

FINANCIAL SERVICES TRIBUNAL

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

AND IN THE MATTER OF a proposal of the Superintendent of Financial Services to order that Kerry (Canada) Inc. reimburse the pension fund of the Pension Plan for the Employees of Kerry (Canada) Inc. (the “Plan”) for certain expenses paid from the Plan since January 1, 1985, together with income thereon, and to order that Kerry (Canada) Inc. amend certain expense provisions of the current Plan documents for consistency with the original Plan documents as specified in the proposed order;

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

AMONG:

KERRY (CANADA) INC.

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

-and-

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

Respondents

BEFORE:

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

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

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

APPEARANCES:

Ronald J. Walker
Christine P. Tabbert
For Kerry (Canada) Inc.

Deborah McPhail
For the Superintendent
of Financial Services

William Fitz
For the Members of the
DCA Employees Pension Committee

HEARD:

October 27 & 28, 2003 and January 7, 8 & 26, 2004

REASONS FOR DECISION

Facts

The Applicant, Kerry (Canada) Inc. (“Kerry Canada”), is the successor to DCA Canada Inc. (formerly called DCA Food Industries Ltd. and the Canadian Doughnut Company Limited) and the sponsor of a pension plan for its employees initially established by its predecessor. We refer to the employer and plan sponsor, from time to time, as the “Company” and the pension plan for the Company’s employees as the “Plan”.

The Plan was established on a defined benefit basis by the terms of a plan text effective December 31, 1954 (the “1954 Plan”) with funding through Company and employee

contributions to a pension fund constituted as a trust under a trust agreement made as of December 31, 1954 between the Company and National Trust Company, Limited as trustee (the “1954 Trust Agreement”). We refer to National Trust and any successor trustee, from time to time, as the “Trustee” and to the pension fund in respect of the Plan as the “Fund”.

A new trust agreement was entered into between the Company and the same Trustee in 1958 (the “1958 Trust Agreement”), which was not materially different from the 1954 Trust Agreement in those provisions that have a bearing on the matters at issue in this proceeding. The actions of the Company in charging certain expenses to the Fund that are challenged in this proceeding took place beginning in 1985. We will, therefore, consider those actions in light of the terms of the 1958 Trust Agreement although the same results should pertain if the 1954 Trust Agreement were taken as the benchmark.

From the establishment of the Plan up to and including December 1984, the Company paid all of the expenses relating to the Plan and the Fund. From the beginning of 1985, the Company began charging expenses relating to the Plan and the Fund, specified below under the heading “Expenses at Issue”, to the Fund although in 1995 the Company reimbursed the Fund for all of the expenses that represented the fees of the Trustee up to the end of 1994, together with foregone income on the amount of those expenses. The Company relies on amended versions of the Plan text, namely the 1975 Plan, 1987 Plan and the 2000 Plan, as authorizing the payment from the Fund of those expenses that were, in fact, borne by the Fund.

On April 22, 2002, the Superintendent of Financial Services (the “Superintendent”), acting through his delegate, the Deputy Superintendent, Pension Division, issued a Notice of Proposal under section 87 of the *Pension Benefits Act* (the “Act”) containing proposals to make orders against Kerry Canada requiring it to:

- reimburse the Fund for all of the amounts paid out of the Fund after January 1, 1985 for expenses that were not incurred for the exclusive benefit of the members of the Plan (excluding taxes, interest and penalties levied against the Fund) and for all income that would have been earned by the Fund if those expenses had not been paid from the Fund (the “First Proposal”); and
- amend the Plan and the trust in respect of the pension fund for the Plan so that all amendments to the Plan and the trust that permit expenses to be deducted from the Fund are consistent with the 1954 Trust Agreement and the 1954 Plan (the “Second Proposal”).

The effect of the Second Proposal would be to require Kerry Canada to amend the Plan and the trust so that the expenses chargeable to the Fund are expressly limited to those expenses that are for the exclusive benefit of the members of the Plan.

