. Ali testified before the Tribunal in respect of these statements that these statements which included Duplate Restored Service under PPG Plan Credited Service, and which were prepared by GBB Consultants Ltd. were “incorrect”. Mr. Ali’s testimony was that while the related programming and statements were to be revised three years after the merger to properly reflect the inclusion of Duplate service, the changes were not made immediately due to cost concerns. His understanding was that Duplate did not distribute the statements to the Restored Service Members although we find that he had no direct knowledge of that fact so we give his testimony in this regard no weight.

Mr. Ali indicated that “corrected statements” were prepared by GBB Associates Ltd. in 1985. The Tribunal notes the testimony of Mr. Clements was that revised

statements were given to him by PPG in 1987, which statement did include Duplate Restored Service in the calculation of the contributory benefit formula only under the PPG Plan. The attached letter from Mr. Pepall to Mr. Clements dated November 29, 1985 indicated that “The regular benefit formula in the PPG Canada Salaried Employees’ Pension Plan will not apply to your restored salary service.” The Tribunal accepts the testimony of Mr. Clements that the attached letter was not distributed to Mr. Clements until 1987 with the revised statement.

It was also Mr. Ali’s testimony that the revised 1985 statement for Mr. Clements was not entirely consistent with the PPG Plan terms at the time. Mr. Ali indicated that PPG did not reconcile the PPG Plan text with the revised member statements until Amendment 8 was passed in 1985 but stated to be retroactive to 1982.

11. PPG Canada Inc. purported to amend the PPG Plan effective June 30, 1982 by a resolution dated April 10, 1988 (“Amendment 8”) to provide Restored Service Members with credit for Duplate Restored Service under a new Article 3.03 – Special Duplate Service and new Article 5.03 – Provisions for Members who have Special Duplate Service as follows:

“3.03      Special Duplate Service

- (a)      A Member shall have recognized as Special Duplate Service such service prior to July 1, 1982 which was:
  - (i)      accrued prior to a break in service with Duplate Canada Inc. as determined in accordance with paragraph 18 of Article II of the Duplate Canada Inc. Salaried Employees’ Pension Plan as in effect June 30, 1982; and
  - (ii)     accrued as an hourly employee of Duplate Canada Inc. as determined in accordance with Article XII of the Duplate Canada Inc. Salaried Employees’ Pension Plan as in effect June 30, 1982.”

“5.03      Provisions for Members who have Special Duplate Service

The following provisions contained in this Section 5.03 apply only to Members who have Special Duplate Service.

- (a) The normal retirement benefit payable to such a Member shall be the lesser of (A) or (B) below:
  - (A)      The sum of:

- (i) the Member's normal retirement benefits as determined in accordance with Section 5.01, and
- (ii) 1.25% of the Member's Final Average Monthly Salary up to \$1,200 multiplied by his years and months of Special Duplate Service.

(B) The sum of:

- (i) 0.85% of the Member's Final Average Monthly Salary up to the Final Average Pensionable Earnings, and
- (ii) 1.6% of his Final Average Monthly Salary in excess of the Final Average Pensionable Earnings, multiplied by 35 years.

(b) The amount of Early Retirement Benefit payable to such a Member shall be determined in accordance with Section 5.03 (a) on the basis of his Final Average Monthly Salary, his Continuous Service, his Credited Service, his Special Duplate Service and the Final Average Pensionable Earnings up to the date of his retirement and adjusted in accordance with Section 5.02. For the purpose of determining the adjustment, if any, to be made to such Early Retirement Benefit, Continuous Service shall include the Members Special Duplate Service.

(c) For the purpose of determining eligibility for a vested deferred annuity under Section 8.01(a), Credited Service shall include a Member's Special Duplate Service.

The deferred vested annuity payable to such Member shall be computed in accordance with Section 5.03(a) on the basis of his Final Average Monthly Salary, his Continuous Service, his Credited Service, his Special Duplate Service and his Final Average Pensionable Earnings up to the date of his termination of employment.

(d) If a former Employee other than an Employee described in Section 11.01 is restored to Service prior to Normal Retirement Date, his Special Duplate Service shall be restored in accordance with the provisions of Section 11.02.

- (e) In the case of such a Member who transfers to employment with the Parent Company or a Related Company or who transfers to hourly employment with the Company in accordance with Sections 12.01 (c) or 12.02 (c), the retirement allowance payable under this Plan shall be computed on the basis of Continuous Service, Credited Service and Special Duplate Service as defined in this Plan and the provisions of this Plan as in effect on the date of the Employer's transfer."

