

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 an intended decision of the Superintendent of Financial Services to refuse to consent to a transfer of assets from the BCE Inc. Pension Plan, Registration Number 908061, to the Pension Plan for Employees of Progistix-Solutions Inc. and its Subsidiary Companies, Registration No. 1086412, under sections 80 and 81 of the *Act*

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

BETWEEN:

BCE INC.

APPLICANT

and

**SUPERINTENDENT OF FINANCIAL SERVICES, SCI GROUP INC., and CANADA
POST CORPORATION**

RESPONDENTS

BEFORE:

Mr. Ralph Scane
Member of the Tribunal and Chair of the Panel

Mr. Patrick Longhurst
Member of the Tribunal and of the Panel

Ms Elizabeth Shilton
Member of the Tribunal and of the Panel

APPEARANCES:

For BCE Inc.:

Mr. David Stamp
Mr. Douglas Rienzo

For the Superintendent of Financial Services:

Ms Deborah McPhail

For SCI Group Inc.:

Mr. Gerald Ranking
Ms Peggy McCallum

For Canada Post Corporation:

Mr. Marc André Leblanc

Date of Hearing:

December 2, 2011

Decision on Motion

This is a motion brought by the Respondent SCI Group Inc. (SCI) in the course of an Application for Hearing brought by BCE Inc. (BCE) pursuant to s. 89(8) of the *Act*. The Application seeks a hearing before the Tribunal regarding a Notice of Intended Decision, dated April 28, 2011 (the NOID), issued on behalf of the Superintendent of Financial Services by the Acting Deputy Superintendent, Pensions (the Superintendent). The NOID advised of the Superintendent's intention to refuse to consent to a transfer of assets from the BCE Pension Plan, Registration No. 908061, (the BCE Plan) to the Pension Plan for Employees of Progistix-Solutions Inc. and its Subsidiary and Affiliated Companies, Registration No. 1086412 (the Progistix Plan) effective June 30, 2001, under sections 80 and 81 of the *Act*. The motion, which is supported by all of the Respondents, seeks an order that BCE produce to the Respondents, or permit inspection of certain documents, in paper and electronic forms, to be described later in this decision.

Background to the Application and Motion

The only evidence filed before the Tribunal for the purposes of this motion was filed by SCI, in the form of an affidavit of Stephen Phinney, Senior Vice-President, Corporate Services of SCI (the affidavit). BCE has not cross-examined Mr. Phinney, nor has it filed any evidence to counter

or dispute the statements in the affidavit. In its written argument, BCE has taken the position that any contentious statements in the affidavit are irrelevant to the motion. For the purposes of the motion, the Tribunal accepts the facts supplied in the affidavit.

SCI Group Inc. is the current corporate name of a company originally incorporated as a numbered company in 1995 and subsequently named Progistix-Solutions Inc.. (For purposes of reciting the history, we refer generally to the company as Progistix and to the pension plan as the Progistix Plan, to preserve consistency with the documentation and the NOID). In his affidavit, Mr. Phinney states that Progistix was originally incorporated by Bell Canada (Bell). Following the incorporation, about 800 employees were transferred from Bell to Progistix in 1995, at the same time transferring their membership from the Bell Canada Pension Plan (the Bell Plan) to the BCE Plan. Subsequent employees of Progistix also became members of the BCE Plan.

By agreement dated April 27, 2001, (the Agreement), Bell sold its shares in Progistix to Canada Post Corporation (Canpost). Pursuant to the Agreement, Canpost agreed to establish and register a new pension plan for the Progistix employees, most of whom at the time of the Agreement were members of the BCE Plan. This new plan was to have terms substantially similar to and no less favourable than those provided to employees under the BCE Plan as of the closing date of the share sale. This new plan, the Progistix Plan, was established effective July 14, 2001. The Progistix Plan was to assume liability for the accrued benefits of Progistix employees who had previously been covered by the BCE Plan. There was to be a transfer of assets from the BCE Plan to the Progistix Plan equal to the liabilities with respect to the transferred employees. The share purchase agreement recognized that new legislation in Quebec might require special calculations with respect to Quebec plan members. It also recognized more generally that regulators in the relevant provinces might require transfers of larger amounts than the parties had agreed upon, and allowed for adjustments based on that possibility.