Kerry Canada made a Request for Hearing by this Tribunal in respect of the Notice of Proposal, as it was entitled to do pursuant to subsection 89(6) of the Act, and Elaine

Nolan, George Phillips, Elisabeth Ruccia, Kenneth R. Fuller, Paul Carter, R.A. Varney and Bill Fitz, being members of the DCA Employees Pension Committee representing certain members and former members of the Plan (the “Employees Committee”) were added as parties by order of the Tribunal.

Those provisions of the various Trust Agreements and Plan texts that bear upon the determination of the issues in this proceeding are summarized in the body of these Reasons for Decision and have been set out in full in the Appendix to these Reasons.

Expenses at Issue

There are seven categories of expenses charged to the Fund after January 1, 1985 that were initially at issue in this proceeding, namely:

- (a) The fees of the Trustee for the performance of its services in respect of the Fund, which were borne by the Fund from 1998;
- (b) The fees of an investment manager for its services in respect of the investment of the Fund assets, which were charged to the Fund from 2000;
- (c) The fees of accounting firms in respect of their audits of the Fund from 1993;
- (d) Miscellaneous expenses relating to the Plan or the Fund, including filing fees charged by pension regulatory bodies;
- (e) The fees of consulting firms for the actuarial and other services relating to the Plan or the Fund;
- (f) The fees of consulting firms for their services in respect of a supplementary retirement plan for executives of the Company; and
- (g) Fees for legal services in the amount of \$5,315 paid to the firm of Fasken, Campbell Godfrey in 1995.

In the course of the proceeding, Kerry Canada agreed to reimburse the Fund for the expenses referred to in items (f) and (g), together with the income that would have been earned thereon. Therefore, expenses in those categories are no longer in issue. The expenses in all of the other categories remain at issue between Kerry Canada and the Employees Committee. The Superintendent agrees with Kerry Canada that the expenses referred to in items (a) to (d) could be charged, as they were, to the Fund but contests the charging of some of the consulting fees referred to in item (e) to the Fund. The consulting fees that remain at issue between Kerry Canada and the Superintendent relate to the addition of a defined contribution option to the Plan.

Effect of the 1958 Trust Agreement

In interpreting the provisions of a trust agreement relating to the funding of a pension plan, it is important to keep in mind that such an agreement typically serves two distinct purposes. One purpose is to establish or continue a trust in respect of all or part of the pension fund (the “trust purpose”). The other purpose is to define the relationship between the plan sponsor or administrator and the trustee by setting out their respective rights and obligations (the “contractual purpose”). The various provisions of the agreement may serve one or both of these purposes. In fact, the settlement of the terms of a trust agreement usually begins with the template of the particular trust company that is to serve as trustee, which means that the protection of the interests of the trustee is likely to be prominent among the contractual purposes served by the agreement.

Sections 5 and 19 of the 1958 Trust Agreement, which were relied on by the Employees Committee in this proceeding, evidence what, in our view, is essentially a contractual purpose in providing for the payment by the Company of the Trustee’s fees and the reimbursement by the Company of the expenses incurred by the Trustee in the execution of the trust and the performance of its duties under the Agreement. These same sections provide that unless or until such fees and expenses are paid by the Company, they are to constitute a charge upon the Fund. This arrangement provides a strong indication that the sections are designed primarily to ensure that the Trustee is paid, rather than to determine the ultimate allocation of responsibility for such payment as between the Company and the Fund.

Section 1 of the 1958 Trust Agreement describes the fund that is to be held in trust under that Agreement as comprising the fund established under the 1954 Trust Agreement together with additional sums paid to the Trustee, and earnings thereon, “less any payments which ... shall have been made by the Trustee as authorized [by the Agreement]”. Section 3(a) of the Agreement reinforces the latter exclusion by stating that the Trustee may make payments out of the Fund “to such persons, or their beneficiaries or personal representatives” upon the certification of the retirement committee that such payments are in accordance with the provisions of the Plan and, “upon any such payment being made, the amount thereof shall no longer constitute part of the Fund.” This section, like section 20 to which we were also referred, has the contractual purpose of protecting the Trustee from liability when acting upon the direction of the retirement committee. It should not be taken to reduce the scope of the pension fund assets that are impressed with a trust. We therefore reject the argument, put to us by Kerry Canada that the pension fund for the Plan that is subject to a trust comprises only those assets remaining in that fund after payment of any expenses authorized by the retirement committee or those officers of the Company acting on its behalf.

