Hawker Siddeley Canada Inc. Pension Plan for Salaried Employees, Registration Number 0344192

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

AND IN THE MATTER OF a hearing held by the Pension Commission of Ontario (the "Commission") to consider an application for the Commission's consent to a payment of surplus to Hawker Siddeley Canada Inc. and CGTX INC. from the Hawker Siddeley Canada Inc. Pension Plan for Salaried Employees, Registration Number 0344192 (the "Plan"), such application made pursuant to subsection 78(1) of the Act and paragraph 8(1)(b) of Regulation 909, R.R.O. 1990 (the "Regulation").

PARTIES:

HAWKER SIDDELEY CANADA INC. ("Hawker")
Applicant

- and -

CONSULTATIVE COMMITTEE, COMPRISED OF SIX INDIVIDUALS DRAWN FROM AN ENTITLEMENT GROUP OF PLAN MEMBERS, FORMER MEMBERS, ANNUITIZED MEMBERS AND THEIR BENEFICIARIES
(the "Consultative Committee")

- and -

THIRTEEN ANNUITIZED MEMBERS FROM THE RETIREMENT PENSION PLAN FOR HOURLY PAID EMPLOYEES OF CANADIAN CAR DIVISION, FORT WILLIAM PLANT
(the "13 Annuitants")

BEFORE: Mr. C.S. (Kit) Moore, Chair
Mr. William M. Forbes, Member
Ms. Judith Robinson, Member
Ms. Joyce A. Stephenson, Member
Mr. David E. Wires, Member

APPEARANCES: For Hawker:
Mr. J. Galway
Ms. C. L. Helbronner
For the Consultative Committee:
Mr. S. Weir

For the 13 Annuitants:
Mr. L. Gottheil

HEARING DATES: December 10, 1998 and January 28, 1999 North York, Ontario

DECISION RELEASED: February 17, 1999

REASONS FOR DECISION

Nature of the Application

On August 21, 1998, the Commission received an application for its consent pursuant to subsection 78(1) of the Act and paragraph 8(1)(b) of the Regulation to a payment of surplus from the Hawker Siddeley Canada Inc. Pension Plan for Salaried Employees (the "Plan") to Hawker Siddeley Canada Inc. ("Hawker") and CGTX INC. ("CGTX"), the other participating employer under the Plan on its wind-up date of June 17, 1996.

The application was made pursuant to a surplus sharing agreement under which surplus of $39,761,785 at June 17, 1996 plus gains (net of losses) to the date of payment less certain expenses and fees relating to the wind-up of the Plan and distribution of surplus assets would be shared 50% with an Entitlement Group of approximately 2300 Plan members, former members, annuitants and beneficiaries (the "Entitlement Group"), as set out in the surplus sharing agreement. The remaining 50%, or $19,880,892, would be shared between Hawker (90.47%, or $17,986,540) and CGTX (9.53%, or $1,894,352) and adjusted in the same way for net gains and losses, expenses and fees. The total surplus of $39,761,785 at June 17, 1996 was determined after setting aside an amount in respect of a proposed transfer of assets to a Quebec-registered pension plan for 26 former members of the Plan.

The application was first considered by the Commission at its meeting of December 10, 1998, at which counsel for CAW-Canada requested standing for CAW-Canada and its Local 1075, and for certain annuitants included in the surplus sharing agreement. Earlier written submissions had been made regarding these matters of standing and the merits of the application. To allow the Commission time to review all written submissions, and to allow opportunity for further written submissions to be made, the Commission adjourned hearing of the application to its next scheduled meeting, on January 28, 1999.

Additional Background

Objections to the application concerned the circumstances of a transfer of assets and liabilities into the Plan from the Pension Plan for Hourly Paid Employees of Canadian Car Div., Fort William Plant, Registration Number C-6336 (the "Hourly Plan"), which was merged with the Plan effective January 1, 1986. On January 3, 1984, Hawker had sold the assets of its Canadian Car Division to Can-Car Rail Inc., which had established a pension plan to which Hourly Plan liabilities and a pro-rata share of assets were transferred for Hourly Plan members continuing employment with Can-Car Rail Inc. Pension entitlements for a group of other Hourly Plan members were annuitized and in a small number of cases were included in the Hourly Plan liabilities as deferred vested pensions. In Hawker's application for surplus withdrawal, the

Entitlement Group included 182 surviving individuals whose entitlements could be traced back to the Hourly Plan, of which 178 were annuitants and 4 were deferred vested members, and of which 133 (73%) consented to the surplus sharing agreement. The 13 Annuitants raising objections were among the members of the Hourly Plan whose pensions were annuitized prior to 1986.