There was understood to be a surplus in the BCE Plan at the time of the sale to Canpost, and reason to believe that some surplus had been transferred to the BCE Plan from the Bell Plan at the time of the original transfer of Bell employees to Progistix. Prior to BCE's application to the Superintendent for approval of any asset transfer, there was some correspondence and discussion between Mr. Phinney and BCE Corporate Services, and also between the actuaries for SCI and BCE, on the subject of the possibility of surplus transfer. It appears to have been generally accepted that Quebec law required that the portion of surplus attributable to Quebec employees would have to be transferred to the Progistix Plan. There was discussion about whether or not a portion of this should be transferred for Ontario employees as well. According to Mr. Phinney's affidavit, BCE's actuary initially indicated that "he thought the Ontario Surplus would have to be transferred" to the Progistix Plan. Subsequently, and prior to the application for approval of a transfer, SCI was advised in writing that the application for asset transfer would not include any Ontario surplus.

By letter dated January 18, 2008, BCE applied to the Superintendent for approval of the transfer between the plans, for an amount of assets equal to the going concern liabilities for the Progistix employees, plus the proportionate share of the surplus in the BCE Plan attributable to members employed in Quebec as of the effective date of June 30, 2001. The application for approval cited provisions of Quebec regulatory law as the justification for the distinction between Quebec members and other members. There was no similar provision made for transfer of a proportionate

share of surplus attributable to members employed in Ontario. In response to BCE's application, by letter to the Superintendent dated February 19, 2008, SCI contested the failure to transfer a share of surplus attributable to all plan members employed by Progistix. That letter raised a variety of concerns, including the issue of the prior discussions between Progistix and BCE in which, it alleged, "Progistix had been led to believe that they would receive a pro-rata share of the surplus attributable to all members". The letter pointed to contribution holidays taken in the Progistix Plan and to an early retirement incentive plan established on the strength of the plan's surplus position. Citing *Burke v. Hudson's Bay*, a case then pending before the Supreme Court of Canada, SCI argued that all members of the plan were entitled to a share of surplus, and that any asset transfer which did not protect that right should be rejected under the Act.

In connection by BCE's application for surplus transfer, it is important to observe that in 2003, the Ontario Court of Appeal issued a decision in *Aegon Canada Inc. and Transamerica Life Canada v. ING Canada Inc.* (2003), 38 C.C.P.B. 1, affirming (2003), 34 C.C.P.B. 1 (SCJ) (*Transamerica*), which, to use the words used by the Financial Services Commission of Ontario (FSCO) on its website, "confirmed that pension plans may be subject to trust provisions that restrict the capacity of an employer to transfer pension assets to another plan." Subsequent to the *Transamerica* decision, the Superintendent has taken the position that before consenting to any plan asset transfer, he must assure himself that trust issues, if any, have been appropriately recognized and dealt with in any asset transfer application under either s.80 or s.81 of the Act. Accordingly, FSCO posts two documents on its website: information entitled "Trust Issues on Plan Transfer/Merger (Transamerica)", and a checklist (known as the "Transamerica checklist") identifying "the impediments related to trust issues that may need to be considered as a result of the court decisions in Transamerica and Baxter". These documents set out specific questions that transfer applicants should answer, and specific information that such applicants need to supply, in support of asset transfer applications. With its application, BCE included a Transamerica checklist, which apparently indicated that the transfer was a "spin-off" plan. (We say "apparently" because that version of the checklist has not been disclosed by BCE and was not before us). The Superintendent apparently takes the position that where a plan is a spin-off plan (i.e. a "stand-alone plan": see para. 8 of the NOID), a *pro rata* share of any surplus must be transferred over to the new plan, regardless of surplus ownership issues. When this fact was drawn to BCE's attention, together with the fact that its application did not propose to transfer surplus except as attributable to Quebec employees, BCE subsequently filed an amended Transamerica checklist which did not identify the plan as a spin-off. FSCO staff nevertheless continued to insist on a "more fulsome" plan history before any determination could be made as to whether trust concerns had been satisfied. In response, counsel for Bell provided its own analysis of the trust issues raised by the plan history, but from FSCO's perspective, gaps in the documentation remained, including gaps in connection with trust arrangements in the 1990s.

Although not a part of the transaction giving rise to the Application, it is relevant to note that, prior to the Agreement, BCE had entered into another agreement (the Nexacor Agreement) which it alleges was "virtually identical" to the Agreement, requiring a transfer of assets from the BCE Plan to a new pension plan, an agreement which did not involve a transfer of a proportionate share of plan surplus in respect to Ontario employees. The transfer of assets under the Nexacor Agreement was approved by the Superintendent on June 18, 2007 without any demand for a "more fulsome" plan history. BCE relies on this transfer as the pattern which it says the Superintendent should have followed in this case.