Nor is there anything in the 1958 Trust Agreement that would confine the trust to those assets in the pension fund that are required to provide the promised benefits and, therefore, that would justify treating surplus assets as outside the scope of the trust. On the contrary, as noted below, section 1 of the Agreement indicates that the trust assets are all of those assets that form part of the corpus or income of the Fund.

Section 1 of the 1958 Trust Agreement evidences a trust purpose in reciting that “no part of the corpus or income of the Fund shall revert to the Company or be used for or diverted to purposes other than for the exclusive benefit of such persons as from time to time may be designated under the Plan.” This reflects a basic trust principle that trust assets are to be employed in the interests of the beneficiaries of the trust. Consistent with this principle, the Agreement also provides, in section 8, that in the event of the termination of the trust, no part of the Fund shall be used other than for the exclusive benefit of members, beneficiaries or personal representatives, as set forth in the Plan. We conclude that the beneficiaries of the trust to which the Fund is subject are those who, by the terms of the Plan, are members or who are their beneficiaries or personal representatives.

Section 11 of the 1958 Trust Agreement deals with the amendment or termination of that Agreement, providing that such action may be effected by an instrument in writing executed by the Company and the Trustee. In other words, the normal contractual effect is to be given to the Agreement in the sense that it is subject to alteration by subsequent agreement of the parties, without the need to involve those who may have some beneficial or third party interest under the Agreement. However, the section goes on to recognize and preserve the trust nature of the Fund by stating that, unless approved by the Minister of National Revenue;

no ... amendment shall authorize or permit any part of the Fund to be used for, or diverted to, purposes other than for the exclusive benefit of such employees, or their beneficiaries or personal representatives as from time to time may be included under the Plan and for the payment of taxes, assessments or other charges as provided in Section 5 and Section 19...

An amendment that authorizes the use of the trust assets of the Fund to pay expenses will be consistent with this limitation if those expenses:

- constitute taxes of any kind, including interest and penalties, levied or assessed against the Fund or the income thereof (as per section 5);
- represent compensation payable to the Trustee that is subject to a charge against the Fund unless or until paid by the Company (as per sections 5 and 19);
- are incurred by the Trustee in the performance of its duties that are subject to a charge against the Fund until paid by the Company (as per section 5); or
- are incurred for the exclusive benefit of the employees, their beneficiaries or personal representatives under the Plan.

The inclusion of the first three classes of expenses within the limitation seems redundant because the 1958 Trust Agreement specifically authorizes the charging of those expenses to the Fund. However, if that Agreement were to be amended to transfer the sole

responsibility for any of these three classes of expenses to the Company, section 11 would permit a second amendment for the purpose of making those expenses chargeable to the Fund once again, as under the 1958 Trust Agreement before it was first amended.

We note that section 11 does not prohibit an amendment to those provisions of section 5 and 19 of the Agreement that provide for the payment of the fees and expenses of the Trustee by the Company. But such an amendment could only be effective (in the absence of the approval of the Minister of National Revenue) to transfer ultimate responsibility for such payment to the Fund where the fees and expenses are incurred for the exclusive benefit of the employees, their beneficiaries or personal representatives.

The Company did not, in fact, initiate an amendment to the 1958 Trust Agreement before starting to debit the Fund, commencing in 1985, with expenses of the kind that had previously been paid directly by the Company.

While the 1958 Trust Agreement was later replaced by a new trust agreement with a different Trustee (the “2000 Trust Agreement”), the latter Agreement does not purport to modify the basic trust principle, evidenced by the 1958 Trust Agreement, that no part of the Fund shall be used or diverted other than for the exclusive benefit of those persons who, by the terms of the Plan, are members or are the beneficiaries or personal representatives of such members.