Amendment 8 does not treat Duplate Restored Service as Credited Service for the purpose of the "Regular Benefit" only the "Alternate Benefit" formulae under Section 5.01 of the PPG Plan.

The Tribunal notes that Amendment 8 was not actually signed until April 10, 1988 although the resolution was ostensibly authorised by the PPG Board of Directors on December 11, 1985. No evidence was adduced to prove that the PPG Plan members were ever given notice of Amendment 8.

- 12. Subsequent correspondence with Mr. Clements from various employees of PPG introduced into evidence made reference to Mr. Clements' Duplate Restored Service as being used only for the Alternate Benefit Formula under the PPG Plan. We find that Mr. Clements did not accept PPG's position on this matter and continued to raise objections which ultimately led to the matter before us.
- 13. A Notice of Proposal was issued by the Superintendent dated December 18, 2006 which provides the basis for this Application. The Notice of Proposal proposed to: (a) revoke the registration of Amendment 8 to the PPG Plan as it "reduces the accrued benefits of the Applicant by accounting for the Duplate Restored Service as an Alternate Benefit instead of as a Regular Benefit when calculating the Normal Retirement Benefit" and therefore "violates section 14 of the PBA and is void"; and b) further orders PPG Canada Inc. as Administrator of the PPG Plan to include the Duplate Restored Service as "Credited Service" under the PPG Plan.

### **Applicant's Position**

- 14. It is the position of the Applicant that the PPG Plan did not include the Duplate Restored Service of the Restored Service Members as "Credited Service" for any purpose prior to Amendment 8, nor was it intended to be "pensionable service" under the PPG Plan. Therefore, the Applicant argued that the Restored Service Members had no basis to expect that their Duplate Restored Service would count for pension benefit accrual purposes under the PPG Plan. Duplate Restored Service effectively would only be relevant in the context of the guarantee under the PPG Plan that benefits would not be less than what they were entitled to under the Duplate Plan based on earnings and service up to the date of merger.

15. It is the position of the Applicant that Amendment 8 to the PPG Plan is therefore valid and does not reduce the accrued benefits of the Restored Service Members or violate s. 14(1) of the *Pension Benefits Act* of Ontario, as Duplate Restored Service was intended only to apply to a non-contributory flat rate benefit under the Duplate Plan. Amendment 8 was in this context a benefit improvement.
16. It is the Applicant's position that, in the alternative, even if Duplate Restored Service was intended to be counted as pensionable service in respect of the PPG Plan's Alternate Benefit formula, Amendment 8 was intended to be a clarification of how Duplate Restored Service was to be treated under the PPG Plan and is not an adverse amendment. It is the Applicant's position that PPG never intended to draft the PPG Plan text so as to put its members in a better position that they have been under a prior plan.

### **Superintendent's Position**

17. It is the Superintendent's position that the Duplate Restored Service was to be recognized for the purpose of factoring in years of service to be credited to the PPG Plan when the member's pension was calculated for both the Regular Benefit and Alternate Benefit Formulae, and not limited to the Alternate Benefit Formula. This result was reflected in the plain wording of the PPG Plan at the time the former Restored Service Members joined it. When Amendment 8 was introduced four years later, with retroactive effect, it purported to reduce this benefit by allowing it to be factored in only to the Alternate Benefit Formula, and the Alternate Benefit formula prevailed only if it resulted in a greater pension amount than the Regular Benefit formula. The Superintendent did not concede that the Alternate Benefit Formula was a "flat rate" benefit as the Applicant has suggested.
18. The Superintendent's position on the meaning of the term "pensionable service" was that it has a defined meaning in the *Income Tax Act* and is not a term of art. Since the Duplate Plan provided that Duplate Restored Service will be included in the Years of Service for the named individuals, it was pensionable service under the Duplate Plan, and therefore pensionable service when the Duplate Plan was incorporated into the PPG Plan. Otherwise the term "pensionable service" in the PPG Plan would have no meaning and the promise of recognition of prior Duplate continuous service and credited service "would be an empty promise". In addition, the Superintendent argued that the "guarantee under Article 5.01 (of the PPG Plan) only requires that a certain minimum service be granted to members adopted from the other plans and does not preclude enhancements when those other plans are adopted".
19. The Superintendent further argued that the Applicant's submissions on intention in drafting its own plan documents are irrelevant. If there is an ambiguity in the meaning of "pensionable service", the *contra proferentum* rule would apply in favour of the members.