The Superintendent's Notice of Intended Decision (the NOID)

The NOID states that the Superintendent intends to refuse his consent to the transfer of assets “under sections 80 and 81 of the [Act].” There is disagreement as to which section applies to this particular transaction. Counsel agree, however, that it is not necessary to resolve this issue for the purposes of this motion, since both sections contains a subsection (5) which requires the Superintendent “to refuse to consent to a transfer of assets that does not protect the pension benefits and any other benefits of the members and former members of the employer’s plan [s.80(5)] *or* of the original pension plan [s.81(5)] or that does not meet the prescribed terms and conditions.”

The NOID notes in its “Reasons” that an actuarial report on the BCE plan as of the effective date of June 30, 2001 showed a surplus in the BCE Plan. It goes on to observe that in completing the Transamerica checklist, the applicant BCE did not “satisfy the requirement in the checklist that, in the case of a transfer that is a spin-off (meaning a transfer to a stand-alone pension plan, as is the case with the Progistix Plan), a proportionate share of assets, including any surplus assets, is being transferred to the receiving plan.” “The Superintendent is therefore unable to determine whether this transfer of assets protects the pension benefits and other benefits of the Transferred Members, regardless of whether the transaction falls within sections 80 or 81 of the [Act].” The NOID states that “BCE Inc. has refused to transfer the proportionate share of surplus relating to the Ontario Transferred Members and has also refused to supply an analysis of surplus entitlement under the BCE Plan.”

In the NOID, the Superintendent draws attention to the 2010 decision of the Supreme Court of Canada in *Burke v. Hudson’s Bay Co.*, [2010] SCC 34, holding that “an employer is not obligated to transfer surplus on a pension plan asset transfer if the employer can demonstrate entitlement to the surplus”. The NOID points out that “BCE Inc. has not demonstrated it is entitled to the surplus under the BCE Plan”.

The Motion

The motion seeks an order that BCE produce to the other parties to the Application, or permit them to inspect:

- (a) all historical trust and plan documents, including all funding agreements, and amendments to the forgoing, for the Bell Canada Pension Plan (the Bell Plan) from the date of inception of the Bell Plan to 2001, inclusive;
- (b) the transaction documents which reflect the transfer of assets and liabilities from the Bell Plan (or other exporting plans) to the BCE Plan in or around 1995, when approximately 800 employees of Bell transferred, and assumed employment, with SCI’s predecessor, Progistix-Solutions Inc., including without limitation, documents which would detail (and quantify) the surplus transferred to the SCI Plan;
- (c) the Reciprocal Transfer Agreement between Bell and BCE (referred to in BCE’s letter to FSCO dated January 23, 2009) and actuarial reports (relating to the Bell Plan) for the period 1995 to 2001 inclusive;

(d) all historical trust and plan documents , including all funding agreements, and amendments to the forgoing, for the BCE Plan from the date of inception of the BCE Plan to 2001, inclusive;

(e) as a consequence of the Share Purchase Agreement dated April 27, 2001, and in connection with Bell's sale to Canpost of all the issued and outstanding shares of SCI, all notes, e-mails, memoranda or other documents which relate to, or touch upon, BCE's apparent decision in 2005 to transfer a proportionate share of surplus for both Ontario and Quebec employees to SCI, including Mr. Lavigne's file and documents relating to the discussions he had with Mr. Béliveau in 2005 and all documents relating to BCE's subsequent decision to limit the surplus transfer to Quebec members only;

(f) all notes, e-mails, memoranda or other documents which relate to, or touch upon, the matters covered by BCE's letter dated January 18, 2008, including the original *Transamerica* Checklist submitted by BCE in connection with the asset transfer to SCI and all other attachments to the letter.

The motion also requests, if an order to produce is made, an order that SCI be at liberty to serve written interrogatories within 30 days following production, and costs.