Effect of the Employee Booklets Describing the Plan

In arguing that the Company was obliged to assume the expenses of the Plan (except for taxes, interest and penalties levied against the Fund), the Employees Committee placed some reliance on the text of two employee booklets issued by the Company to employees to explain the terms of the Plan, namely the 1975 Employee Booklet and the 1988 Employee Booklet. The 1988 Employee Booklet states that “the Company will contribute all additional amounts [beyond the member contributions] that are required to fund the Plan as well as all expenses associated with the Plan”. There is a similar statement in the 1975 Employee Booklet.

The 1988 Employee Booklet contains the *caveat* that it “describes the main provisions of the Plan” and “if there should be any conflict between [the] booklet and the official text [of the Plan], the text will govern in all cases”. Therefore, at most, the 1988 Employee Booklet should be taken to describe a practice as to the payment of the expenses of the Plan and not an undertaking by the Company to pay those expenses. If the booklet were to constitute such an undertaking, it would be inconsistent with and, therefore, subordinate to the expense provisions of the 1987 Plan, which are described below. The 1987 Plan is the form of the Plan that is summarized in the 1988 Employee Booklet. The 1975 Employee Booklet states that it is a summary of the Plan, not a legally binding document. In that case, its statement that the Company pays the cost of administering the Plan cannot create a legal obligation on the part of the Company to continue to do so.

Effect of the Amendments of the Plan

The 1954 Plan, which was in effect when the 1958 Trust Agreement was entered into, contained no provision dealing with payment of expenses relating to the Plan or the Fund. However, the Company amended the Plan in 1975 to provide that the Fund should be chargeable with the fees of the trust company, investment counsel or other fund manager appointed to manage the invested assets of the Fund, the expenses of any such fund manager in respect of the Plan, payment of which was not provided by the Company, and other expenses in respect of the Plan reasonably and properly incurred by such fund manager or the Company that the Company directs be paid from the Fund (section 5 of Article XVII of the 1975 Plan). In 1987, this was replaced by a provision to the effect that all normal and reasonable expenses incurred in the operation of the Plan, including those for actuarial, consulting, administrative, investment management and auditing services, as well as government filing fees, were to be withdrawn from the Fund (Article 15.04 of the 1987 Plan). In 2000, the expense provision was amended once again, to provide that all costs and expenses incurred by the Company as administrator of the Plan on behalf of the Plan or the Fund or by its agents or advisors in respect of the Plan or the Fund may be paid from the Fund, including actuarial, consulting, legal and accounting fees and disbursements, expenses relating to the addition of the defined contribution option and expenses incurred in winding up the Plan (Article 15.04).

These Plan amendments are not inconsistent with the relevant provisions of the Plan that authorized amendments from time to time. Those provisions generally permitted amendments that would not adversely affect the vested rights or accrued benefits of members under the Plan (Article 22 of the 1954 Plan, Article XX of the 1975 Plan and Article 16.02 of the 1987 Plan). As the funding of the Plan was in a substantial surplus position at all relevant times, the amendments were unlikely to run afoul of this limitation even though they would cause the diversion of some of the assets from the Fund. Those diverted assets could fairly be taken to be surplus assets not required to satisfy the vested rights and accrued benefits of members.

The Employees Committee argued that the expense provisions added to the Plan in 1975, 1987 and 2000 are inconsistent with sections 5 and 19 of the 1958 Trust Agreement. As noted above, those sections provide for the payment by the Company of the fees and expenses of the Trustee in connection with the performance of its duties and for a charge against the Fund for the amount thereof unless or until paid by the Company. In our view, there is no inconsistency. We have already indicated that the provisions of the 1958 Trust Agreement dealing with the payment of the fees and expenses of the Trustee are primarily for the purpose of fixing the responsibility of the Company vis-à-vis the Trustee. Therefore, they should not be taken to determine that all fees and expenses for which the Company is accountable to the Trustee must ultimately be borne by the Company as opposed to the Fund. The 1975, 1987 and 2000 amendments to the Plan deal with the matter of ultimate responsibility and, therefore, can be reconciled with sections 5 and 19 of the 1958 Trust Agreement when the Agreement and the Plan are read together as they should be, particularly since the Agreement recites that it forms part of the Plan.