**Issue 1: How was the Duplate Restored Service to be recognized when the Duplate Canada Inc. Salaried Employees Pension Plan (the “Duplate Plan”) was incorporated into the PPG Plan in 1982?**

20. We find that Duplate Restored Service is pensionable service and therefore counts as both Continuous Service and Credited Service under the PPG Plan for the purpose of determining pension benefits under Article 5.01 in respect of pre-July 1, 1982 service. Further Duplate Restored Service shall count for the purposes of determining pension benefits under both the Regular Benefit and Alternate Benefit provisions of the PPG Plan.

Our reasons follow.

21. We find that on the merger of the Duplate Plan and the PPG Plan, that the restated PPG Plan was a continuation and amendment of the Duplate Plan. Upon such merger, the PPG Plan clearly indicated that Restored Service Members retained their rights “in respect of benefits under the Prior Plan accrued to June 30, 198[2] (*and such rights*) shall not be diminished or rescinded by virtue of the introduction of the Plan”.<sup>1</sup> Continuous Service and Credited Service under the amended PPG Plan could not be “less than the amount of pensionable service credited under a Prior Plan”. The Duplate Plan was a “Prior Plan” under the PPG Plan terms by virtue of the June 2, 1982 PPG Resolution and that fact was not disputed by the Applicant.

At a minimum therefore prior to the plan merger, Duplate Restored Service was to be included in the calculation of Prior Duplate Plan service under the non-contributory provisions of the Duplate Plan. The testimony of Mr. Ali, the Applicant’s only witness, and the parties themselves, did not dispute this view. The Duplate Plan did not define the term “pensionable service” nor contain or define the term “Credited Service”, but based pension benefits on Years of Service. “Years of Service” under the Duplate Plan included Duplate Restored Service for purposes of the non-contributory pension benefits.

22. However, at the time of the plan merger, if it was the intention of PPG Canada Inc. or Duplate Canada Inc. to effectively “freeze” the Duplate Restored Service under the Duplate Plan for the purpose of testing pre-merger benefits under the PPG Plan formula, then PPG could have easily amended the PPG Plan to do so. It also did not define “pensionable service”, nor explicitly exclude Duplate Restored Service from its definitions of Continuous Service and Credited Service in calculating the Regular Benefit, although it could have done so in the 1982 PPG Resolution. PPG did not amend that PPG Plan at time of merger to do any of these things. It in fact did not explicitly reference the Duplate Restored Service until Amendment 8 was passed several years later.
23. Further the original annual pension statements for the years 1982-1985 in respect of Mr. J. D. Clements explicitly included Duplate Restored Service as Credited Service

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<sup>1</sup> As per both the Duplate Resolution dated June 2, 1982, the PPG Resolutions dated June 2, 1982 and by sections 3.01(b), 3.02 (b) and 5.01 of the PPG Plan.

under the PPG Plan. While we heard Mr. Ali's testimony that these statements were knowingly produced as "incorrect", we do not find his statements that they were not corrected for the 12 Restored Service Members for cost reasons relevant or plausible. It was his own testimony that he never had direct discussions with any PPG employees nor was he involved in drafting any of the PPG Plan documents. In our view, it would have been an easy matter for PPG and/or GBB Associates Ltd. to produce twelve individual statements with frozen past service benefits for the Restored Service Members. PPG knowingly withholding the annual statements, if true, would have contravened the provisions of the *Pension Benefits Act* in any event, which requires a plan administrator (PPG) to provide such annual members statements. We accept Mr. Clements' testimony that he did receive the original statements as well as revised member statements which attempted to ignore Duplate Restored Service for benefit accrual purposes but the revised statements were not provided to Mr. Clements until 1987. We also find that practice adopted by GBB Associates Ltd. in calculating accrued benefits for members' statements or valuation purposes is not determinative of the meaning of the PPG Plan provisions, so we give Mr. Ali's evidence in this regard no weight.