The Arguments

The documents referred to in paras. (a) – (d) relate primarily to the plan history. The documents referred to in para. (f), while not directly related to plan history, concern BCE's original application for approval of the asset transfer at issue in these proceedings. With respect to these documents SCI, supported by the Superintendent and Canada Post, argues that under s.80(5) and s.81(5) of the *Act*, the Superintendent must refuse to consent to a transfer of assets which does not protect the pension benefits *and any other benefits* of the members and former members of the exporting plan. They argue that protected interests include any trust interest in plan surplus. They rely on the Ontario Court of Appeal in *Aegon Canada Inc. and Transamerica Life Canada v. ING Canada Inc. (2003)*, 38 C.C.P.B. 1, *affirming (2003)*, C.C.P.B. 1 (SCJ) (*Transamerica*). In *Transamerica*, the lower court and the Court of Appeal determined, based on a detailed review of historical documents, that at the time of an earlier merger of the plans of two companies, the assets of one of those plans were subject to a trust which restricted the use of the trust income and capital to the exclusive benefit of employees of one of the merged plans. This meant that the employer/plan administrator of the merged plans could not use the large surplus carried over from that plan to offset the deficit carried over from the other plan in order to take contribution holidays. As SCI and its co-respondents point out, since that decision the Superintendent has taken the position that when dealing with an asset transfer application, in order to fulfil his duty under either s.80(5) or s.81(5) of the *Act*, he must review the historical plan documents in order to determine if beneficial entitlements created by those documents in favour of employees may restrict in some way the ability of the employer to deal with the plan assets in a manner proposed. The parties supporting the motion also rely on *Burke v. Hudson's Bay Co. [2010] 2 SCR 273 (Burke)*. *Burke* involved a challenge similar to the one in this case to an asset transfer which did not include any share of plan surplus. The court carried out a review of historical plan documents to determine whether or not the plan members had a trust interest in the plan surplus. On the

facts, the court found that there was no such trust interest, and therefore no issue could arise as to whether a proportionate part of an actuarial surplus in the exporting plan should be transferred when the employees transferred to a successor plan. However, the court expressly left open the possibility that where historical plan documents *did* create a trust in surplus assets in favour of plan members, a proportionate share of that surplus should be included in an asset transfer. On the basis of existing caselaw, these parties argue that historical plan documents such as those addressed in paras. (a) – (d) are clearly relevant to a determination of the issues raised by ss. 80(5) and 81(5); indeed, as asserted by the Superintendent, they are “centrally relevant”. They likewise assert that the documentation surrounding and referred to in BCE’s application to the Superintendent to approve an asset transfer is relevant to our determination of whether the Superintendent’s Intended Decision should be approved or set aside.

In addition, SCI suggests, although it does not expressly assert, that representations made by BCE between the time of the sale transaction and the application for asset transfer may give rise to a type of estoppel preventing BCE from carrying out an asset transfer that does not include *pro rata* surplus for all members. It is largely on this basis that it justifies its request for the documents referred to in para.(e) of its disclosure motion, which relate to the basis for its understanding that Ontario as well as Quebec surplus would be transferred.

BCE’s primary argument in response to the motion is that none of the documents sought are relevant for the determination of the Application, and hence need not be produced. It submits that the issue to be determined is simply whether the asset transfer should be approved “without requiring any transfer of surplus or conducting any analysis of surplus entitlement”. The documents sought by SCI, it argues, do not relate to that issue. To supplement this position, BCE argues that the Tribunal has no jurisdiction to address the issue of surplus entitlement on the merits. BCE points out that the Superintendent himself has not made a decision on the merits of whether the historical plan documents create a trust interest in favour of transferred employees which would require that a proportionate share of the surplus in the BCE Plan be transferred to the Progistix Plan. Instead, the Superintendent has expressed himself unable to make any such decision on the basis of the evidence available to him. Accordingly, as BCE sees it, the Tribunal has no jurisdiction to deal with the surplus entitlement issue.

Decision

This motion is governed by the Tribunal’s Rule on Disclosure and Production of Documents (Rule 31 of the Tribunal’s Rules of Practice and Procedure), the relevant portions of which provide as follows:

- 31.01 Each party has an obligation by the date by which it has agreed to do so, or by which the Tribunal has directed it to do so, to:
- (a) disclose to the other parties all documents that it proposes to tender as evidence in the proceeding
 - (b) produce to the other parties all other documents that are in its possession or control and are relevant to any issues in dispute in the proceeding; and
 - (c) file and serve on the other parties a list of relevant documents that it refuses to produce, together with the reason for the refusal;

- 31.02 Where a party has failed to produce a relevant document, any other party may file and serve a notice upon that party to produce the document.
- 31.03 Where a party has not produced a relevant document, after proper notice from another party to do so, that other party may file and serve a notice of motion to have the Tribunal determine that production should be required.