However, the expense provisions of the 1975, 1987 and 2000 versions of the Plan must be measured against the terms of the trust to which the Fund is subject by virtue of the 1958 Trust Agreement. They cannot be taken to authorize the use or diversion of any part of the Fund other than for the exclusive benefit of such persons as from time to time may be designated under the Plan (see particularly section 1 of the Agreement). Accordingly, those provisions should be “read down” so that they only apply to authorize the charging of expenses to the Fund when those expenses are for the exclusive benefit of such persons. As none of the parties to this proceeding maintained that such persons would include any persons other than members of the Plan, their beneficiaries or personal representatives, we use the shorthand expression “members of the Plan” hereafter to refer to those persons.

Although we have discussed, at some length, the expense provisions of the Plan, this should not be taken as indicating that we are of the opinion that plan documents must contain specific provisions authorizing the charging to a pension fund of expenses relating to the plan or the fund before such an allocation can be made. In fact, it will probably be implicit in the nature of the usual funding arrangements for a pension plan that the pension fund should bear the expenses that are reasonably incurred in connection with the operation of the plan and the fund. In the present case, a more stringent criterion for charging expenses to the Fund is applicable in that the expenses must be for the exclusive benefit of the members of the Plan before they can be charged to the Fund. This is so because of the specific terms of the trust to which the Fund is subject.

Expenses for the Exclusive Benefit of the Members of the Plan

How then do we determine whether the kinds of expenses that were charged to the Fund after 1985 were for the exclusive benefit of the members of the Plan? We heard expert evidence that the expression “for the exclusive benefit of the members of a pension plan” has no special meaning in the actuarial community.

We believe that expenses in relation to the Plan that are for the exclusive benefit of the members of the Plan, in the sense of the 1958 Trust Agreement, must logically mean expenses that are for the primary benefit of the members since no such expense can fairly be said to be for the exclusive benefit of the members on a strict literal view of that expression. For example, the Company undoubtedly realizes a benefit from the incurring of such expenses since the Plan, in relation to which the expenses are incurred, presumably enhances the morale, security and retention of employees on whom the Company’s productivity and profitability depend. A strict interpretation of “exclusive benefit” could even preclude the payment of a pension benefit to a member because, arguably, such payment would also benefit the Company by discharging its obligation.

Of the expenses that remain in dispute between Kerry Canada and either of the responding parties, in our view the only ones that cannot be characterized as being for the primary benefit of the members are certain fees of consulting firms that relate to the addition of a defined contribution option to the Plan. Those fees, which total \$6,455, are for advice provided in 1999 in connection with consideration of the possibility of

introducing a defined contribution option to the Plan, including the costing of such an option.

We believe that once the decision is made to introduce that option, the fees relating to the implementation of the option are for the primary benefit of the members. Such fees would relate to such matters as the development of the appropriate Plan amendments, communications to Plan members with respect to the option and the processing of the conversion for those taking advantage of the option.

Trust and Plan Amendment Remedy

By the terms of the Second Proposal in the Notice of Proposal, the Superintendent proposes to order Kerry Canada to amend the Plan, and the terms of the trust to which the Fund is subject, in effect to limit, in express terms, the expenses that are payable from the Fund to those that are for the exclusive benefit of the members, which we have interpreted as meaning for the primary benefit of the members. We have already noted that the trust principle evidenced by the 1958 Trust Agreement – that no part of the Fund should be used or diverted in a way that is not for such benefit – was left unchanged, although not repeated, in the 2000 Trust Agreement, the only subsequent Trust Agreement. Therefore, there can be no need to reinstate that principle in explicit terms, by amendment to the trust, because the principle has not been abrogated by any subsequent trust agreement.

