

## Disclaimer

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Superintendent of  
Financial  
Services



Surintendant des  
services  
financiers

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

**AND IN THE MATTER OF** a Notice of Intended Decision of the Superintendent of Financial Services (the “Superintendent”) to Refuse to Approve the Report on the Partial Plan Wind-up as at February 27, 2009 and the Report on the Partial Plan Wind-up as at August 31, 2010, under section 70(5) of the *PBA*, both relating to the PPG Canada Inc. Duplate Division – C.A.W. Pension Plan, Registration Number 0212860 (the “Plan”)

**AND IN THE MATTER OF** a Notice of Intended Decision of the Superintendent to require a revised Report on the Partial Plan Wind-up as at February 27, 2009 and Report on the Partial Plan Wind-up as at August 31, 2010 to be prepared and filed, pursuant to sections 70(1) and 88(3) of the *PBA* relating to the Plan.

### TO:

Joint Board of Administration  
PPG Inc. Duplate Division – C.A.W. Pension Plan  
545 Industrial Boulevard  
Hawkesbury, ON  
K6A 2S5

**Attention:** Ms. Diane P. Castonguay

**Plan Administrator**

### AND TO:

PPG Canada Inc.  
5676 Timberlea Blvd.  
Mississauga, ON  
L4W 4M6

**Attention:** Monica Frank  
Director, Human Resources

**Employer**

**NOTICE OF INTENDED DECISION**

**I INTEND TO REFUSE TO APPROVE**, under section 70(5) of the *PBA* the following reports (the “Reports”):

- a. Report on the Partial Plan Wind-up as at February 27, 2009 prepared by Mercer (Canada) Limited in respect of the Plan and dated October 2009; and
- b. Report on the Partial Plan Wind-up as at August 31, 2010 prepared by Mercer (Canada) Limited in respect of the Plan and dated May 2011.

**I ALSO INTEND TO ORDER**, under sections 70(1) and 88(3) of the *PBA*, that revised versions of the Reports be prepared and filed with the Superintendent within sixty (60) days from the date of the issuance of any Order in accordance with this Notice of Intended Decision. The revised Reports shall consider and reflect:

- i. the value of the benefit in section 4.04(a) of the Plan in determining the liabilities for the commuted value of all benefits under the Plan in respect of each member of the Plan affected by the partial wind-ups who, as at the effective date of the relevant partial wind up, had at least 10 years of credited service and attained the age of 55 but not age 65; and
- ii. the value of the benefit in section 4.04(a) of the Plan in determining the liabilities for the commuted value of all benefits under the Plan in respect of each member of the Plan affected by the partial wind-ups who, as at the effective date of the relevant partial wind up, had a combination of age plus years of continuous employment or membership in the Plan equal to at least 55 (in accordance with section 74(1.3) of the *PBA*) which benefit shall be valued so as to commence on the date on which the member would otherwise be entitled to the benefit but for the relevant partial wind up.

## **REASONS:**

1. The Plan is a defined benefit pension plan covering employees who were represented by the CAW-Canada (now Unifor) Locals 222 and 1661 (the “Union”) and were employed at the production facilities formerly operated by PPG Canada Inc. (“PPG”) in Oshawa and Hawkesbury, Ontario.
2. The Joint Board of Administration as defined in the Plan, which is made up of three members each from PPG and the Union, is the administrator of the Plan.
3. On or about October 1, 2008, PPG sold its automotive glass business in Canada to Pittsburgh Glass Works LLC (“PGW”). PGW, in turn, is 40% owned by PPG and 60% owned by a private equity firm called Kohlberg & Company.
4. Also effective October 1, 2008, PGW established the Pittsburgh Glass Works, ULC Duplate Division – CAW Pension Plan, Registration Number 1205517 (the “PGW Plan”) as a successor to the Plan. All active members of the Plan were transferred to the PGW Plan

effective October 1, 2008 but benefit entitlements in respect of service prior to October 1, 2008 remained an obligation of the Plan. The PGW Plan included the same benefits and entitlements as the Plan including the benefit set out in section 4.04(a) of the Plan which provides that an employee who has satisfied certain eligibility requirements may become entitled to an immediate unreduced early retirement pension. The parties dispute whether or not the section 4.04(a) benefit is payable in the event of a plant closure or discontinuance.