24. Under the provisions of Section 5.01 of the PPG Plan as it existed on June 1, 1982, which determine the pension entitlements of the Restored Service Members, Prior Plan benefits provide a "floor" for the PPG Plan benefits, not a maximum benefit. It is certainly open to plan sponsors to enhance past service benefits for specific classes of plan members, such as for the Restored Service Members. That is what was done under the Duplate Plan when Duplate Restored Service was granted. The fact that under the PPG Plan Restored Service Members may gain additional benefits on plan merger is neither prohibited in law nor unanticipated in practice. Of course PPG could have explicitly amended its plan to freeze those benefits at time of merger. It did not do so.
25. The Applicant submitted that under the PPG Plan, Duplate Restored Service is not pensionable service under the Duplate Plan. We disagree.

The term "pensionable service" is not defined under the *Pension Benefits Act*, but is a general term, not a term of art. The *Income Tax Act* Regulations, under which both the Duplate Plan and PPG Plans are subject for registration purposes, does include a definition of "pensionable service". The *Income Tax Act* Regulations state that: "'pensionable service' of a member of a pension plan under a defined benefit provision of the plan means the periods in respect of which lifetime retirement benefits are provided to the member under the provision".<sup>2</sup> The Applicant's own witness, Mr. Ali, in fact acknowledged that it meant service for which a pension benefit is given under a pension plan. We agree that the ITA definition provides a commonly-used definition of pensionable service.

We do not find any ambiguity in regards to the use of the term pensionable service under the PPG Plan text. We note that the Applicant did not offer an alternate

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<sup>2</sup> *Income Tax Act*, Chapter 1 (5<sup>th</sup> Supp.), R.S.C. 1985, as amended, Regulation 8500(1).

construction of the term but tried to narrow its construction on the facts. In fact the Applicant's own witness provided a consistent construction with that put forward by the Superintendent.

26. We find that Duplate Restored Service did count as pensionable service under the Duplate Plan. We are of the view that no compelling evidence was adduced by the Applicant to support the Applicant's contention that Duplate Restored Service was not pensionable service under the Duplate Plan. It was pensionable service, and the term is broad enough to encompass Years of Service as defined under the Duplate Plan and Credited Service under the PPG Plan.

The pre-merger pension benefits for Restored Service Members were preserved under Articles 3.01, 3.02 and 5.01 of the PPG Plan and post-merger accrual followed the terms of the PPG Plan at merger. We find that given the definition of "pensionable service" as defined above under the *Income Tax Act*, its reasonable application to the PPG Plan text includes the Duplate Restored Service as pensionable service under the PPG pension formulae. Otherwise the term "pensionable service" in the PPG Plan formulae would have no reasonable meaning.

27. Even if the Tribunal were wrong in its interpretation of "pensionable service" and it was established that the term had some ambiguity, we still find that Duplate Restored Service is pensionable service under the Duplate Plan. The Duplate Plan clearly recognizes Duplate Restored Service as "Years of Service" for the purposes of the Non Contributory Pension Benefits. The pension formulae under the Duplate Plan based pension accrual on the member's Years of Service. It is entirely reasonable to equate "Years of Service" as "pensionable service" in this context while recognizing that a plan sponsor, if it chooses to do so, may by definition limit for pension accrual purposes certain periods of service. Duplate did so for example in applying the maximum pension accrual rule under the *Income Tax Act* and in not attributing Duplate Restored Service to its Basic Non-Contributory Pension formula. However, PPG did not similarly limit pensionable service in respect of its pension formulae under the PPG Plan when it merged with the Duplate Plan.

28. It was the Applicant's submission that even if Duplate Restored Service was pensionable service under the Duplate Plan, it was not intended to count towards the accrual of benefits under the PPG Regular Benefit formula.

In this event, the Applicant suggested that the Tribunal look first at the parties' objectives in interpreting the plan provisions. With respect, the Tribunal does not find it necessary to do so where, as in this case, the clear language of the plan provisions provide for a reasonable interpretation of their meaning and in our view produces a fair result. The Applicant referenced the case of *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co*<sup>3</sup>. for the proposition that intention is relevant. However we note that in that insurance case, the court stated:

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<sup>3</sup> *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, (1979), 112 D.L.R. (3d) 49 (S.C.C.) at 58.

“Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties.”

As noted above, the Applicant did not provide an alternative construction of the term “pensionable service”. The plan terms were unilaterally drafted by PPG and we do not need to examine the intention of the parties (here meaning PPG and the plan members) to determine its meaning. The Restored Service Members had no input into the PPG Plan terms and did not receive copies of the PPG Plan text at time of merger. In fact, this Application is the result of efforts for almost two decades by at least one of those members who disputed the Applicant’s position in respect of his Duplate Restored Service under the PPG Plan.