While it might be desirable for the provisions of the Plan to reflect, more accurately, the limitation of the terms of the trust as they apply to the charging of expenses to the Fund, we have concluded that the Superintendent has no authority to direct Kerry Canada to amend the Plan to that end.

The Superintendent argued that the Act carries the implied authority to order such an amendment, relying particularly on section 18 of the Act. There is certainly nothing in the Act that gives the Superintendent express authority to order that an amendment be made to a pension plan. Where the Act does refer to plan amendments, it contemplates their initiation by the administrator of the plan (see sections 12 & 13). The 1975, 1987 and 2000 Plan amendments were initiated in that fashion and the 1975 and 1987 amendments were duly registered by the Superintendent, although they contained provisions about the payment of expenses from the Fund that we consider to be overly broad, on their face, because they do not confine the expenses that are chargeable to the Fund to those that are for the primary benefit of the members of the Plan. The Act does specify certain categories of plan amendments that are void (see section 14), but the expense provisions introduced by the 1975, 1987 and 2000 Plan amendments do not fall within any of those categories. We are unable to conclude that the Superintendent has the authority, in the present context, to direct that the Plan be amended to modify the effect of all or any of those amendments by limiting the expenses chargeable to the Fund to those that are for the exclusive benefit, in the sense of the primary benefit, of the members.

As the Superintendent does not have this authority, the Tribunal likewise does not have the authority on a Request for Hearing under section 89 of the Act, which is what gave rise to this proceeding. Under that section, the Tribunal may only direct the Superintendent to carry out or refrain from carrying out a proposal “and to take such action as the Tribunal considers the Superintendent ought to take in accordance with [the] Act and the regulations” (subsection (9)). Therefore, at the end of a proceeding this Tribunal can only order the Superintendent, and not others, to do something, except that the payment of costs (see section 24 of the *Financial Services Commission of Ontario Act, 1997*), and perhaps some other incidental forms of relief, may be ordered against others. Before ordering the Superintendent to do something, the Tribunal must be satisfied that the Superintendent has the authority, by the terms of the Act or the regulations under the Act, to do what the Tribunal would order him to do.

In proceedings under section 89 of the Act, this Tribunal has, on occasion, ordered the Superintendent to carry out a proposal with some modification to what was originally proposed or to carry out some part of the proposal but to refrain from carrying out another part of the proposal. This is a proper exercise of the Tribunal’s authority under subsection 89(9) of the Act and is appropriate in the present case.

Disposition

We order the Superintendent to carry out the First Proposal contained in the Notice of Proposal, i.e. the proposal to order Kerry Canada to reimburse the Fund for all amounts paid out of the Fund after January 1, 1985 for expenses that were not incurred for the exclusive benefit of the members of the Plan, together with all income that would have been earned by the Fund if those expenses had not been paid from the Fund. However, we also order the Superintendent to modify its proposed order by specifying the amounts to be reimbursed, with foregone income, as comprising:

- the consulting and legal fees that the Kerry Canada has agreed, in the course of this proceeding, to repay to the Fund (as described in (f) and (g) under the heading “Expenses at Issue”); and
- the consulting fees, aggregating \$6,455, for advice provided in connection with the possibility of introducing a defined contribution option to the Plan, including the costing of such an option (described under the heading “Expenses for the Exclusive Benefit of the Members of the Plan”).

Finally, we order the Superintendent to refrain from carrying out the Second Proposal contained in the Notice of Proposal, i.e. the proposal to order Kerry Canada to amend the Plan and the terms of the trust to which the Fund is subject so as to limit the expenses that are payable from the Fund to those that are for the exclusive benefit of the members of the Plan.

If any party wishes to make application for an order of costs in this matter, it may do so by written request filed with the Tribunal and served on the other parties within 30 days of this decision. The other parties shall have 14 days to file and serve written responses to any such request.

DATED at Toronto, Ontario this 4th day of March, 2004.