The CAW-Canada and its Local 1075 (the "CAW") is the successor trade union to the International Union, United Automobile, Aerospace and Agricultural Implement Workers Union - UAW and its Local 1075 (the "UAW"), which represented all members of the Hourly Plan and had a number of collective agreements with the Canadian Car Division of Hawker. The last of these agreements was effective June 1, 1982 to May 31, 1984 and included reference to the Hourly Plan, in the following terms:

"Article 48 - Pension Plan The non-contributory pension plan instituted January 1st, 1963, and as amended at negotiations is supplemental to this agreement."

The Relevant Legislation

The following subsections of the Act are of particular relevance:

78.--(1) No money may be paid out of a pension fund to the employer without the prior consent of the Commission.

79. --(**3**) The Commission shall not consent to an application in respect of a pension plan that is being wound up in whole or in part unless,

a. the Commission is satisfied, based on reports provided with the application, that the pension plan has a surplus;

b. the pension plan provides for payment of surplus to the employer on the wind up of the pension plan;

c. provision has been made for the payment of all liabilities of the pension plan as calculated for purposes of termination of the pension plan; and

d. the applicant and the pension plan comply with all other requirements prescribed under other sections of this Act in respect of the payment of surplus money out of a pension fund.

Clause 8(1)(b) of the Regulation, which precludes payment out of surplus to an employer unless certain consent requirements have been met, reads as follows:

1 **8.**—(1)No payment may be made from surplus out of a pension plan that is being wound up in whole or in part unless,

(b) the payment is to be made to an employer with the written agree-ment of,

i. the employer,

ii. the collective bargaining agent of the mem-bers of the plan or, if there is no collec-tive bargaining agent, at least two-thirds of the mem-bers of the plan, and

iii. such number of former members and other persons who are entitled to payments under the pension plan on the date of the wind up as the Commis-sion considers appropriate in the circumstances.

Preliminary Issue Regarding Standing

The Commission first decided on a request for the CAW and the 13 Annuitants to be given standing at the hearing on the merits of Hawker's application.

The request for CAW standing was made with respect to the interests of former members and annuitants whose entitlements could be traced back to the Hourly Plan. The CAW has no collective bargaining agreement covering members of the Plan, nor does the CAW purport to represent their interests in this matter. As a result, in accordance with the Commission's position on *Pension Plan for Employees of the Corporation of the City of Etobicoke,* October 4, 1997, XDEC-36 (PCO BBS - November 4, 1997), the CAW is not required to consent pursuant to clause 8(1)b) of the Regulation and, in the Commission's view, does not have a genuine interest in the matter. In the circumstances of this case, the Commission declined to give standing to the CAW.

Hawker argued that, in accordance with the Commission's policy that annuitants are not included in the former member consent group unless annuitized shortly before the date of wind-up, as confirmed in *Ferro Canadian Employees' Pension Plan* , December 19, 1995 XDEC-32 (PCO Bulletin 6/4, Fall-Winter 1997, p.75), the 13 Annuitants should also be denied standing. The Commission disagreed, given that Hawker had included the 13 Annuitants in the Entitlement Group, offered them a share of surplus, and asked for their consent to the surplus sharing agreement.

In spite of significant representation provided to the Entitlement Group through the Consultative Committee and its legal and actuarial advisors, the 13 Annuitants argued that the Consultative Committee included no representation from the Hourly Plan, and that significant issues needed to be addressed at the hearing regarding treatment of Hourly Plan assets and liabilities. The Commission determined that the 13 Annuitants should be given standing at the hearing on the merits.

Does the Application Meet the Requirements of the Act?

For the Commission to approve Hawker's application as required by subsection 78(1) of the Act, the application must comply with subsection 79(3) of the Act and clause 8(1)(b) of the Regulation to the Commission's satisfaction. The Commission is also mindful of its policy, as expressed in the following paragraph from *United Dominion Industries Limited*, March 24, 1994, XDEC-20 (PCO Bulletin 5/2- Summer 1994) ("*United Dominion*"), to take certain factors into account when determining the level of scrutiny to be given to prior plan documentation:

" How, then, is the approach of the Commission different when dealing with applications under Regulation 909? As we said in the Western Star decision referred to above, the degree of

scrutiny that the Commission will apply to plan documentation when determining if the requirements of the Clause have been met will vary from case to case. In this case, members and former members had separate legal representation, the requisite number of consents have been obtained as required by clause 8(1)(b) and all other legislative and policy requirements have been met. As well, the Commission was keenly aware of the other relevant facts, set out above in the section entitled "Consents", which relate to the size of the population opposing the application and surplus sharing agreement, the percentage of Plan members that had died pending resolution of the application and the age distribution of the remaining inactive Plan members. In light of all these factors, the Commission did not scrutinize the plan documentation as stringently as it would have under the old regulation nor, indeed, as it would absent one or more of those facts."