The threshold that parties applying for disclosure must meet under the Rules of the Tribunal is not high. In *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, (1999) 21 C.C.P.B. 142, P0013-1998-1, the Tribunal held that disclosure is appropriate where:

- (1) The information sought is arguably relevant to an issue in the proceedings and the issue is not a frivolous one;
- (2) The information sought is sufficiently particularized that the party from whom the information is requested should be able to respond efficiently and with a reasonable degree of precision, and
- (3) The information is not privileged.

In a later case, *Hydro One Members' Committee v. Ontario (Superintendent of Financial Services)*, (2006) 30 C.C.P.B. 266, P0257-2005-1, the Tribunal elaborated on this holding:

We consider that the phrase “arguably relevant” is illuminated by the decision of the Ontario Superior Court of Justice in *Bensuro Holdings Inc. v. Avenor Inc.* (2000) 186 D.L.R.(4th) 182, 187(Ontario S.C.J.). The Court here held, “Relevance for the purpose of disclosure within the meaning of Rule 30.02 [of the Ontario *Rules of Civil Procedure*] constitutes a much broader and looser test of relevance than relevance at trial. Relevance for discovery embraces the “semblance” of relevance, and so long as the documents in question “seem” to be relevant to the issues disclosed in the pleadings, they ought to be produced for inspection. The onus lies on the party resisting disclosure to justify its refusal.

We address first the request for disclosure of the matters addressed in paragraphs (a) to (d) of the motion. These paragraphs relate to the historical plan documents of the BCE Plan and the predecessor Bell Plan. In light of FSCO’s requirements for asset transfer applications, the decision of the Divisional Court in *Transamerica* and the decision of the Supreme Court of Canada in *Burke*, referred to above, there appears to be a clear *prima facie* case for disclosure of these documents to ascertain if there are relevant beneficial entitlements created in favour of employees which might need to be weighed by the Superintendent in discharging his obligations under either s.80(5) or s.81(5) of the *Act*; they are at least “arguably relevant” to the determination of the nature of any such interest and the calculation of the extent of any such interest.

In response to this argument, BCE argues that the Tribunal lacks jurisdiction to review and construe any historical plan documents which might come before it. The Tribunal rejects this argument. In our view, this argument is based on much too restrictive a reading of s.89, and more particularly, s.89(9) of the *Act*. That subsection reads:

(9) At or after the hearing, the Tribunal by order may direct the Superintendent to make or refrain from making the intended decision indicated in the notice and to take such action as the Tribunal considers the Superintendent ought to take in accordance with this Act and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent.

BCE argues that the jurisdiction of the Tribunal conferred by this subsection necessarily involves a “two-step” process: first, an issue arises out of a decision by the Superintendent, generally in the form of a NOID, and subsequently a hearing is held before the Tribunal relating to that issue. Cases decided by the Tribunal have consistently held that its role in pension cases is to hear applications from decisions made by the Superintendent; except in situations where a matter not previously dealt with by the Superintendent is “closely related” to a matter already decided by the Superintendent, the Tribunal may not consider matters which the Superintendent has not considered. Here, BCE argues, the Superintendent has not reviewed and construed the historical plan documents in the first instance, his interpretation of them does not form part of his reasons for issuing the NOID; accordingly, the Tribunal lacks jurisdiction to review and interpret them at this hearing.

While the Tribunal accepts the proposition that a “two- step” process is generally necessary to establish a foundation for its jurisdiction, the cases which establish that general proposition do not support BCE’s argument, in our view. In *Stelco Inc. v. Ontario (Superintendent of Pensions) (1993) 4 PCO Bulletin 48 (PCO)*, the Commission refused to allow an examination into matters outside the time frame covered by an order for a partial wind-up ordered by the Superintendent, as the Superintendent had not had opportunity nor occasion to conduct his preliminary inquiry to determine if a wind-up order should be made relative to the period in which those matters arose. In *Victorian Order of Nurses for Canada v. Ontario (Superintendent of Financial Services), (2009), 78 C.P.B. 244, FST P0304-2008, (FST)*, the applicant had declared a partial wind-up with respect to four separately incorporated branches. The Superintendent had issued an NOP proposing to order the applicant to pay certain deficiencies attributable to these partial wind-ups into the pension plan fund. Six other separately incorporated branches that had formerly participated in the applicant’s plan were granted party status. The Tribunal was asked to determine whether the applicant was responsible for making payments relating to solvency deficiencies with respect to employees or former employees of the latter six branches. The Tribunal held that it did not have jurisdiction to adjudicate this issue in this hearing, since the NOP had dealt only with the original four branches. In *Imperial Oil Ltd. v. Ontario (Superintendent of Financial Services) (2009), 83, CP. CP. P.B 310*, the Superintendent proposed to make a partial wind-up order under s. 69(1)(e) of the *Act*. A group of former employees asked that the Tribunal also consider whether an order should be made under s. 69(1)(d) of the *Act*, a matter which had not been addressed in the NOP. The Tribunal noted that the two subsections required different factual conditions precedent to the Superintendent invoking his jurisdiction to order a partial wind-up, differently directed investigations as to whether those conditions exist, and notices to different groups who might be affected. Referring to the importance of a decision by the Superintendent as a foundation for subsequent action by the Tribunal, the Tribunal refused to add the requested issue in the hearing.