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

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

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

APPENDIX

Selected Trust Agreement and Pension Plan Provisions

1958 Trust Agreement

Section 1

The 1954 Agreement is hereby terminated with effect from the date hereof, provided that no act, thing, document or deed heretofore done, made or executed under the 1954 Agreement shall be prejudiced or invalidated by such termination, but shall continue in full force and effect until duly dealt with under the terms of this Agreement. The Fund as established under the 1954 Agreement, together with such sums of money and such property acceptable to the Trustee as shall from time to time be paid or delivered to the Trustee and the earnings and profits thereon, less the payments which at the time of reference shall have been made by the Trustee as authorized herein, shall constitute the Fund hereby created and established. The Fund shall be held by the Trustee in trust and dealt with in accordance with the provisions of this Agreement. No part of the corpus or income of the Fund shall ever revert to the Company or be used for or diverted to purposes other than for the exclusive benefit of such persons as from time to time may be designated in the Plan.

Section 5

The expenses incurred by the Trustee in the performance of its duties, including fees for expert assistants employed by the Trustee with the consent of the Company and fees of legal counsel, and such compensation to the Trustee as may be agreed upon in writing from time to time between the Company and the Trustee, and all other proper charges and disbursements of the Trustee shall be paid by the Company, and until paid shall constitute a charge upon the Fund. All taxes of any and all kinds whatsoever, including interest and penalties, that may be levied or assessed under any existing or future laws upon or in respect of the Fund or the income thereof shall be paid from the Fund.

Section 11

This Agreement may be amended in whole or in part or be terminated any time and from time to time by an instrument in writing executed by the Company and the then Trustee: provided however that unless approved by the Minister of National Revenue no such amendment shall authorize or permit any part of the Fund to be used for, or diverted to, purposes other than for the exclusive benefit of such employees, or their beneficiaries or personal representatives as from time to time may be included under the Plan, and for the payment of taxes, assessments or other charges as provided in Section 5 and Section 19 herein, provided, it being

understood that this proviso is not to be construed to enlarge the obligations of the Company beyond those assumed by it under the Plan.

Section 19

The Trustee shall be entitled to compensation in accordance with the Schedule of Fees on pension and profit-sharing trusts of National Trust Company, Limited now in effect, which compensation may be adjusted from time to time based upon experience hereunder, as and when agreeable to the Company and the Trustee. Compensation payable to any successor trustee shall be agreed to by the Company and such successor trustee at the time of its designation. Such compensation shall constitute a charge upon the Fund unless it shall be paid by the Company. The Company expressly agrees to pay all expenses incurred by it or by any Trustee in the execution of this Trust and to pay all compensation which may become due to any Trustee under the provisions of this Agreement.

Section 20

Notwithstanding anything herein or in the Plan contained, it is understood and agreed that the Trustee does not nor shall be deemed to assume any responsibility for the terms and provisions of or be involved in any way whatsoever in the administration of the Plan nor shall the Trustee be under any duty or obligation to determine whether any payment or delivery made by it from the Fund pursuant to the instructions, direction or order of the Committee from time to time constitute any use or diversion of the Fund for purposes other than the payment or provision for the retirement benefits and the cash payments provided for in the Plan, if such payment or delivery is certified by the Committee to be in accordance with the provisions of the Plan.

1954 Plan

Article 22

The Company has made every effort to develop this Plan as a safeguard to its employees and as an undertaking which will meet future conditions insofar as they can be anticipated at the present time. The Company hopes to continue the Plan indefinitely but must and does reserve the right to change, modify, suspend or discontinue the Plan, should future conditions, in the judgment of the Company, warrant such action.

If any social security or pension benefits should be created in favour of the Members of the Plan, by means of legislation under which the Company would be required to make contributions to or for the benefit of such Members, either directly or indirectly, through taxation or otherwise, the Company may with respect to such Members either discontinue the Plan or make such modifications

as the Company considers equitable, without limiting the general rights reserved to the Company above.