The Applicant submitted no evidence that the Duplate Restored Members were given written communication at date of merger about the PPG Plan terms, beyond the booklet and addendum referred to in paragraph 10(b) above, which booklet and addendum did not describe Duplate Restored Service, and the internal Duplate memorandum dated June 14, 1982. These facts were supported by both the testimony of Mr. Clements and of Mr. L. B. Boswell, both pensioners under the PPG Plan with Duplate Restored Service. It was Mr. Clements’ undisputed testimony that employee meetings chaired by PPG Corporate Human Resource employees (Ms. Thiessen) in 1982 did not talk about Duplate Restored Service. Further it was not until 1987 that Mr. Clements received his revised annual statement that reflected the position that his Duplate Restored Service did not count under the PPG Plan for the Regular Benefits. In fact it didn’t appear to count at all. If expectation or intent were relevant, we note that there was no evidence at the time of plan merger, that Duplate Restored Service would be “frozen” or applied only to the Alternative Benefit formula. Further the Applicant’s only evidence as to PPG’s intentions was Mr. Ali’s testimony. We note that Mr. Ali indicated that he had had no direct discussions with PPG or the Restored Service Members, or in drafting the PPG Plan documents. Consequently we give no weight to his testimony on the issue of PPG’s intentions or member expectations.

We accept Mr. Clements’ assertions that he remained confused about the application of Duplate Restored Service under the PPG Plan. It was not until 1987 that it became clear that the regular benefit formula in the PPG Plan “will not apply to your restored salary service”. Mr. Clements requested and received a copy of the PPG Plan text and Amendment 8 from PPG in 1999, although he did not receive any prior notice of Amendment 8.

29. Even if there were any ambiguity as to the application of Duplate Restored Service under the PPG Plan, in the absence of alternative constructions to the term pensionable service, we find that the doctrine of *contra proferentum* would apply. Any ambiguity in the meaning of “pensionable service” should therefore be constructed in the member’s favour. The rule was stated by Estey J. in the Supreme Court of Canada decision in *McClelland and Stewart Ltd. v. Mutual Life Assurance*

*Co. Of Canada (1981) 2 S. C. R. 6*, at page 15, and followed by the Ontario Supreme Court in *McCreight v. 146919 Canada Ltd.*<sup>4</sup>, as follows:

“The principle of interpretation applies to contracts and other documents on the simple theory that any ambiguity in a term of a contract must be resolved against the author if the choice is between him and the other party to the contract who did not participate in the drafting.”

The PPG Plan and related amendments were drafted by the Applicant and the interpretation *contra proferentem* should apply. Consequently we find that the term “pensionable service” under the PPG Plan includes Duplate Restored Service for purposes of both the Regular Benefit formula and the Alternate Benefit formula. If PPG had wanted to impose a different meaning it could have done so at time of merger. It did not. The result is neither an unrealistic one nor one that could not have been contemplated at the time of plan merger.

While the effect of the Alternate Benefit formula under the PPG Plan may be a flat rate benefit, it is not expressed as a flat rate benefit and is not equivalent to the contributory service formula under the Duplate Plan. As indicated, had PPG wanted to freeze Duplate Restored Service or otherwise limit the definition of Continuous Service and Credited Service under the PPG Plan to exclude Duplate Restored Service it could have done so.

The Applicant argued that the decision of the Nova Scotia Court of Appeal in the case of *White v. Halifax (Regional Municipality) Pension Committee*<sup>5</sup>, supported its proposition that the PPG Plan should be read in its entirety and in context so as to limit the Restored Service Members from any entitlement to have superior benefits of their current pension plan applied to their former service. Effectively, the Applicant suggests that the Restored Service Members would get a “windfall” under this result and that result would be unreasonable.

In the *White* case, the applicants were members of the Halifax Regional Municipality (“HRM) pension plan, who claimed full credit for pre-1981 service for a former employer. The claim was in contract and estoppel. The HRM members claimed that the terms of the plan and/or the contents of an information and options package provided a contractual right to the benefit they sought. Further, the appellant argued that representations were made that they would get the benefit they claim. Unlike this case, in that case, there was no dispute that the appellant’s years with a former employer (Dartmouth Transit Service or “DTS”) counted as years of service in determining their benefits. The question was what percentage should be multiplied by the number of years of prior service.