All of the above cases dealt with issues which were in fact separate and distinct from those which had been presented to the Superintendent and formed the basis of the proposed decision brought

before the Tribunal. In the present case, the issue the Superintendent was attempting to determine prior to issuing the NOID was whether or not the members of the BCE Plan who were being transferred to the Progistix Plan had an interest in the surplus assets of the BCE Plan which the Superintendent should take into account before approving any asset transfer. The issue was clearly before him; the fact that he was unable to make a determination on the merits on the basis of the material before him does not alter that fact. The previous decisions declining to examine a matter not previously decided by the Superintendent did not contemplate this situation and are not applicable. Section 89(9) of the *Act* gives the Tribunal power not only to make or refrain from making the intended decision indicated in the NOID, but to also “take such action as the Tribunal considers the Superintendent ought to take in accordance with this Act and the regulations and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent.” That section undoubtedly gives jurisdiction to the Tribunal to use its powers to consider the precise issue the Superintendent had been attempting to resolve, but had been unable to resolve, in the Superintendent’s view, because BCE had refused to provide the appropriate evidentiary material (see para. 9 of the NOID).

As noted above, BCE’s core argument against disclosure, to which its jurisdictional argument was subsidiary, is that such production, if made, would be irrelevant to any issue the Tribunal is required to decide in this Application. The Tribunal understands that the crux of this argument is found in the following paragraphs of BCE’ written argument.

“34. BCE did not provide any analysis of surplus entitlement to the Superintendent, on the basis of its position that the Superintendent is not required to make any determination concerning entitlement to surplus in order to approve the Asset Transfer Application under the [Act].

35. Thus, the question in this FST Hearing is whether the Superintendent may approve the Asset Transfer Application under the [Act] without requiring a transfer of surplus or an analysis of surplus entitlement. If BCE succeeds in this FST hearing, The FST presumably would direct the Superintendent to approve the Asset Transfer Application. There is no need for the FST to review the historical plan documents in order to arrive at such a conclusion.

36. On the other hand, if BCE does not succeed and the FST were to find that the Superintendent’s position in the NOID is correct, then this would simply confirm the Superintendent’s rejection of the Asset Transfer Application. There is no need for the FST to review the historical plan documents in order to arrive at such a conclusion. (If the Asset Transfer Application were rejected, it is possible that BCE would make a submission to the Superintendent that BCE is entitled to the surplus; however there is no basis for making the speculative assumption that BCE would do so.) It cannot be assumed that if the FST were to find against BCE at the FST Hearing, an analysis of the surplus entitlement would inevitably follow.”

It would appear, then, that BCE intends to argue that trust issues are irrelevant to whether or not an asset transfer should be approved, and accordingly, the Superintendent (and by extension, the Tribunal) should not consider such issues. At the hearing on the motion, BCE did not provide any elaboration on the position set out in Paragraph 34 of its factum. Accordingly, the Tribunal does not attempt to assess the viability of that argument here, although BCE clearly has a right to

take such a position. However, the fact that BCE intends to put forward this argument does not provide an answer to the *prima facie* case for production under paragraphs (a) to (d) inclusive of the Notice of Motion. Presumably SCI and the Superintendent intend to take the contrary position. Under conventional disclosure principles, they are entitled to disclosure of the documents which are arguably relevant to their position, and not simply to those that are arguably relevant to BCE's.