5. On December 1, 2008, PGW announced the closure of its operations at its Oshawa, Ontario plant. The plant closure was effective on February 27, 2009 and PGW declared a partial wind up of the PGW Plan as at that date.
6. On May 9, 2009, PGW further announced the closure of its operations at its Hawkesbury, Ontario plant effective November 6, 2009. PGW declared a full wind up of the PGW Plan as at August 31, 2010 as a result of the Hawkesbury plant closure.
7. The wind ups of the PGW Plan as a result of the Oshawa and Hawkesbury closures also triggered partial wind ups of the Plan because the PGW Plan was a successor plan to the Plan. The effective wind up dates corresponded with the wind up dates for the PGW Plan (February 27, 2009 in respect of members who were terminated as a result of the Oshawa plant closure and August 31, 2010 in respect of members who were terminated as a result of the Hawkesbury closure).
8. PGW filed wind up reports in respect of the PGW Plan wind ups arising from the Oshawa and Hawkesbury closures in March, 2010 and June, 2011 respectively (the "PGW Reports"). Similarly, the Reports were filed by PPG in respect of the analogous wind ups of the Plan in November, 2009 and June, 2011. The PGW Reports and the Reports both dealt with section 4.04(a) of the PGW Plan and the Plan in the same manner. Specifically, the early retirement benefit provided in section 4.04(a) was not extended to members affected by the wind ups even if they had met the age and service eligibility requirements in section 4.04(a).

#### The PGW Plan Notice of Intended Decision

9. On July 4, 2012, the Superintendent issued a Notice of Intended Decision refusing to approve the PGW Reports (the "PGW NOID") and requiring that PGW file revised reports which reflected the fact that the benefit set out in section 4.04(a) of the PGW Plan text was to be extended to all members affected by the PGW Plan wind ups who, at the effective date of the wind ups, had at least 10 years credited service and attained the age of 55 not age 65. The basis for the intended relief set out in the PGW NOID was that the benefit in section 4.04(a) of the PGW Plan was a consent benefit within the meaning of the *PBA*. Accordingly, the consent of the employer was deemed to be given for the receipt of the benefit and those members who otherwise met the eligibility criteria were entitled to receive the benefit.
10. PGW requested a hearing by the Financial Services Tribunal in respect of the PGW NOID. PGW subsequently filed revised reports which, in the opinion of the Superintendent, met

the requirements of the PGW NOID. Consequently, PGW withdrew its hearing request on December 4, 2012 and the Superintendent withdrew the PGW NOID in a letter dated December 10, 2012.

#### Issue Estoppel and Abuse of Process

11. The Union argues that the issue currently before the Superintendent was fully determined by the Superintendent as a result of the issuance of the PGW NOID. As such, the Union argues that the legal doctrines of issue estoppel and abuse of process apply to these circumstances and create a bar to the relitigation the issue of the required treatment of the benefits in section 4.04(a) of the Plan in the Reports.
12. The Superintendent is of the view that issue estoppel does not apply to these circumstances because PPG was not a party to the dispute leading to the PGW NOID. Further, the fact that PPG is a shareholder of PGW is not sufficient to give rise to the conclusion that PPG is a privy of PGW nor has it been established that PPG had a direct financial interest in the PGW proceeding such that it was entitled as of right to participate in that proceeding.
13. Nor does the doctrine of abuse of process apply to these circumstances. A full hearing was never conducted by the Tribunal in the PGW proceeding and, accordingly, there has not yet been a judicial determination of the issue. Further, PPG has advanced unique factual and legal issues which were not advanced in the PGW proceeding.