In the *White* case, unlike this case, upon the initial merger of the employers the employees joined a pension plan having no previous pension plan with DTS. Several years later, the former DTS employees were allowed to “buy pension credit” for their

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<sup>4</sup> *McCreight v. 146919 Canada Ltd.* (1991) O.J. No. 136, page 16.

<sup>5</sup> *White v. Halifax (Regional Municipality) Pension Committee*, (2007) N.S.J. No. 61 (NSCA).

DTS service under a different pension formula, permitting them to receive two pensions at retirement: one for service with the Metropolitan Authority, and one for DTS service. When HRM was created, it became the employee of all the employees of the predecessor municipalities and the Metropolitan Authority, including the appellants.

When the new HRM pension plan was created, it was found by the courts to define “Credited service” to exclude DTS service. Under a later conversion option offered under the HRM plan, members could elect to convert benefits accrued under a Prior Plan. At issue was whether years of DTS service were benefits accrued under the prior plan which could be converted to the terms and provisions of the current plan. In the alternative the court considered whether the current plan and/or the information and options package and their selection of option 1 gave the HRM members (1) “...a contractual right to have their DTS service credited at the higher rate”, and, (2) if not, did the information and options package make an ‘unambiguous representation’ that gives rise to an estoppel which prevents the pension committee from denying that the appellants are entitled to such a benefit?”

In the *White* case, the court, having noted that “much turns on the precise wording of various documents” entered, as we have done in this case, into a detailed review of the documents. It then considered the interpretation of the plan provisions to be premised on principles of contractual interpretation, from the perspective of what a reasonable party would understand from the conduct of the other. As discussed above, in this case the facts are quite different. The term “pensionable service” in the PPG Plan is not subject to competing alternate meanings and the PPG Plan terms make it clear that Duplate Restored Service was pensionable service and therefore constituted both Continuous Service and Credited Service under the pension formulae as those terms were defined. Unlike the *White* case, this was not a case of conversion of past defined benefits into a different formula, nor of reliance and estoppel on member communications. In this case, the facts turn on the clear meaning of the plan documents, which we have concluded yield a reasonable and fair result, not expectations. The member communications by PPG at the time of plan merger supported the view that PPG did not explicitly exclude Duplate Restored Service from its definitions of Continuous Service and Credited Service in calculating the Regular Benefit, although PPG could have done so in the 1982 PPG Resolution by explicitly freezing the past service benefit. It is therefore not necessary to consider the fairness of the result, which is not unreasonable and is predictable in its outcome.

In summary on Issue 1, we find that Duplate Restored Service should be recognized as pensionable service under the PPG Plan when the Duplate Canada Inc. Salaried Employees Pension Plan (the “Duplate Plan”) was incorporated into the PPG Plan in 1982 for purposes of both the Regular Benefit and Alternate Benefit formulae.

**Issue 2: Is Amendment 8 to the PPG Plan void pursuant to Section 14 of the *Pension Benefits Act, Ontario*?**

30. Given our findings on Issue 1, we find on the second issue, that Amendment 8 to the PPG Plan is void pursuant to Section 14 of the *Pension Benefits Act, Ontario*. Our reasons follow.

Amendment 8 does not treat Duplate Restored Service as Credited Service for the purpose of the “Regular Benefit” only the “Alternate Benefit” formulae under Section 5.01 of the PPG Plan. This fact was not disputed by the Applicant. Therefore it was not, as the Applicant argued, a benefit improvement, but a reduction in accrued pension benefits. Amendment 8 was not actually signed until April 10, 1988 although the resolution was ostensibly authorised by the PPG Board of Directors on December 11, 1985 with retroactive effect to July 1, 1982.

Under Section 14(1)(a) and (b) of the *Pension Benefits Act, Ontario*, 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; (or)
- (b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan”.

On the facts of this case, we find that Amendment 8 is void under Section 14(1) of the *Pension Benefits Act, Ontario*.

## CONCLUSION

We find in favour of the Superintendent on both Issues 1 and 2. The Superintendent is ordered to proceed with the Notice of Proposal dated December 18, 2006 in revoking the registration of Amendment 8.

Dated at the City of Toronto this 26<sup>th</sup> day of November, 2007.

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“F. Holden”  
Florence A. Holden  
Member of the Tribunal and Chair of the Panel

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“S. Bharmal”  
Shiraz Bharmal  
Member of the Tribunal and of the Panel

\_\_\_\_\_  
“John Solursh”  
John Solursh  
Chair of the Tribunal and Member of the Panel