In the case of Hawker's application and the related surplus sharing agreement, most of these factors are present, as noted in the following points:

1. Notice Requirements - In the Commission's view, the notice met the requirements of the Act and Regulation, and in particular included relevant prior documentation for the Hourly Plan. The Commission also notes that Commission staff reviewed the notice and included the following comment in a memorandum dated December 2, 1998:

   "Staff have reviewed the notice and are of the opinion that the contents of the notice satisfied the requirements of the regulations and the Commission's administrative practices regarding contents."

2. Separate Legal Representation - Members of the Entitlement Group were offered the opportunity to obtain individual legal advice through the Consultative Committee's counsel, Borden & Elliot, and Hawker agreed that reasonable costs of such advice would be paid for out of the Plan.

3. Consents - The requisite number of informed consents were obtained and a relatively high percentage (88%) of the Entitlement Group consented, as summarized in the following table taken from Hawker's application, showing notices and consents as at August 19, 1998:

   Notices Issued Written Consents Percentage Consenting

   Active Members 309 285 92.2%
   Former Members 348 243 69.8%
   Partial Wind-Up Members 225 210 93.3%
   Annuitants 1357 1234 90.9%

4. Age Distribution - The Commission takes note of Hawker's statement that it was under no legal obligation to include annuitants, but had voluntarily chosen to do so to make its surplus sharing proposal as broadly based as possible, in an effort to avoid protracted proceedings that would delay access to surplus for the employers and for members of the Entitlement Group. In this regard, Hawker states that approximately 65% of the Entitlement Group is over the age of 65 and approximately 45% of the Entitlement Group is over the age of 75.

5. Opposition to the Application - The 13 Annuitants opposing Hawker's application represent approximately 1% of the annuitized members, or approximately 0.6% of total membership, in the Entitlement Group. As noted above, a high percentage (88%) of members of the Entitlement Group have consented to the surplus sharing agreement.

In the Commission's view, these factors may allow the Commission to give a lower level of scrutiny to prior plan documentation than would otherwise be the case. Nevertheless, the Commission has been asked to address specific questions regarding prior plan documents for the Hourly Plan, and must consider those questions before deciding on the application. In this regard, the Commission's views are set out below.

Prior Documentation Relating to the Hourly Plan

Written submissions from the 13 Annuitants raised questions concerning prior documentation for the Hourly Plan, and in particular requested that the Commission address the following two issues before deciding on the application:

a. the validity of an amendment made in 1971 to Article Twelfth of the 1963 trust agreement (the "1971 Amendment"); and

b. the meaning and scope of the 1971 Amendment.

The 1963 trust agreement, which was the original trust agreement for the Hourly Plan, included the following exclusive benefit language in Article Third:

"THIRD: Anything contained in this Agreement to the contrary notwithstanding, no part of the Trust Fund (other than such part as is required to pay taxes and administrative fees and expenses) shall be used for, or diverted to, purposes other than for the exclusive benefit of the employee members of the Plan or their beneficiaries". Article Thirteenth provides for termination of the trust and agreement, but makes payment of the Trust Fund subject to Article Third:

"THIRTEENTH: This trust and agreement may be terminated at any time by the Company and upon such termination or upon the dissolution or liquidation of the Company, the Trust Fund shall be paid out by the Trustee as directed by the Company subject to the provisions of Article THIRD thereof."

The following relevant excerpt from the original wording of Article Twelfth describes the power of amendment originally contained in the 1963 trust agreement. This wording does not include reference to the exclusive benefit language of Article Third, but does require that amendments not permit trust funds to be used for purposes other than those specified in the Hourly Plan.

"TWELFTH: This Agreement may be amended or modified at any time by the Company, provided that no such amendment or modification shall increase the duties or obligations of the Trustee without its consent and provided further that no such amendment or modification shall authorize or permit any part of the Trust Fund to be used for, or diverted to, purposes other than those specified in the Plan. Any such amendment or modification shall be by a written instrument which shall be delivered to the Trustee."

The 1971 Amendment added the following relevant clauses to Article Twelfth:

"TWELFTH: Notwithstanding anything herein contained:

(ii) in the event of the consolidation or merger of the Plan with or into any other pension plan established by the Company, the Company may direct the Trustee in writing to transfer the assets of the Trust Fund to any pension fund or funds established for the purpose of providing the pension and other benefits under the pension plan resulting from such consolidation or

merger and in such event the Trustee shall forthwith transfer all of the assets in the Trust Fund to such pension fund or funds and such assets shall thereafter no longer constitute a part of the Trust Fund; provided that any such consolidation or merger shall be carried out on such terms as not to impair the pension and other benefits to which the members or pensioners are entitled under the Plan as at the effective date of such consolidation or merger;

(v) in the event that at any time the assets in the Trust Fund together with the assets in all other pension funds established under the Plan shall exceed the amount required to provide the pension and other benefits to which the members are entitled under the Plan at such time, the Company may direct the Trustee in writing to transfer to a pension fund or funds established under any other pension plan of the Company or of any subsidiary or associated company, all or any portion of the excess assets and in such event the Trustee shall forthwith make such transfer and the assets so transferred shall thereafter no longer constitute a part of the Trust Fund.