#### Section 4.04(a) Benefit

14. The Reports state that affected members were entitled to their full accrued benefits as if they were fully vested in accordance with sections 73 and 74 of the *PBA*. The Reports also state that there were no ancillary benefits which required the consent of PPG.
15. "Ancillary benefits" are defined in section 1(2) of Regulation 909, R.R.O. 1990, as amended (the "Regulation") as "...the benefits referred to in section 40(1) of the [*PBA*]". Section 40(1) of the *PBA* refers, among other things, to early retirement options and benefits in excess to those provided in section 41 (early retirement option). The early retirement option and benefits provided in section 41 are the right to retire early and to receive an early retirement pension (i.e., a reduced pension) under the pension plan.
16. Section 4.04(a) of the Plan provides that an employee who has satisfied the eligibility requirements to receive an early retirement pension under the Plan may become entitled to an immediate monthly pension benefit equal to his or her accrued pension at the date of his early retirement, i.e., an unreduced pension. Specifically, section 4.04(a) provides as follows:

Any Employee who has at least 10 years of Credited Service and has attained the age of 55 years, not age 65, may be retired at the option of the Company or under mutually satisfactory conditions. Loss of employment due to the closing of a plant or

a complete or partial discontinuance of operations shall not be construed as retirement at the option of the Company. To an Employee retired in accordance with this subparagraph, there shall be payable an immediate monthly Pension Benefit equal to his Accrued Pension at his date of early retirement.

17. The early retirement benefit (an unreduced early retirement pension) provided in Section 4.04(a) of the Plan is in excess of the early retirement options and benefits provided in section 41 of the *PBA* (i.e., a reduced pension). Therefore, the benefit in section 4.04(a) of the Plan is an ancillary benefit.
18. There are three criteria that an Employee must meet to be eligible for the benefit in section 4.04(a) of the Plan: (i) at least 10 years of credited service; (ii) attained the age of 55, not age 65 and (iii) retired at the option of PPG or under mutually satisfactory conditions.
19. Section 4.04(a) states that “[l]oss of employment due to the closing of a plant or a complete or partial discontinuance of operations shall not be construed as retirement at the option of the Company”. These words in section 4.04(a) of the Plan could be read as meaning that a member who has 10 or more years of credited service and has attained age 55 may not be retired at the option of PPG if he or she has lost his or her employment due to a plant closing or a complete or partial discontinuance of operations. Alternatively, these words may be read as meaning that loss of employment due to plant closure or discontinuance is not per se retirement at the option of the employer such that the benefit is triggered by the mere fact of a plant closure or discontinuance without further specific agreement of the employer.
20. In either event, section 4.04(a) permits an employee who meets the other eligibility criteria set out in section 4.04(a) (10 or more years of credited service and between age 55 and 65) to be retired under mutually satisfactory conditions even in the context of the closing of a plant or a complete or partial discontinuance of operations.
21. The words “retired under mutually satisfactory conditions” in section 4.04(a) of the Plan contemplate an agreement between the employee (and/or, potentially, the Union) and PPG about the conditions under which the employee may be retired. In other words, an Employee is not eligible to retire without PPG’s agreement or consent. This conclusion is applicable whether it is the Union or the employee who is the party to the mutually satisfactory arrangement with PPG. Therefore, the consent of PPG is an eligibility requirement for the Employee to receive the ancillary benefit in section 4.04(a).
22. Section 74(7) of the *PBA* states that for purposes of section 74 “where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit the employer shall be deemed to have given the consent”. Therefore, given that the consent of PPG is an eligibility requirement to receive the ancillary benefit in section 4.04(a) of the Plan, PPG is deemed to have given the consent and any member affected by the partial wind up is eligible to receive the benefit in section 4.04(a) if he or she has at least 10 years of credited service and attained the age of 55, not age 65 at the effective date of the partial wind up.