Much of the problem with the argument as set out in BCE's written argument, above, lies in the assumptions which form the basis of Paragraphs 35 and 36. Without knowing the precise nature of the argument indicated in Paragraph 34, the Tribunal is not in a position to assess at this point what might follow from a decision either to uphold or dismiss that argument. It does not follow ineluctably from a conclusion that the Superintendent could approve the transfer without requiring an analysis of surplus entitlement that he *should* do so in the circumstances of this proposed asset transfer. In considering the latter, the Tribunal is as bound by s.80(5) or s.81(5) of the *Act* as is the Superintendent, and must keep those subsections in the forefront of its own consideration of the issues. Similarly, it does not follow that, if BCE's argument fails, the Tribunal would simply uphold the Superintendent's proposed decision as indicated in the NOID. It is clearly open to the Tribunal, under s.89(8), to decide the issue of whether approval should be granted on its merits. Accordingly, to reach the proper conclusion on the Application, whether BCE's argument wins or loses, the Tribunal may be assisted by the documents of which production is sought in Paragraphs (a) to (d) inclusive of the Notice of Motion. This possibility brings the documents sought to be produced in these paragraphs of the Notice of Motion within the "arguably relevant" test in *Monsanto, supra*. Accordingly, the motion for production of these documents is granted.

Turning to Paragraph (e) of the Notice of Motion, we do not consider that the disclosure sought in that paragraph is justified at this time. The material sought to be disclosed here is described as follows:

(e) as a consequence of the Share Purchase Agreement dated April 27, 2001, and in connection with Bell's sale to Canpost of all the issued and outstanding shares of SCI, all notes, e-mails, memoranda or other documents which relate to, or touch upon, BCE's apparent decision in 2005 to transfer a proportionate share of surplus for both Ontario and Quebec employees to SCI, including Mr. Lavigne's file and documents relating to the discussions he had with Mr. Béliveau in 2005 and all documents relating to BCE's subsequent decision to limit the surplus transfer to Quebec members only;

"BCE's apparent decision" is a reference to Paragraphs 15 to 25 inclusive of Mr. Phinney's affidavit. In those paragraphs, Mr. Phinney describes his attempt, in 2005, to obtain information from BCE as to the amount to be transferred from the BCE Plan to the Progistix Plan, in order to determine SCI's requirement to contribute to the Progistix Plan. He describes how, after submitting a written enquiry on May 6, 2005, to Mr. Lavigne, an actuary with BCE dealing with the file, he requested Mr. Béliveau, an actuary with the firm Morneau Sobeco, representing SCI, to speak with Mr. Lavigne concerning the question. The affidavit continues, in Paragraph 17, "[t]hereafter, Mr. Béliveau told me that he'd spoken with Mr. Lavigne (in Mr. Lavigne's office) and that Mr. Lavigne had told him that he thought the Ontario Surplus would have to be transferred to SCI by BCE."

Mr. Phinney states that he subsequently received a letter, dated August 8, 2005, from Mr. Lavigne at BCE, replying to Mr. Phinney's letter of May 6, 2005. Mr. Lavigne's letter explained that the quantification of the transfer of assets from the BCE Plan to the Progistix plan had been delayed by the necessity of receiving confirmation from the Financial Services Commission of Ontario, still outstanding, of the financial consequences to the BCE Plan of prior partial wind-ups of that Plan and of the Nexacor Agreement, and therefore, that [BCE is] "not in a position to submit to [Progistix] and to the applicable regulatory authorities our report on the Transfer Amount and Surplus as provided for in [the sale contract between Bell and Canpost]." However, the letter continued on to advise that the amount of surplus required to be transferred was estimated to be one of three amounts: (1) a proportionate share of surplus for Quebec members only (\$10.0M); (2) a proportionate share of surplus for Quebec and Ontario members (\$17.4M); (3) Surplus amount reflecting the net asset contributed /transferred in the BCE Plan in respect of [Progistix] employees (\$17.0M). Mr. Phinney states that, "[b]ased on Mr. Lavigne's advice to Mr. Béliveau, Mr. Béliveau revised SCI's actuarial valuation report for the year ending December 31, 2003. The revised actuarial report, which was sent to FSCO by Morneau Sobeco on November 22, 2005, reflects a transfer of *pro rata* share of the Ontario Surplus to SCI."