However, all contributions made by the Company are irrevocable, and, together with all contributions made by Members, may only be used exclusively for the benefit of Members, retired Members, their beneficiaries or estates, and their contingent annuitants. No change or modification will effect any rights which such persons may then have with respect to the terms of payment of, or the amount of, retirement income, which the contributions made by the Member and/or the Company, prior to the effective date of such change or modification, will provide.

If it ever should be necessary to discontinue the Plan, contributions made by the Company cannot be withdrawn, but must remain in the Trust Fund. In such event the Trust Fund shall be distributed among the Members and retired Members and their beneficiaries and estates and contingent annuitants in an equitable manner determined by the Retirement Committee in consultation with the Actuary and the Company, or, if the Company shall have been wound up or have become bankrupt, by the liquidator or Trustee in Bankruptcy of the Company as the case may be. No liability shall attach to the Retirement Committee or any person thereon, or the Company, or the Liquidator, or the Trustee in Bankruptcy in connection with the distribution, if made in all sincerity and good faith.

1975 Plan

Article XVII, Section 5

The Fund shall be chargeable with the fees of the Fund Manager and any expenses incurred by the Fund Manager in respect of the Plan for which payment is not provided by the Company, and any expenses in respect of the Plan reasonably and properly incurred by the Fund Manager or the Company which the Company may direct to be paid from the Fund.

Article XX

1. Notwithstanding anything herein contained, but subject to Section 3 of this Article, the Plan may be amended at any time and from time to time by the Company, and all such amendments shall be binding on the Company and on every Member.
2. Notice of every such amendment shall forthwith be given to the Fund Manager. If the amendment directly or indirectly affects the benefits due to the Members, notice thereof shall be given to the Members.

3. No such amendment shall adversely affect the right of a Pensioner to continue to receive his pension under the Plan, or adversely affect any vested right as the same exists under the Plan at the date of such amendment, or reduce the benefits which the Member has accrued by reason of service to the date of the amendment, except as provided under Article XV (RIGHTS ON DISCONTINUANCE OF PLAN).

1987 Plan

Article 15.04

All normal and reasonable expenses incurred in the operation of the Plan shall be withdrawn from the Pension Fund, unless otherwise paid by the Company. Such expenses may include, but shall not be limited to, those relating to actuarial, consulting, administrative, investment management and auditing services, as well as government filing fees.

Article 16.02

No amendment to the Plan shall operate to reduce the benefits which have accrued to Members hereof prior to the date of such amendment, nor shall the Company have the power to make any amendment which would cause or permit any portion of the contributions made prior to that date to be diverted, prior to making provisions for the satisfaction of all liabilities of the Plan, for purposes other than the benefit of the Members, their respective estates, Beneficiaries or joint annuitants in accordance with the provisions of the Plan, the requirements of Revenue Canada and the provisions of the Pensions Benefits Act. In the event of termination of the Plan, the Company shall not be obligated to make any further contributions to the Plan with respect to service after the date of such termination of the Plan.

2000 Plan

Article 15.04

(a) Subject to paragraph (b), all costs and expenses incurred by the Administrator on behalf of the Plan or the Pension Fund may be paid from the Pension Fund or by the Company from the Forfeiture Account or otherwise, including without limitation, the fees and disbursements of the agents of the Administrator with respect to the Plan or Pension Fund, the fees and disbursements of the advisors with respect to the Plan or Pension Fund, including actuarial, consulting, legal and accounting fees and disbursements, expenses incurred in connection with adding a defined contribution component to the Plan, and expenses incurred in winding up the Plan. The administrator or the Company or either of them may pay any such fees and

expenses on behalf of the Plan or Pension Fund, subject to reimbursement by the Pension Fund in accordance with Applicable Legislation.

- (b) The following expenses shall be paid from each of the Accounts under Part 2: the investment management fees of the Funding Agency related to such Account and the costs related to the investments of the Investment Fund(s) in which such Account is invested, including brokerage, commissions and transfer taxes, and costs related to investment counsel and investment management services.

[The investment management expenses referred to in clause (b) relate to those incurred in respect of defined contribution accounts under the Plan.]