23. Further, section 74(1.3) entitles those plan members whose combination of age plus years of continuous employment or membership in the pension plan (at the effective date of the date of wind up) equals at least 55 to “grow into” the early retirement provisions of the Plan. In other words, the member who meets the age plus service threshold of 55 is entitled to the payment of an unreduced early retirement pension, such as the section 4.04(a) benefit, commencing “the date on which the member would be entitled to an unreduced pension under the pension plan if the [partial wind up] had not occurred and if the member’s membership continued to that date”. Accordingly, the combination of sections 74(7) and 74(1.3) requires that the section 4.04(a) benefit be extended to those members who (regardless of employer consent), as at the effective date of the relevant partial wind up, had a combination of age plus years of continuous employment or membership in the Plan equal to at least 55 which benefit shall be valued so as to commence on the date on which the member would otherwise be entitled to the benefit but for the relevant partial wind up.

#### Past Practice and Bargaining History

24. PPG argues that words of the Plan text ought to be interpreted employing the collective agreement interpretative principles as developed in arbitral jurisprudence. Accordingly, PPG asserts that the collective bargaining history and past practice should be examined to assist with the interpretation of section 4.04(a). PPG argues that this evidence supports the conclusion that the parties never intended that section 4.04(a) be a consent benefit.

25. In advancing this argument, PPG relies on the definition of the term “consent benefit” in section 1(2) of Regulation 909, R.R.O. 1990 to the *PBA*:

“consent benefit” means an ancillary benefit, other than a plant closure benefit or a permanent layoff benefit, the eligibility requirements for which include the consent of an employer or, in the case of a jointly sponsored pension plan, the consent of the employer or the administrator.

26. The benefit in section 4.04(a) is not a plant closure nor a permanent lay off benefit because it applies in situations other than plant closures and permanent layoffs. Accordingly, the section 4.04(a) benefit is a consent benefit within the meaning of section 1(2) of the Regulation if the eligibility requirements for the benefit “include the consent of an employer.” For the reasons set out above, section 4.04(a) meets this condition and is a consent benefit.

27. However, even if PPG were correct that its approach to the interpretation of section 4.04(a) is the correct approach and that the parties’ negotiation history and past practice establishes that the parties did not intend that section 4.04(a) be a consent benefit, the conclusion reached by the Superintendent would not be altered. The reason for this is if the parties intended that section 4.04(a) not be a consent benefit then receipt of the benefit would necessarily not be conditional upon the consent of the employer on its face. This characteristic is necessary for the section 4.04(a) benefit to be removed from the scope of the definition of the term “consent benefit” in the Regulation. Either way, the consent of the employer is not a requirement for receipt of the benefit. If the benefit is subject to the consent of the employer on its face, then the *PBA* deems that consent to

have been given. If the benefit is not subject to the consent of the employer on its face, then employer consent is obviously not an eligibility requirement for receipt of the benefit.

28. The past practice evidence relied upon by PPG, which the Union disputes, largely consists of examples where the section 4.04(a) benefits were not paid with the alleged knowledge and acquiescence of the Union in circumstances where the Union's current interpretation of section 4.04(a) and the *PBA* would require payment of the benefit. Similarly, the bargaining history evidence relied upon by PPG (which is again disputed by the Union) consists of collective bargaining positions and proposals offered by the Union which PPG asserts are inconsistent with the Union's current position concerning the scope of the benefits under section 4.04(a) of the Plan.
29. Assuming that PPG is able to prove its version of past practice and bargaining history, this evidence does not establish that the Union shared PPG's interpretation of section 4.04(a) of the Plan. PPG's version of the facts would be equally consistent with the conclusion that certain Union representatives at certain points in time were unaware of the rights afforded by the consent benefit provisions of the *PBA*. However, even if the Union was unaware of these statutory rights and did not assert them at certain points in the past this would not alter the substance and applicability of these statutory rights to the matters at hand. The parties' past practice or bargaining history are irrelevant to the interpretation of the rights and entitlements afforded under the *PBA*.