This section of the affidavit hints at the possibility that SCI may seek to argue some version of estoppel in connection with the transfer of Ontario surplus. In general, Paragraph (e) of the Notice of Motion seeks to explore the reasons for the change of position by BCE regarding transfer of surplus attributable to Ontario members of the BCE Plan from that suggested by Mr. Lavigne in his conversation with Mr. Béliveau, referred to above, to its later decision to transfer a surplus share only with respect to Quebec members. There is an inference in SCI's submission to the Superintendent, described above, and in SCI's written and oral submissions on this motion, that the conversation between the actuaries created some form of reliance interest in SCI which it could set up against BCE. SCI has not yet made such a claim in these proceedings. Given the nature of estoppel, which requires detrimental reliance, it does not appear likely that SCI's claim in this regard would be strengthened by anything to be found in BCE's files on this issue. At this stage of the proceedings, however, we cannot rule out the possibility that an estoppel-type claim might succeed should SCI chose to make one. The point is that it has not yet committed itself as to whether it intends to make an estoppel or related claim in this case.

While, as noted above, the threshold for relevance in a discovery application is low, there is nevertheless a threshold. The "semblance of relevance" must be to some matter that might assist the Tribunal on an issue before us. If estoppel does become an issue before us, SCI may be able to make a case that the material (or some of it) referred to in paragraph (e) may be relevant. If it does not, information about the basis upon which Mr. Lavigne made the statement alleged to have been made in that conversation, or about the opinions of BCE or any of its officers or consultants several years after the sale as to BCE's legal obligations, or as to their reasons for any change which might have occurred in BCE's position with respect to whether surplus attributable to Ontario employees is payable, could not assist the Tribunal in deciding this matter. The Tribunal must form its own opinion as to the effect, if any, of those documents in creating interests in employees which would require that such surplus be transferred. Accordingly, we defer any decision on paragraph (e) until it is clear whether or not SCI does intend to put forward the position that BCE made legally relevant representations to SCI after the Canpost sale was concluded that should affect the outcome of this case.

Paragraph (f) of the Notice of Motion requests disclosure of:

all notes, e-mails, memoranda or other documents which relate to, or touch upon, the matters covered by BCE's letter dated January 18, 2008, including the original *Transamerica* Checklist submitted by BCE in connection with the asset transfer to SCI and all other attachments to the letter.

This is the letter which submitted the application for approval of the transfer of assets which the Superintendent proposes in the NOID to refuse to consent. We have no difficulty with the proposition that all documents attached to that letter should be disclosed; their arguable relevance is self-evident, since they formed part of the basis for the Superintendent's decision. We are of the view, however, that given the nature of that letter, a request for production of "all notes, e-mails, memoranda or other documents which relate to, or touch upon, the matters covered" in the letter is overbroad. To the extent that it covers matters already dealt with in items paragraphs (a)-(d), it is redundant. To the extent that it covers matters dealt with in paragraph (e), it suffers from the relevance problems we have already discussed above. To the extent that it addresses issues not covered by other paragraphs, it clearly falls afoul of the *Monsanto* requirement that "the information sought [must be] sufficiently particularized that the party from whom the information is requested should be able to respond efficiently and with a reasonable degree of precision." If SCI is not satisfied with the disclosure made in response to this order, it may return to us with a more particularized request for production under this heading once the issues have been clearly stated by the parties.

ORDER

Accordingly, we direct the applicant BCE Inc., within thirty days of this order, to:

1. Produce or permit the other parties to inspect all documents covered by Subparagraphs (a) – (d) of Paragraph 1 SCI's Notice of Motion dated October 24, 2011;
2. Produce or permit the other parties to inspect the original *Transamerica* Checklist submitted by BCE in connection with the asset transfer to SCI, together with all attachments to BCE's January 18, 2008 letter submitted in connection with the asset transfer, as referred to in subparagraph (f) of Paragraph 1 SCI's Notice of Motion dated October 24, 2011.

All other requests for production or inspection are dismissed at this time, without prejudice to SCI's right to renew those requests in accordance with our reasons.

SCI's Notice of Motion also requests a right to serve interrogatories on BCE after any disclosure. In our view, any such order is unnecessary, since the Tribunal's Rules 19 & 20 permit such interrogatories in any event. The Notice of Motion also sought costs. No basis for any costs order under the Tribunal's Rules was asserted or argued, and we dismiss this request.

Dated at Toronto, Ontario, this 23rd day of January, 2012.

"Ralph Scane"

Mr. Ralph Scane
Member of the Tribunal and Chair of the Panel

"Patrick Longhurst"

Mr. Patrick Longhurst
Member of the Tribunal and of the Panel

"Elizabeth Shilton"

Ms Elizabeth Shilton
Member of the Tribunal and of the Panel