The Trustee shall be under no liability for any transfer of assets made by it in accordance with the written direction of the Company as aforesaid."

a. Validity of the 1971 Amendment - In submissions regarding the validity of the 1971 Amendment, the 13 Annuitants highlighted the broad exclusive benefit language of Article Third of the 1963 trust agreement, and also noted that the original amending power of the 1963 trust agreement would not permit trust funds to be used for purposes other than those specified in the Hourly Plan. Hawker submitted that the exclusive benefit language of Article Third was not so broad as to encompass the amending power of Article Twelfth. In support of this position, Hawker noted that the termination provision (Article Thirteenth) of the 1963 trust agreement was explicitly made subject to the provisions of Article Third, whereas the amending provision (Article Twelfth) was not. Both the 1963 pension plan text and trust agreement were silent on treatment of surplus assets.

   The 1971 Amendment included amendments to the wording of Articles Third and Twelfth that provided an explicit exemption of Article Twelfth from the application of Article Third. The Commission was unable to determine conclusively whether or not this was the original intent of the 1963 documents, but was swayed by the argument that Article Twelfth was not intended to be subject to the exclusive benefit language of Article Third. This view is consistent with the position taken by Commission staff when the 1971 Amendment was submitted for registration and subsequently approved.

   The Commission was presented with no documents indicating that the union had viewed the 1971 Amendment during their period of collective bargaining with Hawker, but notes that the collective bargaining agreements did include specific reference to the pension plan, and the union would have been expected to be aware of the 1971 Amendment, if not in 1971 then during the subsequent 13 years when collective agreements were made with Hawker. While the collective bargaining agreements referred only to the "non-contributory pension plan instituted at January 1st, 1963, and as amended at negotiations", there is no question in the Commission's view that the trust agreement and pension plan are linked to some degree and that members or their representatives would be expected to keep themselves informed of the status of both aspects of their pension arrangements.

   The Commission also noted that a detailed legal review of prior plan documents was carried out by legal counsel for the Consultative Committee representing members of the Entitlement Group, including those individuals whose annuities arose from pension entitlements under the

Hourly Plan.

The Commission therefore takes the view that the 1971 Amendment was a valid amendment to the 1963 trust agreement.

b. Meaning & Scope of the 1971 Amendment - The 13 Annuitants also raised issues regarding the meaning and scope of the 1971 Amendment, in particular the provision that a merger "shall be carried out on such terms as not to impair the pension and other benefits" to which members are then entitled, and the provision giving employers direction over transfers of surplus assets to other funds. More specifically, the 13 Annuitants submitted that "other benefits" should include rights to surplus funds whether or not yet crystallized.

In the Commission's view, the Supreme Court of Canada's decision in *Schmidt v. Air Products* (1994), 115 D.L.R. (4th) 631(S.C.C.) would support the position that only those benefits crystallized at the time of the event (in this case, the merger) would come under the definition of "other benefits" here. The Hourly Plan did not develop surplus assets until Hourly Plan members' pensions were annuitized, which was not effected until after the 1984 merger took effect. As a result, the Commission has no reason to believe that the 1984 merger impaired pensions and other benefits of Hourly Plan members and pensioners. In fact, the surviving individuals from this group have been included in the Entitlement Group relating to the Hawker application to withdraw surplus from the Plan.

Conclusion

For these reasons, the Commission gave its consent pursuant to subsection 78(1) of the Act and clause 8(1)(b) of the Regulation, to a payment of surplus to Hawker and CGTX, from the Hawker Siddeley Canada Inc. Pension Plan for Salaried Employees, Registration Number 344192, in the amount of 50% of the surplus in the Plan as of June 17, 1996 ($39,761,785, after setting aside an amount of surplus for which a transfer may be requested) plus 50% of the gains (net of losses) thereon to the date of payment less 50% of expenses and fees related to the wind up of the plan and distribution of the surplus assets.

This consent shall not be effective until Hawker satisfies the Commission that all benefits, benefit enhancements, including enhancements pursuant to the surplus sharing agreement, and any other payments to which the members, former members and any other persons entitled to such payments have been paid, purchased or otherwise provided for.

Dated this 17th day of February, 1999 at the City of North York, Province of Ontario.

C.S. (Kit) Moore, Chair
William M. Forbes, Member
Judith Robinson, Member
Joyce A. Stephenson, Member
David E. Wires, Member