#### Letter of Understanding Number 9

30. PPG relies on a letter of understanding dated April 1, 2005 from PPG Canada Inc. to the CAW (LOU No. 9) which sets out the circumstances when PPG will give consideration to providing employees who are unable to perform work for reasons of age or partial disability "with a pension based on credited service to the date of early retirement but not subject to actuarial reduction." (i.e., provide the benefit in section 4.04(a) of the Plan).
31. However, the language in LOU No. 9 does not limit the circumstances when PPG may consent to an employee receiving the benefit in section 4.04(a) of the Plan to the situations set out in LOU No. 9 or amend section 4.04(a) of the Plan. Rather, it provides some guidance as to how PPG intends to exercise its discretion in the circumstances covered by the scope of LOU No. 9. (i.e.: where employees are unable to perform work for reasons of age or partial disability).

#### The Requirement for Revised Reports

32. Section 30(2)(b) of the Regulation, which applies to the Plan because the Plan provides defined benefits guaranteed in whole or in part by the Pension Benefits Guarantee Fund, requires that a wind up report must be prepared by "determining the liabilities for the commuted value of all benefits under the plan in respect of each member and former member under the plan, including... (v) funded consent benefits." A "funded consent benefit" is defined in section 1(1) of the Regulation as "a consent benefit for which a member has met all eligibility requirements except the consent of an employer ...".

33. Section 4.04(a) of the Plan is an ancillary benefit the eligibility requirements for which include the consent of PPG, i.e., a consent benefit. Therefore the value of this benefit must be considered in determining the liabilities for the commuted value of all benefits under the Plan in respect of each member affected by the partial wind-up who, as at the effective date of the relevant partial wind up, has:
- i. at least 10 years of credited service and attained the age of 55, not age 65; or
  - ii. a combination of age plus years of continuous employment or membership in the Plan equal to at least 55
34. The Reports do not consider and reflect the value of the funded consent benefits to which members of the Plan affected by the wind ups may be entitled and do not set out all the liabilities of the Plan as required by section 70(1)(a) of the *PBA*. In the result, the Reports do not meet the requirements of the Regulation and *PBA*.
35. Section 70(5) provides that the Superintendent may refuse to approve a wind up report that does not meet the requirements of the *PBA* and the Regulation or does not protect the interests of the members and former members of the pension plan.
36. Section 88 of the *PBA* indicates that the Superintendent may order a plan administrator to file a new report if the report that has been filed does not meet the requirements of the *PBA* and Regulation.
37. For the reasons set out above, the Reports do not meet the requirements of the *PBA* and Regulation. Therefore, the Superintendent has the authority to order PPG to file reports pursuant to section 88(3) of the *PBA* that consider and reflect the value of the funded consent benefits in determining the liabilities for the commuted value of all benefits under the Plan in respect of each member or former member under the Plan, as required by section 30(2) of the Regulation.
38. Such further and other reasons as may come to my attention.

**YOU ARE ENTITLED TO A HEARING** by the Financial Services Tribunal (the “Tribunal”) pursuant to section 89(6) of the *PBA*. **To request a hearing, you must deliver to the Tribunal a written notice that you require a hearing, within thirty (30) days after this Notice of Intended Decision is served on you.**<sup>1</sup>

**YOUR WRITTEN NOTICE** must be delivered to:

Financial Services Tribunal  
5160 Yonge Street  
14th Floor  
Toronto, Ontario  
M2N 6L9



Attention: The Registrar

**FOR FURTHER INFORMATION** on a Form for the written notice, please see the Tribunal website at [www.fstontario.ca](http://www.fstontario.ca) or contact the Registrar of the Tribunal by phone at 416- 590-7294, toll free at 1-800-668-0128, ext. 7294, or by fax at 416-226-7750.

**IF YOU FAIL TO REQUEST A HEARING WITHIN THIRTY (30) DAYS, I MAY CARRY OUT THE INTENDED DECISION AS DESCRIBED IN THIS NOTICE.**

**DATED** at Toronto, Ontario, this **26th** day of **March**, 2014.

*Original Signed By*

Brian Mills  
Deputy Superintendent, Pensions

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<sup>1</sup>NOTE - Pursuant to section 112 of the PBA any Notice, Order or other document is sufficiently given, served or delivered if delivered personally or sent by regular mail and any document sent by regular mail shall be deemed to be given, served or delivered on the fifth day after the date of mailing.

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